THE INDIAN DECISIONS, NEW SERIES,
ALLAHABAD, VOL. VII.

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Puisne Judges :

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1889
JAN. 16.

FULL BENCH.

13 A. 1 (F.B.) = 10 A.W.N. (1890) 207.

[1] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst and Mr. Justice Mahmood.

MASHIAT-UN-NISSA (*Decree-holder*) *v.* RANI (*Judgment-debtor*).*
[16th January, 1889.]

Limitation—Executian of decree—Act XV of 1877 (Limitation Act), sch. ii, art. 179, cl. (2)—"Appeal"—" Final decree or rder"—Decree against defendants severally—Appeal by some only of the judgment-debtors—Civil Procedure Code, s. 544.

Where a decree for possession of immoveable property was passed not jointly, but severally, as against all the defendants individually, and specifically stated the proportions of which they were severally in possession, as also the costs separately payable by each of them to the plaintiff ; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non-appealing defendants, but referred merely to the specific property alleged to be in the appellants' hands :—

Held by the Full Bench (Brodhurst and Mahmood, JJ., dissenting) that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree, was barred by limitation, and clause 2 of art. 179, sch. ii of the Limitation Act (XV of 1877), did not apply so as to make time run from the proceedings in the appeal preferred by the other defendants. That clause applies only to those cases in which the parties to the execution proceedings were parties to the appeal, or to the class of cases to which s. 544 of the Civil Procedure Code applies. *J.P. Wise* v. *Rajnarain Chuckerbutty* (1) and *Mullick Ahmed Zumma* v. *Muhammad Syad* (2) approved.

[2] *Held* by Brodhurst and Mahmood, JJ., *contra*, that art. 179, clause 2, must be construed as applying without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original suit. *Nur-ul-Hasan* v. *Muhammad Hasan* (3) followed.

[N.F., 26 M. 91 (93) (F.B.); R., 22 B. 500 (507); 23 C. 876 (882); 3 A.L.J. 381 = A.W.N. (1906), 155; 5 O.C. 217 (219); 32 P.R. 1907 = 8 P.L.R 1908 ; D., 17 A. 103; 25 C. 594 (601) = 2 C.W.N. 556 (562.]

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* Second Appeal, No. 672 of 1887, from a decree of C.W.P. Watts, Esq., District Judge of Moradabad, dated the 21st January 1887, reversing a decree of the Subordinate Judge of Moradabad, dated the 28th August 1886.

(1) 10 W.R. 30. (2) 6 C. 194 = 6 C.L.R. 573. (3) 8 A. 573.

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THE facts of this case are sufficiently stated in the judgments of Straight and Mahmood, JJ.

Mr. *Roshan Lal* and Babu *Durga Charan Banerjee*, for the appellant. Munshi *Madho Prasad*, for the respondent.

JUDGMENTS.

MAHMOOD, J. (after explaining the circumstances under which the case was referred to the Full Bench, continued) :—

The case itself is to my mind already governed by authority. The facts of it are, that one Musammat Mashiat-un-nissa brought a suit against six persons, Ibrar Husain, Mohan Singh, Udai Singh, Musammat Rani, Syad Muhammad Ali, and Iradat Ali, and obtained a decree for possession of immoveable property on the 12th December 1881. In this litigation some parties were absent in the first Court. Among them were Ibrar Husain and Iradat Ali, so that the decree so far as it related to them was a decree passed *ex parte*.

Matters stood thus when only two of the defendants, namely, Udai Singh and Mohan Singh, who were parties defendants to the cause and had defended it, presented an appeal to the lower Appellate Court, not from the whole decree, but from a portion thereof. And having read the decree itself in the original Hindustani in which the matter is dealt with, I have no doubt that the original decree was not a joint decree, but a several decree, and that it was in respect of some of the parties an *ex parte* decree. The Court of first appeal decreed the appeal on the 24th April 1882, and from that decree an appeal was presented to this Court, as a Court of second appeal, and this Court by its judgment of the 17th April 1883, restored the decree of the Court of first instance.

The present proceedings began in consequence of an application made by the decree-holder, Musammat Mashiat-un-nissa, who is appellant before us, on the 15th April 1886, and to those proceed-[3]ings she impleaded, among others, Musammat Rani, who was one of the original parties to the original decree, and sought execution against her. Musammat Rani, on the 17th May 1886, preferred objections on the ground *inter alia*, that the decree was barred by limitation. Upon consideration of these objections, the Court of first instance disallowed the objections, and allowed execution on the 28th August 1886, but the lower Appellate Court, by its order of the 21st January 1887, allowed the objections, and held that the execution of the decree was barred by limitation.

It is in consequence of that order that this second appeal has been preferred. It has been preferred upon two grounds stated in the memorandum of appeal. The first is that, because the decree was joint and was executed within three years from the date of the final decree of this Court, the judgment of the Court below is wrong. The other reason is that costs having been jointly awarded against all the judgment-debtors, the decree could not have been executed separately against the present respondents alone, and so the decree was not barred. The argument which was addressed to me as a Judge of this Court sitting in the single Bench, also when sitting with my brother Brodhurst, as also when sitting in this Court as member of a Bench of three Judges, also when sitting here in the same capacity as member of a Bench of five Judges, seems to me to raise three points of law which I must say Mr. *Durga Charan Banerji* has argued with much ability. Those points are :—

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First, as to the interpretation of art. 179, sch. ii of the Limitation Act (XV of 1877), especially clause 2 of the third column of the article, whether the words "appeal" and "final decree or order of the appellate Court" are to be limited to any particular class of decrees or are to be understood in the broad sense of the words being read without any qualification by importing either epithets or other matters with respect to the statutory words above mentioned.

The second question is, if these words are to be qualified by any qualification outside the statute in which they occur, whether or not the words to be imported are to be limited to any particular class of epithets.

[4] The third question is, what was exactly the nature of the decree?

Dealing with the third question first it is clear to me that the decree cannot fall under the words, "joint" or "joint and several," though it may fall, to the extent of the two persons Ibrar Husain and Iradat Ali, under the category of being a decree *ex parte*. I do not, however, wish to deal with this point at any length, because the views which I hold are independent of the nature of the decree. I must, however, refer by way of explanation to the circumstances which to my mind require consideration as to the meaning of the word "decree."

In the course of the argument yesterday I said from the Bench that to my mind if the word decree is to be qualified, contemplates possibilities of the following description :—

(1) A decree passed *ex parte*.

(2) A decree passed in default.

(3) A decree in an appeal, in respect of a portion of the subject-matter of the decree.

(4) A decree passed in appeal by only one out of several parties or by all the parties.

(5) A decree in an appeal from a decree passed only as to costs.

(6) A decree or order in a Civil Court not governed by the Civil Procedure Code.

And irrespective of other considerations which may refer to the possibilities of the decree, a decree may be qualified by the words "joint," "several," "joint and several."

I have arrived at the conclusion that the real difficulty which arises in this case is that of interpreting the statute whereby the case is governed. In doing so, I am within the authority, not only of judgments in the Courts in England, but also of judgments in British India that the general rule of interpretation is that a word which is to be understood in the language of the statute is to be understood in the most general manner unless there is enough reason to qualify the meaning of the word. In cases where a statute is [5] peculiar, and limited in its own scope, the principle of interpretation has been to refer to other portions of the statute, but also in cases where there are statutes more than one, the Judges have to consider those statutes which are *in pari materia*, and with their help to remove the ambiguity. The rule again is what has been, I believe, called in England the golden rule of interpretation, that the Legislature deals with the difficulties which arose before the statute was passed.

I hold this to be a sound principle of interpretation, and I hold also that in the statute, Act XV of 1877, there is nothing to warrant me, either in the first column of article 179, or in the third column of the same article, clause 2, in limiting the word "appeal" or "decree" by any one of the epithets which I have suggested if a broad meaning is to be placed upon those words. This is what I have already said on a former occasion in

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Nur-ull-Hasan v. *Muhammad Hasan* (1). I refer especially to the first portion of my judgment which is reported at page 576. There, in expressing my concurrence with the views which Mr. Justice Oldfield had already expressed, I went on to say :—"I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is, to my mind, very clear. The present case is not necessarily inconsistent with what was ruled there. In the 2nd clause of article 179, there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed ; the clause as framed must be looked upon as intended to apply, without any exceptions, to decrees from which an appeal has been lodged, by any of the parties to the original proceedings ; and I should say the clause should certainly be applied to cases such as the present, where the whole decree was imperilled by the appeal."

It is clear that the main principle upon which my judgment proceeded was that there was no justification for qualifying the words to which reference has already been made by me more than [6] once. I think the ruling deals not only with the first point, but also with the second, as stated by me, and I have said enough on the third point. But because in the course of the argument some difficulty was raised by Mr. *Madho Prasad*, for the respondent, as to whether or not in interpreting article 179, we are to read the Civil Procedure Code as to the words "appeal" and "decree" I only wish to touch upon one or two points. A Full Bench of this Court in *Lal Singh* v. *Kunjan* (2) in interpreting s. 540 of the Civil Procedure Code, has held that the word decree as used in that section does not mean an *ex parte* decree, and that from such a decree no appeal would lie, and another Full Bench of this Court in interpreting the same expression has read that Section with s. 584 and has held that a second appeal from an *ex parte* decree is allowable: *Ajudhia Prasad* v. *Balmakund* (3). If we were thus to read in the provisions of the Civil Procedure Code as to whether an appeal does or does not lie from *ex parte* decree, the argument would raise more complications in this case than those expected by the arguments of the learned pleaders for the parties, because it so happens that over that question, I have not been able to agree with the majority of this Court in their ruling in *Lal Singh* v. *Kunjan* (2).

Then again, if we were to read the Civil Procedure Code into the provisions of the Limitation Act, another difficulty would arise, and again on account of the Full Bench ruling of this Court as to the meaning of the words "decree which is capable of execution," that is to say, whether it is the last decree passed in the case or also a decree which, though passed by the first Court, contains the mandatory portion of the decree which is capable of execution: *Shohrat Singh* v. *Bridgman* (4) explained in *Muhammad Suliman Khan* v. *Muhammad Yar Khan* (5).

These questions I have only touched upon to show that I do not find any reasons which would justify me in not interpreting the Limitation Act, XV of 1877, by the ordinary rules of interpretation. I hold that the Act is, so far as this point is concerned with [7] limitation, *in pari materia* with the Civil Procedure Code, and that the Civil Procedure Code cannot be imported for deciding questions of limitation unless there is special reference in the Act. Such special reference occurs in the body of article 179. It occurs also in the latter parts of the same article, but it is clear to my mind that, so far as explanation I of

(1) 8 A. 573. (2) 4 A. 387. (3) 8 A. 354. (4) 4 A. 376. (5) 11 A. 267.

the article is concerned, the explanation, like explanation II of the article, is by its own words limited to clause (4) of the article. There are many reasons why the same rule and the same principle which apply to clause (4) as to the extension of the time within which execution is to be limited are not to be made to apply to clause (2). The main reason is that in explanation I the word "appeal" does not occur, and therefore the word "application" in that clause is not to be taken as applying to "appeal" nor even for extending limitation to any decree on account of its having been subjected to appeal. Then again as to explanation II, there is no difficulty connected with this case.

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I only wish now to say that there is a vast distinction between cases in which an application for execution is made, there having been no appeal from the decree, and cases in which there has been an appeal as contemplated by clause (2), article 179. I am particularly anxious to say this, because what I have said in *Nur-ul-Hasan* v. *Muhammad Hasan* (1) in the second paragraph of my judgment has been somewhat misunderstood. I said then, "I think the decree-holders in this case might, as a consequence of the appeal by the rival pre-emptors, claim, by analogy, the same footing with reference to limitation for executing their decree as a decree-holder who has taken a step-in-aid of execution, which is another ground for extending the time for execution, as provided in the fourth clause of the article."

Now when I used the word "might," I meant in that case to which Mr. Justice Oldfield and I were parties, that we were not anxious to question the authority of the ruling in *Sangram Singh* v. *Bujharat Singh* (2), and we therefore distinguished it from the case before us, but it does not imply that we adopted it.

[8] Besides the rulings to which I have referred, Mr. *Durga Charan Banerji* has relied upon the following authorities :—*Ram Lal* v. *Jaggannath* (3), *Kishan Sahai* v. *The Collector of Allahabad* (4), *Narsingh Sewak Singh* v. *Madho Das* (5), *Basant Lal* v. *Najm-un-nissa* (6), *Mullick Ahmed Zumma* v. *Mahammad Syad* (7), *Gunga Moyee Dassee* v. *Shib Shunker Bhuttacharjee* (8), *Chedoo Lal* v. *Nand Coomar Lal* (9), Mr. *Madho Prasad* relies upon the following rulings :—*Har Proshaud Roy* v. *Enayet Hussein* (10), *J.P. Wise* v. *Rajnarain Chuckerbutty* (11), *Sreenath Mojoomdar* v. *Brojonath Mojoomdar* (12) *Khema Debea* v. *Kamola Kant Bukshee* (13). Those authorities I have of course read with profound respect, but it would be taking up more time of the Court than necessary if I dealt with each of them separately. It seems to me that those rulings which relate to enactments antecedent to Act XV of 1877, are applicable only to cases to which those Acts applied. At least the Full Bench ruling in *J.P. Wise* v. *Rajnarain Chuckerbutty* (11), as also the ruling in *Sreenath Mojoomdar* v. *Brojonath Mojoomdar* (12), have no reference to the present enactment, although, if the same case arose with reference to this enactment, I should have considered it necessary to say more than what I have already said. The rulings antecedent to the enactment then do not throw much light on the present case. I still adhere to the views expressed by me in the case of *Nur-ul Hasan* v. *Muhammad Hasan* (1), *viz*, that art. 179, cl. (2) of the Limitation Act (XV of 1877) must be construed as

(1) 8 A. 573. (2) 4 A. 36. (3) 4 A.W.N. (1884), p. 138. (4) 4 A. 137.
(5) 4 A. 274. (6) 6 A. 14. (7) 6 C. 194 = 6 C.L.R. 573. (8) 3 C.L.R. 430.
(9) 6 W.R. Misc. 60. (10) 2 C.L.R. 471.
(11) 10 W.R. 30 = 11 B.L.R. 258. (12) 13 W.R. 309.
(13) 10 W.R. 10 = 10 B.L.R. 259, Note.

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intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original proceedings.

For those reasons I would decree the appeal and, setting aside the order of the lower Appellate Court, remand the case under s. 562 of the Civil Procedure Code for being dealt with according to law, because the learned Judge of the lower Appellate Court [9] has reversed the order of the first Court only upon the ground of limitation. As to costs I would make them abide the final result.

STRAIGHT, J.—This is a second appeal upon the execution side, and it arises under the following circumstances: One Mussumat Mashiat-un-nissa brought a suit against seven persons, among whom were two persons, named Mohan Singh and Udai Singh, and a third person called Musammat Rani, who is the judgment-debtor, respondent to this appeal. She brought the suit as the daughter of her father Ghulam Raza who had died on the 8th August 1869, and she claimed that Mujib-un-nissa, her mother, having also died on the 22nd February 1876, as against her brother Ibrar Husain, who also was a defendant to the suit, she was entitled to obtain one-third of the estate of which he had obtained possession, he being only entitled to retain two-thirds. It will therefore be seen that the principal defendant to that case was Ibrar Husain, her brother, and it is clear from the plaint that all the other defendants were included in the suit as being in possession of portions of the estate as transferees either directly or indirectly from Ibrar Husain. Each of these defendants put in a separate statement of defence, except Udai Singh and Mohan Singh, who put in a joint defence in which they said, with respect to the property in their possession, that they were in possession of it under certain special circumstances, while as for the respondent Musammat Rani, she said that in respect of the village of Barai, which was the village claimed as against her in the suit, and of which recovery was sought from her, she had bought it from one Behari, who in his turn had obtained it at an auction sale of the rights of Ghulam Raza prior to his death. The Subordinate Judge who tried the case as the Court of first instance went fully and specifically into the various defences raised by the various defendants, and in the result he decreed the claim of Musammat Mashiat-un-nissa against all the defendants with one reservation, namely, that "excepting the mortgagee rights in the village of Gulba and in the grove, she be put in possession of the other property. Costs to be borne by all the defendants with the exception of Bhuri Singh." To give effect to the judgment of [10] the Sub-Judge on the 12th December 1881, a decree was drawn up, which, it has been conceded by my brother Mahmood, was a decree severally as against all the defendants individually and in no sense against them jointly, and which specifically stated the proportions of which they were severally and separately in possession, as also the amount of costs each of them was to pay to the plaintiff. Consequently there was no difficulty in the way of the decree-holder doing what explanation II, art. 179 contemplates, *viz.*, making an application for execution against all or any of the judgment-debtors to the decree. With the exception of Udai Singh and Mohan Singh, all the judgment-debtors, including the respondent Musammat Rani, remained content with the decree and made no move to obtain a modification or reversal of it by appealing, and, in my opinion, it became a final decree against them according to law. Udai Singh and Mohan Singh, however, did prefer an appeal to the Court of the Judge. I have carefully studied their terms of their memorandum of appeal and there

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is not to be found in it one single word assailing the decree in respect of any right or ground common to themselves and all or any of the other defendants. On the contrary the pleas taken simply assailed the decree in respect of the specific property alleged to be in the hands of those defendants-appellants as to which they had set up the bar of limitation and other special grounds of defence. Consequently in the Judge's Court the appeal, and the only appeal preferred, was by Mohan Singh and Udai Singh against Musammat Mashiat-un-nissa, and this was the appeal the Judge proceeded to hear and heard. For the reasons given in his judgment he decided that the plaintiff as against Mohan Singh and Udai Singh, could not maintain her suit in the shape in which she had brought it, and consequently he allowed the appeal and reversed the judgment of the Subordinate Judge in respect of those two defendants and dismissed her suit as to them. She in due course of law preferred a second appeal to this Court which came before Mr. Justice Oldfield and my brother Tyrrell; and they, having considered the judgment of the Judge, were of opinion that it was necessary that certain issues should be tried by the Court [11] below, and accordingly remanded them under s. 566. The result of the findings on remand was that Mr. Justice Oldfield and my brother Tyrrell practically restored the decision of the first Court in favour of the plaintiff as to those two defendants. It will thus be seen that from the 12th December 1881, there had been standing as against all the defendants with the exception of Udai Singh and Mohan Singh, an unappealed and executable decree in the hands of Musammat Mashiat-un-nissa, the decree-holder, which, I may remark in passing, it has been conceded there was nothing to prevent her from executing against any of the judgment-debtors with the exception of Udai Singh and Mohan Singh. It is this decree, and not the decree of this Court in appeal to which those two particular defendants alone were parties, that is, the subject-matter of the execution proceedings now sought to be taken. Musammat Mashiat-un-nissa has now made an application for execution of that decree of 1881, as against Musammat Rani the respondent here, and to this Musammat Rani raises objections and says, "upon the face of it, the decree is barred by limitation, because the decree is dated the 12th December 1881, and here are you making your first application to enforce it in the year 1886." To this the decree-holder responds:—"I am all right, because there has been an appeal, and therefore I am saved by the terms of art. 179, column 3, para. 2, of the Limitation Act." In my opinion it was the duty of the Court which was asked by the decree-holder to execute the decree to see whether there had been an appeal, not by one or two defendants simply assailing a part of the decree specifically and separately affecting them, but an appeal which, though preferred by only two of the defendants, assailed a decree which disposed of the suit on grounds common to themselves and the rest of the defendants. The decree which was passed on the 12th December 1881, did not proceed on grounds common to the defendants; on the contrary, as I have already pointed out, it was several and specific as to each of them and distinguished the proportion of the property deliverable. In other words there were several separate decrees included in one. In so far as it affected the respondent Musammat Rani there never was any appeal, and it seems to me the learned Judge could not have [12] taken any other view than he did, namely, that there had been no appeal. I do think that, for the purpose of dealing with such a decree as that of a Civil Court of a Subordinate Judge acting under the Civil

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Procedure Code, we are entitled to look to the Civil Procedure Code for information as to what the words "appeal" and "decree" mean, and I am not aware that there is any rule of interpretation or of law that should prevant us from doing so. The principle upon which I have founded my view of this case has been specifically stated, no doubt before the present Limitation Act came into force, by Sir Richard Couch in *J. P. Wise* v. *Rajnarain Chuckerbutty* (1). The same principle has also been recognised by Mr. Justice Pontifex in *Mullick Ahmed Zumma* v. *Muhammad Syad* (2). It seems to me to be a reasonable principle, and it is difficult to understand why one judgment-debtor whose liability is independent of and apart from that of another judgment-debtor under the same decree, under circumstances such as are disclosed in the present case, should have the period of limitation for execution of the decree as against him almost, if not quite, indefinitely postponed because the other judgment-debtor, in respect of matters alien to him and his liability, prefers an appeal. I entirely agree with what my brother Tyrrell has said, and that the appeal ought to be dismissed with costs.

EDGE, C. J.—The facts of the case have been very clearly stated by my brother Straight in his judgment just delivered, and I may say at once that I agree with the conclusions at which he has arrived. There is no doubt considerable difficulty in determining what cl. (2), art. 179, sch. II of the Limitation Act, XV of 1877, really means. On the one hand it is not an unreasonable construction which has been put upon that clause by my brothers Brodhurst and Mahmood, but it appears to me that to put that construction upon it would be to extend the period of limitation as against persons who were in no way concerned with an appeal, and whose rights under a decree could not be affected by an appeal to which they were not parties, or whose liabilities under a decree could neither be limited or extended or varied by an appeal to which they were not [13] parties unless such appeal came within the scope of s. 544 of the Code of Civil Procedure. I cannot see why, in a case such as the present, when it was perfectly competent to the appellant before us to execute the decree of the first Court against those defendants who had not appealed, we should extend the period of limitation by holding the clause I have referred to to mean an appeal by any party to the suit. I think myself that an indication of what was the intention of the persons who drafted the clause in question may be found by examining explanation I to art. 179. It is quite true, as pointed out by my brother Mahmood in the course of the argument, that explanation I does not directly refer to clause (2); but still in the explanation we find it explained that when a decree is a several decree against different persons, the running of limitation will not be suspended by reason only of an application being made for execution against one of the several judgment-debtors. The case to which my brother Straight referred, the Full Bench case of *J.P. Wise* v. *Rajnarain Chuckerbutty* (1), is, I think, consistent with sound common sense. It is true that the case was decided under Act XIV of 1859, and not under the Limitation Act in question here. I infer from the judgment which was delivered by Pontifex and McDonell, JJ., in *Mullick Ahmed Zumma* v. *Muhammad Syad* (2) that they took the same view of the law which the majority of this Bench now take, notwithstanding the cases which have been cited to the contrary. I think cl. 2, art. 179, applies only to those cases in which the parties to the execution proceedings

(1) 10 W.R. 30. (2) 6 C. 194 = 6 C.L.R. 573.

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were parties to the proceedings in appeal, or the class of cases to which s. 544 of the Civil Procedure Code applies. On the facts of the case stated by my brother Straight it was not a case in which s. 544 of the Code of Civil Procedure would apply, as there was nothing common between the case of the defendants who appealed from the original decree and the other defendants. The defendants who appealed were fighting their own battle which did not concern the consideration of the case of the other defendants in the suit. I am of opinion that the appeal here should be dismissed with costs. As the [14] majority of the Court are of this opinion, the appeal is dismissed with costs.

BRODHURST, J.—Numerous rulings of this Court and of the Calcutta High Court have been referred to by the learned pleader for the appellant in support of his pleas. The rulings of this Court include judgments delivered even by a majority of this Court as now constituted. In *Nur-ul-Hasan* v. *Muhammad Hasan* (1) Mr. Justice Oldfield in the course of his judgment remarked—" Nur-ul-Hasan, the purchaser of the property, has now preferred this appeal on the ground that the application for execution is barred, having been filed more than three years after the passing of the decree. In my opinion the appeal fails because art. 179, cl. (2), being the limitation law applicable, the time should run from the date of the decree of the appellate Court. It is contended that that law is inapplicable because the appellant did not appeal from the original decree, and so far as he is concerned the respondents ought to have executed the decree irrespectively of the fact that an appeal had been preferred by some of the defendants. On this point certain decisions have been brought to our notice, *viz.*, *Hur Pershad Roy* v. *Enayet Hussain*, *Sangram Singh* v. *Bujharat Singh*. I think those cases are distinguishable from the present case, as in this csse, although only one set of defendants appealed against the original decree, the grounds of such appeal imperilled the rights of the plaintiffs-respondents which they had obtained by a decree against all the defendants. Had the appeal of the second set of pre-emptors succeeded, the property decreed to the respondents would have passed away from them, and there would have been no decree for them to execute against the present appellant. I think this circumstance marks the distinction between the present case and the cases cited; but for my own part I think the terms of art. 179, cl. (2), are so clear and distinct that they scarcely admit of any such distinction being drawn. Under that law the period for the execution of a decree will begin to run, where there has been an appeal, from the date of the final decree or order of the appellate Court. It [15] contains nothing as to whether the appeal shall have been made by all the parties, or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. It seems to me to give a plain and clear rule that in all cases where there has been an appeal the date of the final decision of the appellate Court shall be the date from which the time for execution will begin to run. In support of the view I am taking that in the present case limitation should run from the date of the appellate Court's decree, I may refer to *Mullick Ahmed Zumma* v. *Muhammad Syad* and *Ram Lall* v. *Jagannath*." And my brother Mahmood observed: "I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is to

(1) 8 A. 573.

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my mind very clear. The present case is not necessarily inconsistent with what was ruled there. In the second clause of art. 179 there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed; the clause as framed must be looked upon as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings.

These rulings have not been refuted by the judgment of any Bench of a High Court that has been reported or that I have had an opportunity of considering. I concur in these rulings, and I would therefore allow the appeal and remand the case to the lower appellate Court, under s. 562 of the Civil Procedure Code, for disposal of the other points raised before it. Costs should abide the result.

TYRRELL, J.—In my opinion the limitation applicable is that of art. 179 cl. (i) sch. ii, of the Limitation Act (XV of 1877) and time against the decree-holder began to run from the date of the decree of the Subordinate Judge of Moradabad, which is the only decree passed in the cause between the decree-holder and the respondent, a decree which had become final long before the institution of the [16] present proceedings in execution. As there was no appeal in the case between the parties to those proceedings, I am of opinion that the Limitation of art. 179, clause (2), is inapplicable to this case. Several cases were cited on behalf of the appellant in which art. 179, cl. (2), was applied against judgment-debtors, who had not been parties to an appeal that had been made between other parties to the case; but most, if not all of these, were cases which either fell within the scope of s. 544 of the Civil Procedure Code now in force or would be amenable to the principle explained by Mr. Justice Oldfield in *Nur-ul-Hasan* v. *Muhammad Hasan* (1), that is to say, they were cases in which the whole decree was appealed against, and the appellate Court dealt with the decree as a whole upon questions affecting all the parties to the decree, or cases in which the integrity of the decree as affecting the parties in the cause was imperilled. But the case before us, as well as the case of *Sangram Singh* v. *Bujharat Singh* (2) seems to me to be of an essentially different character. In both these cases the decree though one in form was in effect a decree awarding several reliefs having nothing in common as touching the individuals thereby severally affected. I think the distinction I have endeavoured to draw between the two classes of cases above referred to is justified, by way of analogy at least, by the rules contained in the explanation appended to cl. 4 of art. 179 and by the principles laid down in many cases, among which I may mention *Sreenath Majoomdar* v. *Brojonath Majoomdar* (3) and *Mullick Ahmed Zumma* v. *Muhammad Syad* (4). Accordingly I am of opinion that the rule followed by my brother Straight and myself in *Sangram Singh* v. *Bujharat Singh* (2) is applicable to the conditions of the present case, and therefore that the appeal of the decree-holder ought to be dismissed with costs.

Appeal dismissed.

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(1) 8 A. 573. (2) 4 A. 36. (3) 13 W.R. 309.
(4) 6 C. 194 = 6 C.L.R. 573.

13 A. 17 (F.B.) = 10 A.W.N. (1890) 235.

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[17] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst and Mr. Justice Mahmood.

MAHESH RAI AND OTHERS (*Defendants*) v. CHANDAR RAI AND OTHERS (*Plaintiffs.*)*
[5th December 1889.]

Jurisdiction—Civil and Revenue Courts—Suit for declaration that tenants are shikmis and not occupancy tenants, and that their holdings are plaintiff's sir land—Act XII of 1881 *(N.W.P. Rent Act), ss.* 10, 95 *(a)—Act XIX of* 1873 *(N.W.P, Land Revenue Act), s.* 241*—Act I of* 1877 *(Specific Relief Act), s.* 42.

The effect of s. 95 (*a*) and s. 10 of the North-Western Provinces Rent Act (XII of 1881) is to deprive the Civil Courts of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zemindar and tenants, the status of the tenants.

A Civil Court has no jurisdiction to entertain a suit in which, the defendants being admittedly the tenants of the plaintiffs, the plaintiffs, pray for a declaration that certain entries of the defendants in the revenue records as occupancy tenants, and certain orders of the Revenue Courts maintaining those entries, be set aside, and that the defendants are shikmis and not occupancy tenants, and that the land in question is the plaintiff's sir land. Such a suit cannot be brought within the Civil Court's jurisdiction by dropping all the reliefs claimed except the last mentioned declaration, that being merely of importance as incidental to the previous ones and as a roundabout mode obtaining a declaration that the defendants are not the plaintiff's occupancy tenants.

Per Edge, C.J., and Mahmood, J.—Whether the last-mentioned prayer is one which could be brought under s. 42 of the Specific Relief Act, *quære.*

Per Straight, J.—The suit might also be considered as one to set aside orders passed by the Settlement Officer in the discharge of his duty for the purpose of correcting the jamabandi as a part of the record of rights, and thus the Jurisdiction of the Civil Court was barred by s. 241 of the North-Western Provinces Land Revenue Act (XIX of 1873).

[F., 15 A. 115 (116); R., 15 A. 387 (389); 18 A. 270 (273) = 16 A.W.N. 59; 20 A. 241 (242) = 18 A.W.N. 29; D., 12 A.W.N. 46.]

THIS suit was instituted under the following circumstances. The plaintiffs were zamindars and the defendants were tenants of certain villages in taluqa Unjiar in the district of Ghazipur. The holding occupied by the defendants was 17 bighas in extent, and at the settlement of 1840 was recorded as the sir land of one Chattar Rai, the ancestor and predecessor in title of the plaintiffs Chandar [18] Rai and Siparas Rai. The names of Chandar Rai and Siparas Rai, and of their co-sharers Hira, Jaimangal, Bhairo, Rambandan and Ram Prasad were recorded in the jamabandi, from 1857 to 1862, in respect of the 17 bighas, which were always shown as sir land. In 1862 a change was made, the defendants being then recorded in the jamabandi as occupancy tenants in respect of the 17 bighas, and from that time the land was no longer described as sir. It was entered as "share of Chandar Rai, Siparas Rai, Kali Charan Rai, Kauleshar Rai, kashtkars." In or about the year 1288 fasli (1881 A.D.) at or shortly before the revision of the settlement of the district, the plaintiffs became aware of the nature of the entry in the jamabandi, and they filed an objection in the Settlement Department to the effect that the land was their sir land, and that the defendants were in

* Second Appeal, No. 839 of 1887, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 15th April 1887, reversing a decree of Pandit Kashi Narain, Subordinate Judge of Ghazipur, dated the 29th April 1886.

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possession as their shikmi sub-tenants, and not as occupancy tenants, and that the entry of the defendants' names as occupancy tenants had been brought about fraudulently and by collusion with the patwari. The objection came before the Assistant Settlement Officer, whose order thus described the issue between the parties: "The plaintiffs' claim is that the sir belongs to them, and that the defendants are shikmi sub-tenants, and that the plaintiffs receive rent at the rate of Rs. 5. The defendants plead that 17 bighas in six mauzas are held by them as principal tenants at a rent of Rs. 17-13-0, at the rate of Re. 1 per bigha; that the groves Nos. 295, 111 and 112 are within their cultivatory holding, and that Nos. 295, &c., have been planted by their ancestors.

The Assistant Settlement Officer decided this issue in favour of the plaintiffs, and he held that the 17 bighas were their sir land, of which the defendants were in possession as shikmis only, and he directed that the jamabandi should be amended accordingly. The defendants appealed from this decision to the Settlement Officer, who, by an order dated the 13th August 1884, reversed the Assistant Settlement Officer's order, and held that the defendants were occupancy tenants of the 17 bighas, which were not sir land. On further appeal, this decision was affirmed on the 6th November 1884 by the Commissioner of Benares, and on the 27th March 1885 by the Board of Revenue.

[19] On the 24th November 1885, the plaintiff instituted the present suit in the Court of the Subordinate Judge of Ghazipur. The plaint after reciting the orders passed by the Revenue Courts, continued :—

"As this finding of Revenue Department clearly affects our rights injuriously, and as there is no other means of getting relief except by instituting a suit in Court, therefore the plaintiffs pray judgment as follows :—

"That a declaratory decree be passed in plaintiffs' favour and against the defendants in respect of 17 bighas 1 biswa 13 dhurs of sir land as per numbers given below, situated in taluqa Unjiar, pargana Garh, valued at Rs. 2,135-0-0, and it be declared that the land claimed is the plaintiffs' sir; that the defendants' allegation and adverse possession set up by them in respect of the said land be held as null and void, and that the whole of the Court costs be allowed.

"That the judgment of the Revenue Court, so far as it is injurious to the plaintiffs' rights, be declared as set side and of no effect.

"That it also should be decided that the defendants' possession is as sub-tenants (*asami shikmis*) under a settlement for a short period, which in no way affects our sir land.

"The cause of action arose on the 13th August, 1884, when the defendants were held to be occupancy tenants.

The Court of first instance (Subordinate Judge of Ghazipur) dismissed the suit. The lower Appellate Court (District Judge of Ghazipur) set aside the first Court's decree and allowed the claim.

The defendants appealed to the High Court. Their first ground of appeal (repeating the contentions which they had raised in both the lower Courts) was :—

"That the tenancy of the appellants in respect of the land in suit belonging to the plaintiffs-respondents being admitted, it was for the Revenue Courts to determine the nature of such tenure, and the suit is not cognizable by the Civil Courts."

[20] Mr. *C. H. Hill* and Pandit *Sundar Lal* for the appellants.

The Hon. *T. Conlan*, Mr. *G. T. Spankie*, and Mr. *Amir-ud-din* for the respondents.

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The case came for hearing before Edge, C.J., and Brodhurst, J., who passed the following order:—

"We refer this case to the Full Bench of five Judges, so far only as the question of the jurisdiction of the Civil Court is concerned."

At the hearing before the Full Bench, Mr. *G. T. Spankie*, on behalf of the appellants, withdrew the second and third prayers contained in the plaint; and the case was argued solely on the question whether the suit was maintainable in a Civil Court as a suit for a declaration that the land in dispute was the plaintiffs' sir land.

JUDGMENTS.

EDGE, C. J.—In this case the plaintiffs are zamindars of a mahal, and the defendants were admittedly tenants of the plaintiffs. I say admittedly, because there is no question here of suing a trespasser. The plaintiffs said that the defendants were their tenants, and the defendants admitted that they were tenants of the plaintiffs. The only question between the parties was whether the defendants were, as the plaintiffs said they were, the *shikmi* tenants of the plaintiffs or the occupancy tenants of the plaintiffs as the defendants alleged that they were. The question arose on the revenue side. On that side it was decided in three different appeals, ending with the Board of Revenue, that the defendants were occupancy tenants of the plaintiffs. It is not material whether that point was ever decided on the Revenue side or not: the question is, can this suit be maintained in a Civil Court? This suit which the plaintiffs have brought, is in fact one the object of which is to get a declaration that the defendants are not the occupancy tenants of the plaintiffs, but merely their *shikmi* tenants, and, as leading up to that end, it is asked as part of their prayer that it should be declared that the land which is cultivated by the defendants is the *sir* of the plaintiffs. I say that that it is purely an [21] incidental part of the prayer in this suit, because the suit really turned on the question of the *status* of the defendants as tenants; the question of *sir* land or not is merely a matter incidental. The lower appellate Court on appeal went at great length into the evidence relating to the land in question from the date of the settlement of 1840, and came to the conclusion that the defendants were not occupancy tenants, but *shikmi* tenants. In fact the only point which the lower appellate Court did try was the real point in dispute between the parties in the case, and that was, what was the *status* of the defendants. The case came in second appeal before my brother Brodhurst and myself. It was contended before us, as has been contended here to-day, that the suit is not one which is cognizable by the Civil Court, and that it is a suit, if maintainable at all, for the Revenue Court, and is not maintainable in the Civil Court.

It is quite clear to my mind that the effect of s. 95, cl. (*a*), and s. 10 of the Rent Act [XII of 1881] is to deprive the Civil Court of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zamindars and tenants, the *status* of the tenants. Under s. 10 of the Rent Act, the Collector is the person who has to decide whether a tenant is a tenant at fixed rate or an ex-proprietary tenant or an occupancy tenant, or whether he is some other kind of tenant who has got no right of occupancy, and under s. 95 of the Rent Act, that question is tied up to the Revenue side, and a Civil Court has got no jurisdiction in the matter. Mr. *Spankie* when the case came on to-day informed us on

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behalf of his clients, the plaintiffs in the suit, that he abandoned that part of the prayer in the plaint which asked for a declaration that the entry in the Revenue record be set aside, and that part of the prayer which asked for a declaration that the defendants were *shikmis* and not occupancy tenants. What remains then after such an abandonment? There remains of the prayer really the incidental and tail end; an incidental portion which could only be of importance where the plaintiffs were trying to obtain one or other of the declarations, the prayer for which [22] Mr. *Spankie* has abandoned. I do not think that in a case between a landlord and a tenant the landlord can come into the Civil Court and can ask for a declaration that the land is his *sir*, if the defendant is in occupation of it; because the only object of having such declaration would be to get the Court in a roundabout way to say that the defendant was not the occupancy tenant of the landlord. Further, I very much doubt whether such an emasculated prayer as Mr. *Spankie* has put before us here is one which could be brought under s. 42 of the Specific Relief Act. The legal character of the plaintiffs as landlords is not denied; what are then their rights which they want a declaration in respect of? The only declaration would be a right to have it declared that it is their *sir* land freed from the right of the defendants as occupancy tenants. That is to decide that the defendants are not occupancy tenants, and that is a question of tenancy, which is not one for a Civil Court, but for a Revenue Court to decide.

Whether we look at this suit as it first came to this Court and as it was referred to the Full Bench, or whether we look upon the suit as emasculated by the abandonment of the other prayers by Mr. *Spankie*, the suit in either case is not maintainable in a Civil Court. I do not wish it to be inferred that I have any doubt that a Civil Court has jurisdiction, as between a zemindar and a trespasser, to decide whether land is *sir* or not. But this is quite a different case. This is a case between persons who are admittedly landlord and tenant. The real object of the suit is to get a Civil Court to interfere with the jurisdiction of the Revenue Courts. This case should be referred back to my brother Brodhurst and myself for decision with an expression of opinion that the suit, as originally brought, or in its emasculated form, is not one within the jurisdiction of the Civil Courts.

STRAIGHT, J.—As I think it very desirable in this case with regard to the question of the jurisdiction of the Civil and Revenue Courts that the reasons for our decision should appear very clearly, I wish to state what I understand the facts are out of which the suit now before us has originated. It seems that in respect of the [23] land to which it relates the defendants, so far back as the year 1862, were recorded in the *jamabandi* as occupancy tenants, and that somewhere about 1288 fasli the plaintiffs first ascertained that this entry stood in this way in the *jamabandi*. At or soon after that time the revision of the settlement of this district was proceeding, and objection was taken by the present plaintiffs to this entry in the *jamabandi*. That objection was heard in the first instance by the Deputy Settlement Collector, and he came to the conclusion that the land was, as claimed by the plaintiffs, their *sir* land and that the defendants were in occupation of it as *shikmis*, and he proceeded to direct that the entires should be amended accordingly. From that decision of his, there was an appeal, as by law provided, to the Settlement Officer Mr. Irvine, and he, after going fully into the matter, upon the 13th August 1884, reversed the Deputy

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Settlement Officer's decision, and held that the defendants were occupancy tenants and that the land to which the plaintiffs' application related was not *sir* land. From his decision there was an appeal to Commissioner, and the Commissioner upheld that view. From the Commissioner's decision there was an appeal to the Board of Revenue and the Board took the same view, and accordingly in the *jamabandi* stands the names of the defendants as occupancy tenants at a particular rate of rent. Having failed in all their proceedings in the Revenue Courts, the plaintiffs then came into Court with the present suit, and by their plaint what they sought was to have it declared that the land claimed is the plaintiffs' *sir*; that the defendants' allegation of adverse possession set up by them was null and void; that the judgment of the Revenue Court so far as it is injurious to the plaintiffs' right be set aside and of no effect, and that it should be decided that the defendants' possession "is that of sub-tenants, which in no way injuriously affects their *sir* land."

To-day at the commencement of the argument of this reference, which is concerned solely with the question of jurisdiction, Mr. *Spankie* very ingeniously withdrew that portion of this plaint which in terms asked for a declaration that the defendants were the *shikmi* tenants of the plaintiffs. For my own part it does not seem to me [24] that that withdrawal alters the real nature and character of this suit, which, as any one who reads the plaint carefully for a moment must feel, is nothing more than a suit brought for the purpose of getting out of the adverse orders passed by the Revenue Courts, and obtaining a declaration to the effect that the land is of such a character that the defendants could not, and cannot, be the occupancy tenants of that land. I quite agree with what has been said that in order to oust the jurisdiction of the Civil Courts there must be a clear declaration in the statute that the jurisdiction of that Court is excluded. Whether I look upon this suit as a suit in the nature of that to which s. 95 (*a*) would apply, *viz.*, that it really involves questions a consideration of which could be made the subject of an application to determine the nature or class of the tenants' tenure, or whether I regard it as of a different character and as assailing something done by the Settlement Officer, it appears to me that it falls within a category of cases as to which the jurisdiction of the Civil Court is specifically and directly prohibited by law. Of course in all these cases language can be found to put a plaint into such a shape as to make it appear as if the suit was of a civil nature. But whether as dealing with an application such as that which is mentioned in cl. (*a*), s. 95, or making such an order as a Settlement Officer can make under s. 53 and the following sections, it must necessarily be a part of that officer's duty to ascertain, among other things, what was the nature of the land in respect of which he had to declare the character of the tenant's tenure. As I put the illustration to Mr. *Spankie* during the course of the argument, so I repeat it now. Suppose a zamindar comes into Court and seeks to eject a tenant upon the ground that he is an occupancy tenant paying a specified rate of rent. The defendant says:— "I am not an occupancy tenant, but I am ex-proprietary tenant." Now, for the purposes of determining whether the ejectment should be granted, it would be the duty of the Revenue Officer to determine what was the precise nature of the tenure. According as it was found whether the tenant was an occupancy tenant or an ex-proprietary tenant, so would the question of his being an occupancy or an ex-pro-

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prietary tenant be set at rest. I asked Mr. *Spankie* whether a tenant, [25] against whom a Revenue Court had declared that he was not an ex-proprietary tenant could go into the Civil Court to have it declared that he was an ex-proprietary tenant and that the land was once his *sir* land. Mr. *Spankie* says "Yes." I do not think he can. It seems to me that would be inviting a Civil Court to take cognizance over a matter which is exclusively within the jurisdiction of the Rent Court. In this particular case the orders of the Settlement Officer were made in the discharge of his duty as a Settlement Officer for the purpose of correcting the jamabandi which is a portion of the record of rights, and in the course of that duty it was his business to determine the class of the tenants' tenure and the rate of rent payable by them. Looking at the case from this point of view, it is in my opinion prohibited by s. 241, Land Revenue Act, and the jurisdiction of the Civil Court is excluded in respect of such a suit as the present. I concur in the order proposed by the learned Chief Justice.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I also concur with the learned Chief Justice and my brother, Straight.

MAHMOOD, J.—I also concur in the order made by the learned Chief Justice in this case. I understand that the solitary question which has been referred to the Full Bench in this case is whether or not, upon the pleadings of the parties in this litigation and the frame of the suit, and especially with reference to the prayers contained in the plaint, this was or was not a suit cognizable by the Civil Court. To this solitary question, which, as I said, is the one which we have to consider, I give an answer in the negative. The relation of landlord and tenant is admitted to exist between the parties to the suit, and the defendants-appellants have obtained an adjudication from the Revenue Courts that they are occupancy tenants. It is clear after having read the plaint in the suit that the object of the suit was only of a declaratory character, especially what the learned Chief Justice terms the emasculated plaint, which is now before the Full Court after the withdrawal of the other [26] reliefs by Mr. *Spankie*. The plaint so altered, and indeed without such alteration, amounted to what? It amounted to praying for setting aside orders made by the Revenue Courts in the admitted exercise of their jurisdiction as to the determination of the class of tenants to which this suit in the Civil Court relates, which determination is also, as I have already said, the object of the present litigation.

Dealing with the plaint in this manner, I have no doubt that it was a plaint such as a Civil Court might have entertained, if it could have entertained it subject to the limitation contained in s. 11 of the Civil Procedure Code itself. One of those restrictions involved in that very section is the turning point of the answer which we should give to the reference, *viz.*, s. 95 of Act XII of 1881 of which I consider it important to consider the first paragraph, because it is so worded as to include "any dispute or matter on which any application of the nature mentioned in this section might be made." And among them is cl. (*a*) of that same section which says "application to determine the nature and class of a tenant's tenure under s. 10." Now s. 10 of the Rent Act undoubtedly contemplates applications made by a tenant, and if the first part of s. 95 did indeed limit it to applications only by tenants for the purpose of determining the nature of their

tenure, then I should have some difficulty in holding that the general provisions of s. 11 of the Civil Procedure Code were limited. But s. 95 of the Rent Act places the matter upon a broader footing, a footing which the learned Chief Justice has described, which might involve not only applications such as s. 10 contemplates, but also all disputes or matters such as might be required to be considered by reason of the jurisdiction which is thus exclusively given to the Revenue Court, or rather I should call it the Rent Court.

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This being so, I have no doubt, and I agree with the learned Chief Justice in holding that it is a matter of no consequence what the Revenue Courts have actually done in connection with the exercise of jurisdiction as to the determination of the nature of the [27] tenure which the defendants-appellants before us have in respect of the land which forms the subject of the suit.

But what is important for me to state is that I also concur with the learned Chief Justice in that part of his judgment in which he referred to the provisions of s. 42 of the Specific Relief Act (I of 1877) as limiting, restricting or formulating the jurisdiction of the Civil Courts for the purpose of passing declaratory decrees in which no consequential relief was prayed for. It is clear that the object of the suit was of a wholly declaratory character. It did not pray for any consequential relief, even in the shape of the ouster of the defendants, and obviously because no such ouster could be claimed after the declaration by the Revenue Court as to the defendants-appellants being the occupancy tenants of the land. There could be no such claim of ouster upon the ground that the defendants were trespassers, because the case admittedly is one between landlord and tenant. That being so, it seems to me that, irrespective of anything in the Rent Act, s. 95, cl. (*a*), and s. 10 of the same enactment, the case in its present simple form could not be maintained.

Now this is the way in which I have dealt with the reference, and I wish to make no further observation beyond pointing out that the interpretation which I have placed upon cl. (*a*), s. 95 of the Rent Act, and s. 10 of that enactment, as implying that all disputes between parties to a litigation in which the relation of landlord and tenant is not only not denied but actually admitted, as in this case, must be dealt with by the Revenue Court under that enactment, is borne out by the preamble of that statute to the exact terms of which I wish to call attention. I am satisfied therefore that this was a suit not cognizable by a Civil Court, and I agree in the order which the learned Chief Justice has made.

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[28] APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Young.

KISHEN LAL (*Plaintiff*) *v.* GANGA RAM AND ANOTHER (*Defendants*).* [24th June, 1890.]

*Mortgage—Hypothecation—Charge—Lien—Transfer of interest in immoveable property—Construction of document—Words—" Arh "—" Mustaghraq "—Power of sale in default—*Bona fide *purchaser for value without notice—Rights of purchaser at sale in execution of money decree—Act IV of* 1882 *(Transfer of Property Act)*, ss. 40, 58 (*b*), 69, 100.

In January 1883 a decree was obtained upon a bond executed in October 1875, whereby certain immoveable property was made security for a loan, the transaction being described not by the word "*rehan*" or mortgage, but by the words "*arh*" and "*mustaghraq*". The instrument contained no express covenant for sale of the property in default of payment, but it contained a covenant prohibiting alienation until payment,and a stipulation that, in the event of the property specified being destroyed or proving insufficient to satisfy the debt, the obligee might realize the amount from the obligor's person and other property. The decree directed the sale of the property as in the terms of an ordinary decree for the sale of mortgaged property. In 1885, before any steps had been taken in execution of the decree,the same property was sold in execution of a simple money-decree against the obligor, and the purchaser obtained possession. It was found as a fact that at the time of the sale, the bond of October 1875, and the decree thereon of January 1883, were not notified, but through no fault of the obligee decree-holder,and that the purchaser was a *bona fide* transferee for value without notice of the bond and decree.

Held that the words "*arh*"and"*mustaghraq*" used in the bond implied a power of sale in default and denoted a mortgage without possession : that the transaction, though entered into prior to the passing of the Transfer of Property Act (IV of 1882), must be regarded as amounting to a simple mortgage as defined in s. 58 (*b*) of that Act, and not as merely creating a charge as defined in s. 100; and that consequently the rights of the obligee must prevail over those of the subsequent *bona fide* purchaser for value without notice of the bond and the decree thereon.

Held also by Mahmood, J., that the title of the judgment-debtor at the time of the sale in 1885 in execution of the simple money-decree was subject to the mortgage-decree of January 1883, and the purchaser at that sale, could acquire no higher title than the judgment-debtor possessed, and was equally bound by the terms of the decree of January 1883, in respect of the property which he had purchased, and could not prevent the property being sold under that decree except by paying up the decretal money. *Unnopoorna* [29] *Dossee* v. *Nufur Poddar* (1) and *Rajah Enayet Hosein* v. *Gridhari Lal* (2) referred to.

Per Mahmood, J.—The power of sale mentioned in s. 58 (*b*) of the Transfer of Property Act is not a power in the mortgagee to bring the mortgaged property to sale independently of a Court The observations on this point of Muttusami Aiyyar,J., in *Rangaswami* v. *Muttu Kumarappa* (3), or Birdwood and Jardine,JJ., in *Khemji Bhagvandas* v. *Rama* (4) and of Petheram, C.J., in *Sheoratan Kuar* v. *Mahipal Kuar* (5), dissented from.

The nature of simple mortgage, hypothecation, charge and lien discussed.

Aliba v. *Nanu* (6), *Martin* v. *Pursram* (7), *Raj Coomer Ram Gopal Narain Singh* v. *Ram Dutt Chowdhry* (8), *Moti Ram* v. *Vitai* (9), *Gopal Pandey* v. *Parsotam Das* (10), *Shib Lal* v. *Ganga Prasad* (11), *Girdhar Ranchoddas* v. *Bakamachund Revachand* (12), *Sobhagchand Gulabchand* v. *Baichand* (13), *Narain Purshotam* v. *Dolatram Virchand* (14), and *Durga Prasad* v. *Shambhu Nath* (15), referred to.

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* Second Appeal No. 868 of 1888 from a decree of H F. Evans, Esq., District Judge of Aligarh, dated 13th February 1888, confirming a decree of Babu Abinash Chander Banerji, Subordinate Judge of Aligarh, dated the 6th May 1887.

(1) 21 W.R. 148. (2) 12 M I.A. 366. (3) 10 M. 509. (4) 10 B. 519.
(5) 7 A. 258. (6) 9 M. 218. (7) 2 Agra 124. (8) 13 W.R. (F.B.) 82.
(9) 13 B. 90. (10) 5 A. 121. (11) 6 A. 551. (12) 8 B.H.C.R. 75.
(13) 6 B. 193. (14) 6 B. 538. (15) 8 A. 86.

[App., 14 A.W.N. 57 (58); R., 33 C. 985 (993)=4 C.L.J. 219 (225); 33 C. 1133 (1152)=4 C L.J. 121=10 C.W.N. 1010; 35 C. 837 (844)=7 C.L.J. 492=12 C.W N. 849; 30 M. 426=11 C.W.N. 1005 (P.C.)=6 C.L.J. 379=4 A.L J. 625=17 M.L.J. 444=2 M.L.T. 333=9 Bom. L.R. 104; 5 A.L.J. 723 (724)=A.W.N. (1908) 277; 12 C.P.L.R. 26 (30); 9 Ind. Cas. 828 (829); 19 Ind. Cas. 658 (659); 19 Ind. Cas. 661 (662).]

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THE facts of this case were as follows. On the 18th October 1875, one Baldeo Das *alias* Bal Kishen executed in favour of Nathu Ram a deed in the following terms :—

"I Balkishen, son of Megraj, caste Bakkal Bara Sevi, resident of muhalla Bahi Kila, one of the quarters of the town of Kol, do declare that I have borrowed in cash Rs. 500, half of which is Rs. 250, from Nathu Ram, son of Bindaban, caste Bakkal Bara Sevi, resident of mauza Marwar, pargana Hasangarh, in the district of Aligarh, and have brought the same to my use. I promise in writing that the same shall be paid on demand to Nathu Ram aforesaid with interest at the rate of annas 14 per cent. without any objection or excuse. If I fail to pay interest for six months, interest will be paid also on the interest overdue at the rate of annas 14 per cent. Until repayment of the aforesaid sum I shall not transfer to any one else in anyway a pucka built shop belonging to me situated in Bazaar Kalan in the town of Kol and bounded on the east by the shop of Rup Ram Bakkal, on the west by the [30] shop of Hugam Chand and Roshan Lal, on the south by the door of the shop and the road, and on the north by the house of Nur Muhammad Shaikh, which I have hypothecated (*arh mustaghraq*) in this bond. Should I do so, the act would be invalid. If by mischance the property hypothecated (*shai mustaghaqa*) should by some unforeseen accident be destroyed or should prove insufficient to satisfy the bond debt, the obligee aforesaid shall be at liberty to realize the amount of this bond from my other property and person. I shall have no objection to this. I have written these presents in the shape of a hypothecation bond that they may serve as evidence and be of use when needed."

This bond was duly registered.

On the 9th September 1879, Baldeo Das mortgaged the same shop to Dal Chand. On the 27th January 1883, Nathu Ram, in a suit brought by him against Baldeo Das and Dal Chand, obtained a decree upon his bond of the 18th October 1875. This decree directed the sale of the shop, in the terms of a decree for enforcement of a simple mortgage. Before any steps were taken in execution of this decree, the same shop was on the 4th March 1885, sold in execution of a simple money-decree held by one Hazari Mal against Baldeo Das, and was purchased by the present plaintiff, Kishan Lal, who, on the 9th July 1885, obtained possession. At the sale in execution of Hazri Mal's decree, no notification was made of the bond of the 18th October 1875, or of the decree obtained thereon by Nathu Ram on the 27th January 1883. It appeared that the Sub-Registrar in whose office the bond was registered had erroneously reported that there were no incumbrances on the property, being apparently misled by the *aliases* of the obligor.

Some time subsequent to the 9th July 1885, Nathu Ram put his decree in execution and caused the shop to be attached in the hands of Kishen Lal under his purchase. Kishen Lal objected to this attachment, but his objection was overruled by the Court executing the decree, on the 27th September 1885. On the 30th October 1886, he instituted the present suit under s. 283 of the [31] Civil Procedure Code, in the Court of the Subordinate Judge of Aligarh, to establish his right in the shop under his purchase of the 4th March 1885, and to have it declared that

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the shop was not liable to attachment in execution of Nathu Ram's decree of the 27th January 1883, and was not subject, as against him, either to that decree or to the bond of the 18th October 1875, which it enforced.

The defendants were the representatives of Nathu Ram.

The Court of first instance (Subordinate Judge of Aligarh) held that the plaintiff's purchase of the 4th March 1885 was subject to the incumbrance created in favour of Nathu Ram by the bond of the 18th October 1875 and to the decree thereon of the 27th January 1883, and that the shop was liable to attachment and sale in execution of the decree. He accordingly dismissed the suit.

On appeal by the plaintiff, the District Judge of Aligarh found that there was "not the least reason for believing that the plaintiff did know that the respondent had any lien on the shop" at the time of his purchase, and that he was " a *bona fide* purchaser for a good consideration without notice." On the other hand, the Court also found that Nathu Ram was not " guilty of any negligence in failing to notify his lien when the sale of the shop took place," and that at the time of the sale Nathu Ram was " a mortgagee with an antecedent lien on the property established by a decree of the Civil Court." The Court observed—" I apprehend that in a Court of equity in England the appellant would be protected from the attachment of the property by the respondent, but from the case *Durga Prasad* v. *Shambhu Nath* (1) it appears that this principle is not followed in the Courts in India, and that therefore the appellant's suit must fail. The judgment of the lower Court must be affirmed, and the appeal must be and is hereby dismissed."

The plaintiff appealed to the High Court.

Mr. A. *Strachey* and Munshi *Ram Prasad* for the appellant.

[32] Munshi *Kashi Prasad* and Babu *Jogindro Nath Chaudhri* for the respondents.

For the appellant, it was contended that the rights created in favour of Nathu Ram by the instrument of the 18th October 1875, and the decree thereon were those of the holder of a charge only as distinguished from the holder of a simple mortgage ; that to constitute a simple mortgage, as defined in s. 58 (*b*) of the Transfer or Property Act (IV of 1882), words expressly or impliedly conferring upon the obligee a right of sale (which right, it was admitted, could only be exercised through a suit in Court) in default of payment were essential ; that the words "*arh*" and "*mustaghraq*" (unlike the word *rehn*) did not constitute a mortgage because they did not expressly or impliedly refer to sale or give the right of sale on default, but merely effected a charge upon the property within the meaning of s. 100 of the Transfer of Property Act ; and that the rights of a charge-holder, as distinguished from a simple mortgagee, amounted only to an equitable lien, or a trust, which could not be enforced as against a *bona fide* purchaser for value without notice. In support of these propositions the following authorities were cited:—Transfer of Property Act, ss. 40. 58, 69, 100 ; *Rangasami* v. *Muttu Kumarappa* (2), *Aliba* v. *Nanu* (3), *Khemji Bhagvandas Gujar* v. *Rama* (4), *Govind Bhaichand* v. *Kalnak* (5), *Moti Ram* v. *Vitai* (6), *Gopal Pandey* v. *Parsotam Das* (7), *Sheoratan Kuar* v. *Mahipal Kuar* (8), *Sheo Dayal Mal* v. *Hari Ram* (9), *Bunscedhur* v. *Heera* (10),

(1) 8 A. 86.
(2) 10 M. 509.
(3) 9 M. 218.
(4) 10 B. at pp. 526, 527.
(5) 10 B. 592.
(6) 13 B. at pp. 99. 100.
(7) 5 A. at pp. 127, 128.
(8) 7 A. at pp. 262, 265.
(9) 7 A. 590.
(10) 1 N.W.P.H.C.R. 74.

Ramsidh Pande v. *Balgobind* (1), *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (2), *Kinlock* v. *The Collector of Etawah* (3) read with s. 56 of Act XVIII of 1873, *Dayal Jairaj* v. *Jivraj Ratansi* (4), *Girdhar Ranchoddas* v. *Hakamchand Evachand* (5); Rashbehary Ghose's Law of Mortgage in India (second ed.), pp. 124, 125, 323-325, 445, [33] 446, 447, 499, Shephard and Brown's Commentaries on the Transfer of Property Act, pp. 107-109, 188, 189; Fisher on Mortgages, vol. i; Snell's Principles of Equity (15th ed.), pp. 333-336; Story's Equity Jurisprudence (Grigsby's ed.), pp. 331, 332, 856, 857, 848; Addison on Contracts, pp. 593, 619, Indian Trusts Act (II of 1882), ss. 63, 64. With reference to the extent to which various equitable liens are enforceable against subsequent *bona fide* transferees, the following authorities were quoted:—Transfer of Property Act, ss. 39, 55 (4) (*b*), (6) (*c*); White and Tudor's Leading Cases in Equity, vol. i, p. 267; Rashbehary Ghose, pp. 322, 333, 440, and Shephard and Brown, pp. 44, 94. *Shib Lal* v. *Ganga Prasad* (6) was distinguished, upon the construction of the deed by the majority of the Full Bench in that case at p. 553. It was contended that in *Durga Prasad* v. *Shambhu Nath* (7) the principle applied by Courts of equity was wrongly stated; but in any event that case was distinguishable, the transaction there being undoubtedly a mortgage.

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JUDGMENTS.

YOUNG, J.—Kishen Lal, appellant, was auction-purchaser in 1885 (4th March) of a shop belonging to one Bladeo *alias* Bal Kishen, of which he got possession on the 9th July, 1885.

The said Baldeo had previously, *viz.*, on the 18th October 1875, hypothecated the same shop to one Nathu Ram (whose representatives are the present respondents). He had also mortgaged it to one Dalchand for a large sum in 1879.

On 27th January 1883, Nathu having sued Baldeo (*alias* Bal Kishen) and Dalchand on the above bond of the 18th October 1875, obtained a decree against them and proceeded to attach the shop in execution of his decree. Kishen Lal objected that he had bought it at auction in execution of Hazari Lal's simple money-decree against Baldeo Das.

The lower appellate Court finds that Nathu Ram is not chargeable with fraud, deceit or *laches*, and that he was not bound to disclose his prior lien to the appellant. On the other hand, the Court finds as a fact that appellant was an innocent purchaser for value without [34] notice. The Court following the ruling in *Durga Prasad* v. *Shambhu Nath* (7) dismissed plaintiff's appellant's appeal.

Against that decision the present appeal is brought.

The sale at the auction in 1885 was the sale of the debtor's interest at that time and no more. That interest in 1885 was subject to the respondent's lien under the bond of the 18th October 1875, which lien had been affirmed by the decree of January 1883.

It is, however, strongly urged upon us here that the bond of the 18th October 1875, did not amount to a simple mortgage, as defined in the Transfer of Property Act (IV of 1882), s. 58, and merely created a charge of the character described in s. 100 of that Act, and that such charge would not be enforceable as against a subsequent innocent

(1) 9 A. 158. (2) 9 M. I. A. at p. 307. (3) 3 A. 433.
(4) 1 B. 237. (5) 8 B. H. C. R. 75. (6) 6 A. 551.
(7) 8 A. 86.

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purchaser for value without notice although a mortgagee under a simple mortgage would be so preferred. It was contended that the law on this matter in force prior to the passing of Act IV of 1882, was practically the same as that which was formulated by that Act, and the learned Counsel for the appellant endeavoured to establish the proposition that documents wherein the power of sale was not expressly given did not amount to mortgages, but only created a charge or lien on the property in question. Mr. *Strachey* (for appellant) admitted that the word "*rehan*" occurring in a document to denote the nature of the incumbrance created, would suffice to show it was a mortgage, and would give the prior incumbrancer a preferential title to the subsequent innocent purchaser for value without notice.

But he contended that no such inference would arise where the document used words such as are here employed, *viz.*, "*arh*" and "*mustaghraq*" and, as here, conveyed no express power of sale in case of default.

The whole subject was considered by us at much length, and the very numerous authorities quoted by the learned Counsel for the appellant and the able argument based by him thereon were carefully weighed.

[35] The primitive meanings of words sometimes assist in the better comprehension of their secondary significations. I do not know that we are much aided in the present instance by the original derivations of the terms used in the documents before us. "*Arh*" denotes a "support" or "propping up," "*mustaghraq*" is literally "submerged."

There is a clause against alienation during the continuance of the debt, but the document contains no express provision conferring the power of sale in default. I give the document itself as follows :—(His Lordship here read the bond of the 15th October 1875 above set forth, and continued :—

The learned Counsel Mr. *Strachey* for appellant contended that the bond of 1875 in favour of Nathu Ram did not transfer any interest in the property to the obligee and merely amounted to a charge thereon, and that on this ground the appellant, the innocent purchaser without notice, had a preferential claim to the respondent whose incumbrance amounted (as he alleged) to a mere lien on the property. He pointed out that the remedy by sale of the property would be alike whether the incumbrance were by way of mortgage or by mere charge on the property.

He admitted that where the transaction amounted to a mortgage, and certainly if the word "*rehan*" was used to denote the nature of the incumbrance, there the incumbrancer had a preferential title to the innocent purchaser without notice ; but he contended that the words employed in the document of 1875, "*arh*" and "*mustaghraq*" did not amount to a mortgage, and merely constituted a lien or charge on the property which would not give respondent any perferential title to the appellant.

The principles laid down in the Transfer of Property Act (IV of 1882) were examined, and the term "simple mortgage," as defined in s. 58 of that Act, was considered and contrasted with "charge" as defined in s. 100 of the Act.

S. 58 lays down that a simple mortgage is "where without giving possession of the mortgaged property the borrower agrees [36] expressly or impliedly that in the event of his failing to pay according to his contract the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied so far as may be necessary in payment of the mortgage-money."

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A " charge " is defined as follows in s. 100 :—

" Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

The words "hypothecation " and " lien" which were also freely used during the argument, do not appear to be terms used in the Transfer of Property Act. A " charge" in strictness not only empowers its possessor in many cases to hold the property charged, if in his possession, but also gives him the right to come into Court and sue actively for the satisfaction of his claim. A "lien" strictly is neither a *jus in re* nor a *jus ad rem*, but is a simply a right to possess and retain property until some charge attaching to it is paid or discharged (Story, Equity Jurisprudence, s. 506 ; V. S. Doraiswami Aiyar, Commentary on Act IV of 1822, p. 140) *Rangasami* v. *Muttu Kumarappa* (1) was quoted, where the question was whether a certain bond amounted to a mortgage or not. The document being in a language prevalent in Madras, it is, of course, only possible to judge of its tenor from the English translation given of it in the judgment, and this is the less satisfactory in regard to the question of its applicability to the case before us, as the point in issue before us is as to the scope and significance of the words "*arh*" and " *mustaghraq*," employed in the deed of 1875, it being admitted that if the word " *rehan* " had been employed instead of " *arh* " and *mustaghraq*, " then no doubt could have remained as to the document amounting to a mortgage. In the Madras case just cited, the bond, which was of the 1st June 1862, is called a hypothecation bond and runs :—" Having pledged to you this day, &c., &c., the brickbuilt house &c., &c" No power of sale was expressly given.

[37] Mr. Justice Kernan held it was not a mortgage adding however the significant remark—" The term 'mortgage' has not, I am informed, any corresponding vernacular term denoting a transfer of land as security." His Lordship expressed his dissent from the Allahabad High Court's ruling in *Shib Lal* v. *Ganga Prasad* (2), but concurred with the Bombay High Court in *Lallubhai* v. *Narran* (3). His Lordship Muttuswami Ayyar, J., said that the substantial question for consideration was whether the hypothecation bond in suit operated " to create only a charge on immoveable property or a simple mortgage within the meaning of the Transfer of Property Act," and he concluded that it created a charge only. With much respect to the learned Judges I venture to think that the question before the Court was hardly whether the bond of 1862 operated to create a charge or a simple mortgage, as defined by the provisions of an Act which came into force twenty years subsequently ; but rather (as indicated by the same Judge himself) what was the intention of the parties at the date of the execution of the bond, and what was the proper construction of the document, having regard to terms employed, and to the sense in which such terms were ordinarily used at such date ; and this seems to me precisely the question for determination in the case now before us.

Another Madras ruling, to a similar effect to that in I.L.R., 10 Mad just quoted, was also cited, *Aliba* v. *Nanu* (4).

The learned Counsel for the appellant reiteraled his argument that there must be a distinct grant of the power of sale in order to bind an

(1) 10 M. 509. (2) 6 B. 719. (3) 6 A. 551. (4) 9 M. 218.

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innocent purchaser for value without notice, and that a charge, while creating a trust against the obligor, went no further and could not be enforced against an innocent purchaser for value without notice, and in support of these propositions quoted Story on Equity Jurisprudence, ss. 1217-1231 and Dr. Rashbehary Ghose's Law of Mortgage in India, p. 322. *Khemji Bhagvandas Gujar* v. *Rama* (1) was next cited. There the Court declined to recognise certain deeds as being mortgage-deeds, although they were so called in the deeds themselves, and the Court held that the creditor had a [38] mere charge upon the property and that no interest "in the land was transferred to him such is is transferred by a power of sale in an ordinary mortgage" (p. 527).

The next authority which came under our consideration was the Full Bench ruling in *Gopal Pandey* v. *Parsotam Das* (2).

There the question was whether the hypothecation of his right of occupancy by an occupancy tenant was or was not a "transfer" of such right within the meaning of s. 9 of the N. W. P. Rent Act of 1873, and their Lordships held (my brother Mahmood dissenting) that such hypothecation was not a "transfer". In that case Mahmood, J., said (and with that opinion I entirely concur):—"But it may be safely taken that the word 'transfer' is used in law in the most generic signification comprehending all the species of contract which pass real rights in property from one person to another" (p. 137).

Another passage (p. 138) appears to me worthy of quoting. Mahmood, J., goes on to say :—"The most essential of the elements which constitute the simple mortgage is the right to cause the property to be sold, a right without which the transaction, whatever else it may be, certainly cannot be called hypothecation, pledge or simple mortgage."

This appears to me to point to the right path to be taken an answering the question before us. What we have to see is not what is the necessary and logial effect of the definitions of simple mortgage and charge in the Transfer of Property Act, but what was the intention of the parties in 1875 when they wrote the deed before us.

And here I must remark that we have no right to assume that, prior to Act IV of 1882, the notions of "charge," "lien," "incumbrance," "hypothecation," familiar to English lawyers were equally familiar to the native mind, much less that these terms bore precisely the same connotation to native as to Engligh lawyers. Indeed if we examine s. 100 we shall even yet fail to find a definition [39] of "charge" as contradistinguished from "lien," the former denoting a result of the act of parties, while the latter is restricted to a liability arising by statute. Nor could terms be easily found in Urdu to express such distinctions except by a periphrasis. I do not say that the idea of a charge is wholly unknown to native lawyers. No doubt the claim of a Hindu widow to maintenance would be in the nature of a charge or lien on the estate (so would be *malikana* and other *haqq*). It might be held that such a charge as that for maintenance by a Hindu widow would not be preferred to the title of an innocent purchaser for value without notice. But such a charge would certainly not be described by the terms "*arh*" and "*istighraq*."

Those words are to the best of my belief terms ordinarily employed by native lawyers to denote a mortgage without possession. I consider that, with this exception, they have as much force as the word "*rehan*," and imply the power of sale in default equally with that word. This to my

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(1) 10 B. 519. (2) 5 A. 121.

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mind is a complete answer to the question before us. If the terms employed impliedly give the power of sale, and I hold they do, then this document is a simple mortgage even under the definition of s. 58 of Act IV of 1882, and the incumbrancer holding under it has undeniably a preferential title to the innocent purchaser for value without notice.

Sheoratan Kuar v. *Mahipal Kuar* (1) was cited. I refer to it chiefly on the ground that it was therein held that "a simple mortgage is a transfer, being a transfer of the right of sale." In that case it was held that a simple mortgage was effected by the instrument, which was of similar character to the one now before us, save that in the case I am quoting (*Sheoratan Kuar* v. *Mahipal Kuar*) the word "*rehan*," *i.e.*, "mortgage," was used. The case of *Shib Lal* v. *Ganga Prasad* (2) was much discussed. The Full Bench of this Court in that case held that a similar instrument to the one now before us operated to create a simple mortgage within the meaning of the Transfer of Property Act. In that case my brother Mahmood in interpreting the meaning of the terms used in [40] the document, the basis of the suit, said as follows (v. p. 556) :—"There can be no doubt that the deed of the 20th December 1869, to which this reference relates, is a deed of hypothecation or simple mortgage, the covenant against alienation taken with the word '*arh*' which occurs in the deed placing the matter beyond question." In *Motiram* v. *Vitai* (3) where certain landed property was mortgaged as security for a debt, but the deed contained no express power of sale, it was held by the Full Bench that the document was a mortgage and not a deed of charge merely.

In *Varden Seth Sam. Luckpathy Royjee Lallah* (4) their Lordships of the Privy Council upholding an equitable lien by deposit of title deeds as against one claiming to be a *bona fide* purchaser for value without notice, remarked :—"To give effect to the legal estate as against a prior equitable title, would be an adoption of the English law, and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice."

In *Durga Prasad* v. *Shambhu Nath* (5) the Court held that "the principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration without notice when clothed with the legal title, has no applicability in our Courts."

The case so far differs from the present one, as in the former there was no question that the document, the basis of the suit, created a valid mortgage.

A consideration of the foregoing cases and of the facts of the present appeal leads clearly to the following conclusions.

The definitions of Act IV of 1882, however useful in illustrating principles, can clearly not have retrospective effect and (as expressed by Muttuswami Ayyar, J., in I.L.R., 10 Mad. 515) "prior transactions must be interpreted according to the intentions of the parties at the time they were concluded."

Granting then that an innocent purchaser for value without notice may well be allowed preference where the nature of the [41] incumbrance set up against him is merely that of a "charge" on the property not amounting to a mortgage, and even further conceding that a mere covenant against alienation without more will not suffice to constitute a mortgage, we have still in this case to look at the terms of the document of 1875, and to decide what was the intention of the parties at the time they executed it.

(1) 7 A. 258. (2) 6 A. 551. (3) 13 B. 90. (4) 9 M.I.A., p. 307. (5) 8 A. 86.

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Looking at the document as a whole and considering the meanings, both primitive and secondary, of the terms employed, *viz.*, "*arh*" and "*mustaghraq*," I have no doubt whatever that it was intended to effect a mortgage without possession of the property named therein, and I think it did effect such mortgage.

I think the power of sale is impliedly given by reason of the force of the words *arh* and *mustaghraq* themselves, and I think that to rule that these words merely constituted a charge on the property as a charge is understood by English lawyers is to import a meaning into these Hindustani words which they were never intended to bear and which they do not bear.

For these reasons I would confirm the judgment below, and dismiss this appeal with costs.

MAHMOOD, J.—This case have been very ably argued by Mr. *Strachey* on behalf of the appellant, and in dealing with his contention I wish to say at the outset that I entirely agree with my brother, Young, in thinking that the fate of this appeal depends upon the interpretation of the effect of the hypothecation deed in favour of Nathu Ram dated the 18th October 1875, on which he obtained the decree of the 27th January 1883, against the obligor Balkishan *alias* Baldeo. That decree directed specific enforcement of the hypothecation by sale of the hypothecated property, and in execution thereof the property having been attached, the plaintiff-appellant's objections founded on his auction purchase of the 4th March 1885, were disallowed by the Court executing the decree on the 27th September 1885. It was to set aside that order and to obtained release of the property from attachment that this suit was instituted on the 30th October 1886, against the decree-holder Nathu Ram, who is now represented by the respondents.

[42] The lower Courts have concurred in holding, on the one hand, that Nathu Ram's hypothecation deed of the 18th October 1875, was a genuine and *bona fide* transaction, as also the decree which he obtained on that deed on the 27th January 1883, and on the other hand, that the plaintiff's auction purchase of the 4th March 1885 was made by him *bona fide* for valuable consideration and without notice of Nathu Ram's hypothecation deed of the 18th October 1875 and decree of the 27th January 1883.

These findings of fact cannot be questioned in second appeal, and they furnish the basis of Mr. *Strachey's* argument on behalf of the appellant. The learned counsel contends that the hyopthecation bond of the 18th October 1875, did not amount to "a simple mortgage," within the meaning of cl. (*b*) of s. 58 of the Transfer of Property Act (IV of 1882); that therefore the decree of the 27th January 1883, cannot be regarded a decree enforcing sale in pursuance of a mortgage; that the deed only created a "charge" such as that contemplated by s. 100 of that Act; that it therefore did not amount to the transfer of an interest in immovable property, but only to such an obligation annexed to ownership of immoveable property as would fall under the purview of the second paragraph of s. 40 of the Act, and under the last part of that section could not follow the property in the hands of a *bona fide* transferee for value who took without notice of the charge, such as the plaintiff-appellant in this case.

This contention is supported by citation of many rulings which have been noticed by my brother, Young, in his judgment; but I do not think it necessary for me to consider all of them in detail, as I agree with my learned brother in thinking that the intention of the parties as expressed in the deed of the 18th October 1875, amounted to what is known in this

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part of the country as hypothecation or simple mortgage of which a clear definition is given in cl. (*b*) of s. 58 of the Transfer of Property Act (IV of 1882). That definition is only a reproduction of older law and is therefore applicable to the deed now in question though it was executed in 1875. Viewing the deed in this light it is true that it does not contain any [43] express words giving the obligee the power of bringing the property to sale as the means of securing payment of the money advanced, but I think there is sufficient language in the deed to show that such power is implied. In the first place the transaction is described as "*arh,*" "*mustaghraq,*" which means a hypothecation or simple mortgage, and in the next place, the deed contains a covenant against alienation till payment of the loan, and then goes on to say, "if the hypothecated property (*shai mustaghriqa*) is destroyed by some unforeseen calamity or proves insufficient for the bond debt," then the creditor can recover it from the other property of the executant. This, I think, clearly implies power of bringing the property to sale, because that is the creditor's remedy for recovery of money advanced under a transaction of "*arh*" in this part of the country, and in this deed the meaning is further made clear by the use of the word *mustaghraq*, which implies hypothecation or simple mortgage.

But against this interpretation Mr. *Strachey* argues that neither the word "*arh*" nor he word "*mustaghraq*" is the specific term for mortgage (for which the word is "*rehan*") ; that they only mean security by hypothecation, which in the absence of a clear indication of a power of sale amounts only to a charge such as s. 100 of the Transfer of Property Act contemplates.

In order to deal with this contention it will be convenient to consider how the matter is dealt with in the Transfer of Property Act, and I cannot do better than quote a passage from the judgment of Mr. Justice Muttuswami Ayyar in *Aliba* v. *Nanu* (1) where that learned Judge says:—"S. 58 defines a mortgage to be the transfer of an interest in immoveable property for the purpose of securing the payment of money, but cl. (*b*) defines a simple mortgage to be one in which there is no delivery of possession of the mortgaged property, but in which the mortgagor binds himself to pay the debt personally, and agrees expressly, or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold [44] and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money. In s. 100, a charge is defined to arise where immoveable property of one person is, by the act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage. The distinction then between a simple mortgage and a charge consists in this, *viz.*, where a power of sale is conferred upon the mortgagee expressly or impliedly by the instrument of mortgage, the transaction is a mortgage; otherwise it only creates a charge."

I concur in this statement of the effect of s. 58, cl. (*b*), and s. 100 of the Transfer of Property Act, and I also agree in the distinction pointed out between a simple mortgage and charge, and in order to make the distinction clearer I may here adopt the language of Dr. Rashbehary Ghose in his note on s. 100 of the Transfer of Property Act (2), where the learned author says:—"A charge must be distinguished from a mortgage

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(1) 9 M. 218 at p. 221. (2) Tagore Law Lectures, 1875, 6th ed. 2, p. 499.

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as defined in the Act, more specially from a simple mortgage. In every mortgage there must be a transfer of an interest in specific immoveable property, while in the case of a mere charge no interest is transferred, nor is it necessary that the property to which it relates should be specific. A charge differs from a mortgage not only in form, but also in substance. A plea of purchase for value without notice, for instance, although it may be perfectly good against a charge, will be wholly unavailing against a mortgage."

Whilst such is the distinction between a charge and a simple mortgage, Mr. *Strachey* in support of his contention relies upon a passage in the judgment of Mr. Justice Muttuswami Ayyar in *Aliba* v. *Nanu* (1), where that learned Judge observed :—

"Prior to Act IV of 1882 the obligor had only the rights of an ordinary debtor under a hypothecation deed. On the one hand, he had no right of redemption, whilst on the other the obligee had no power of sale as inherent in the contract. If the Courts ordered a sale, they did so as it was the only mode in which a charge could be [45] enforced. There is no doubt that Act IV of 1882 affects the Act of Limitation as to mortgages executed subsequently to July 1882, but, as already remarked, it does so by creating new rights and liabilities in the obligor and obligee with reference to those mortgages. In this view it seems to me that Act IV of 1882 could have no retrospective operation, and I hold therefore that the claim for the sale of the hypothecated property was one to enforce a charge, that it falls under art. 132, and that the hypothecation on which it is based does not possess the properties with which mortgages executed subsequent to the 4th July 1882, are invested by Act IV of 1882."

But there are even stronger observations than these in favour of Mr. *Strachey's* contention, made by the same learned Judge in the Full Bench case of *Rangasami* v. *Muttu Kumarappa* (2), where in interpreting a deed in which the words "hypothecation" and "pledge" were used as representing the transaction, but no power of sale was expressly given to the obligee, the learned Judge said :—

"The transaction is, I think, clearly not a simple mortgage as defined in s. 58 of that Act. There is neither the transfer of property mentioned in that section, nor a special agreement whereby the creditor acquires a power to sell the hypothecated property on default of payment according to the contract. On the other hand, the transaction in suit appears to be of the kind described in s. 100, which defines how a charge is created. It was argued that the Courts used to sell the hypothecated property at the instance of the creditor, and that a power to sell on default might be taken to be inherent in every contract of hypothecation made prior to 1882; but it must be remembered that the power contemplated by the Transfer of Property Act, s. 58, cl. (*b*), is a power to sell *otherwise* than through the intervention of a Court of justice, and that if the Court directs a sale in the case of a hypothecation bond, it is for the reason that it is the only mode in which the amount charged on immoveable property can be realized." And later on in the same judgment (at page 516) the learned Judge went the length of saying :—"It seems to me that the Transfer of Property Act [46] does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definitions it contains of simple

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(1) 9 M. 218 at p. 222. (2) 10 M. 509 at p. 515.

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mortgages." Again Mr. *Strachey* relies upon a ruling of the Bombay High Court in *Khemji Bhagvandas Gujar* v. *Rama* (1) where Birdwood and Jardine, JJ., said:—

"And exhibit No. 3, with which we are more immediately concerned, simply recites that the land stands security for the money under it. The property is also spoken of as mortgaged; but the word must be construed as meaning only that the land has been made security for the payment of the money, so that the creditor has a charge upon the property within the sense of s. 100 of the Transfer of Property Act (IV of 1882). He has the right to have his charge realized by sale under a decree, but he is not a mortgagee, as no power is given him expressly or by implication to sell the property out of Court. Until he obtains a decree against the land, no interest in it is transferred to him such as is transferred by a power of sale in an ordinary mortgage."

Now there can be no doubt that if these rulings of the Madras and Bombay High Courts are to be accepted as governing the decision of this case, the deed of the 18th October 1875 must be regarded as creating nothing more than a charge which could not prevail against a *bona fide* transferee for value without notice, such as the plaintiff-appellant in this case. But I cannot accept those rulings as applicable in this case, partly because they seem to be affected by considerations relating to the nature and incidents of hypothecation peculiar to those Presidencies, and partly because, I respectfully think, they proceed upon a misapprehension of the nature of the power of sale as contemplated by cl. (*b*) of s. 58 of the Transfer of Property Act. So far as the Madras cases are concerned, the passages which I have quoted from the judgment of Mr. Justice Muttuswami Ayyar would go to show that in that Presidency no such thing as hypothecation carrying with it as a necessary incident the power of bringing the property to sale ever [47] existed before the Transfer of Property Act, and that therefore cl. (*b*) of s. 58 of that enactment was the introduction of new law. The same is possibly the case in Bombay, because there, as the passage which I have quoted from the judgment of Birdwood and Jardine, JJ., would show, even the use of the word mortgage coupled with the expression security would not amount to a simple mortgage within the meaning of cl. (*b*) of s. 58 of the Transfer of Property Act. Such is not the case in this part of the country, for here words of hypothecation and simple mortgage have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of his claim, and no express words conferring such power are insisted upon as necessary to create such power. Upon this point the ruling of this Court in *Martin* v. *Pursram* (2), which was followed by a Full Bench of the Calcutta High Court in *Raj Coomar Ram Gopal Narain Singh* v. *Ram Dutt Chowdhry* (3) and other cases which I shall presently refer to, are clear authorities.

The other reason why I respectfully decline to adopt the Madras and Bombay rulings above mentioned is that in the passages which have been relied upon by Mr. *Strachey*, and which I have quoted, the learned Judges seem to have held that the power of sale contemplated in cl. (*b*) of s. 58 of the Transfer of Property Act must be a power in the mortgagee to bring the property to sale independently of the Court. Mr. Justice Muttuswami Ayyar in *Rangaswami* v. *Muttu Kumarappa* (4) in answering the contention that the right of sale was an incident inherent in every hypothecation

(1) 10 B. 519.
(2) N.W.P.H.C.R. (1867) 124.
(3) 13 W.R. 82 F.B.
(4) 10 M. 509.

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said :—" But it must be remembered that the power contemplated by Transfer of Property Act, s. 58, cl. (*b*), is a power to sell, *otherwise than through the intervention of a Court of Justice.*" Similarly Birdwood and Jardine, JJ., in dealing with a similar contention in *Khemji Bhagvandas Gujar* v. *Rama* (1), observed "He has the right to have his charge realized by sale under a decree, but he is a not a mortgagee, as no power is given him, expressly or by implication, to sell the property out of Court." Again Birdwood, J., in the later [48] case of *Motiram* v. *Vitai* (2) pointed out (at p. 100), that this view was in accordance with the dissentient judgment of Petheram, C.J., in the Full Bench case of *Sheoratan Kuar* v. *Mahipal Kuar* (3), where that learned Chief Justice (at p. 266) said :—

"A reference to s. 100 of the same Act shows that according to the law of this country, immoveable property may be made the subject of a security by a transaction which may not be a mortgage, *i.e.*, by a transaction which does not transfer *to the lender* any interest in the land itself. The question then comes to this, Does the bond in question, either expressly or impliedly, *give the lender himself* any right to cause the property to be sold, or in other words, to *sell it himself?* as if it does not, it transfers no interest in the property and is not a mortgage but a charge."

With due respect to the learned Judges who have thus interpreted the power of sale as contemplated in cl. (*b*) of s. 58 of the Transfer of Property Act to mean a power to sell the property without the intervention of the Court, I am unable to accept their interpretation. The exact words in the clause are :—" the mortgagee shall have a right to cause the mortgaged property to be sold," and s. 67 clearly shows that such power is to be exercised by obtaining from the Court "an order that the property be sold." The use of the phrase, "to cause" taken with the provisions of s. 67 as to order for sale, clearly shows that in a simple mortgage the mortgagee's power of sale is not intended to be exercised independently of the Court. If any doubt could exist upon the point it is removed by the express provisions of s. 69, which, in dealing with the matter, lays down that a power of sale " without the intervention of the Court is valid in the following cases and *in no others*," and the cases enumerated in the section do not include simple mortgages, as defined in cl. (*b*) of s. 58. It is therefore clear that in order to constitute a simple mortgage an express or implied power of sale exercisable through the Court is all that is required,and that it is none the less a mortgage,if it conveys no power to the mortgagee to sell the property out of Court, a power which, as I have shown, could [49] not be valid in such mortgages. This view is in accord with the doubt expressed by Sargent, C.J., in *Motiram* v. *Vitai* (2) as to the accuracy of the ruling in *Khemji Bhagvandas Gujar* v. *Rama* (1) for he observed :—" It is to be remarked that in *Girwar Singh* v. *Thakur Narain* (4) the High Court of Calcutta treat the document in that case, which was a simple mortgage in the same form as exhibit 3, the subject of discussion in *Khemji Bhagvandas* v. *Rama* (1), as a mortgage within the contemplation of the Transfer of Property Act, and it is certainly very difficult to suppose that the framers of that Act intended to exclude from their definition of mortgage a large class of instruments which were not only in every day use, but regarded and described by the natives of this country as mortgages, and treated as such by all the Courts of the mufassil."

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(1) 10 B. 519 at p. 527. (2) 13 B. 90 at p. 97. (3) 7 A. 258.
(4) 14 C. 730.

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I now proceed to consider some of the rulings of this Court in which the question as to what amounts to a simple mortgage has been discussed. In the case of *Gopal Pandey* v. *Parsotam Das* (1) a Full Bench of this Court had to consider whether a hypothecation by an occupancy tenant of his occupancy tenure was a transfer within the meaning of s. 9 of the N. W. P. Rent Act. The majority of the Court in that case answered the question in the negative, whilst I answered it in the affirmative. In delivering my judgment in that case I went at considerable length into the question (at pp. 136—39) what constituted hypothecation or simple mortgage, and to those views I still adhere, and need not repeat them. Mr. *Strachey*, however, argues that my opinion in that case is no longer available to me as the majority of the Court decided the question in the negative. This at first sight seems to have force, but as a matter of fact with the exception of Stuart, C. J., who delivered a separate judgment, the opinion of the majority of the Court does not abrogate the opinion which I expressed as to the nature and incidents of hypothecation or simple mortgage, for they only ruled that "transfer" in s. 9 of the Rent Act, meant only an out and out transfer. The ruling of the learned Judges may be quoted here, in their own words. They said :—" What s. 9 aimed at was to prevent occu-[50]pancy tenants from wholly divesting themselves of their rights of occupancy by out and out transfer to strangers to the exclusion of co-sharers interested by inheritance in such right." Beyond this the ruling has never been understood to govern questions of mortgages, and its effect has been strictly limited to the interpretation of s. 9 of the Rent Act by this Court itself.

This appears from the Full Bench ruling in *Shib Lal* v. *Ganga Prasad* (2), where a deed such as the one in this case which employed the word *arh* with a covenant against alienation was accepted as amounting to a simple mortgage within the meaning of cl. (*b*), s. 58 of the Transfer of Property Act. Again, in *Sheoratan Kuar* v. *Mahipal Kuar* (3) a deed worded similarly to that in this case was held by the majority of the Court to be a transfer by simple mortgage within the meaning of cl. (*b*), s. 58 of the Transfer of Property Act, although the deed did not expressly give power of sale to the mortgagee and the words "*rehan*" (mortgage) and "*mustaghraq*" were taken to imply a power of sale, though of course not a power of sale without the intervention of the Court. In delivering my judgment in that case I said :—"In some cases, such as those described in s. 69 of the Transfer of Property Act, the mortgagee may sell the property by private sale ; in other cases (and this is the rule of simple mortgages in India) his only way of selling the property is to go to the Court to obtain an order for sale. I am of opinion that this distinction between the two forms of mortgage to which I have referred does not place them under different categories, for my conceptions of jurisprudence convince me that both must be classed under the genus of *jura in re alienâ* or estates carved out of the full ownership of property, the object, namely, security of immoveable property for the performance of a pecuniary obligation, being in both cases identical." It seems to me that the question whether the mortgagee's power of sale is to be exercised out of Court or through the intervention of the Court is a matter relating to what may be called the *modus operandi* as distinguished from the essence of the mortgage.

[51] There was another point which Mr. *Strachey* urged in support of the appeal. He contended that even if the deed of the 18th October

(1) 5 A. 121. (2) 6 A. 551. (3) 7 A. 258.

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1875 be taken to amount to a simple mortgage, the fact that the plaintiff is a *bona fide* purchaser for value without notice rendered his purchase of the 4th March 1885, free of the prior incumbrance. For this contention the learned counsel relied upon a ruling of the Bombay High Court in *Girdhar Ranchoddas* v. *Hakamchand Revachand* (1) where such a rule seems to have been laid down with reference to the *Gujrati* form of *Sankhat* mortgage, which is apparently similar to a simple mortgage in this part of the country. That ruling, however, has been overruled by a Full Bench of the same Court in *Sobhagchand Gulabchand* v. *Bhichand* (2) and again by another Full Bench of the same Court in *Narain Purshotam* v. *Daolatram Virchand* (3). There is thus no authority for the proposition that a simple mortgage such as the one in this case is unavailable as against a *bona fide* transferee for value without notice.

There is yet another reason why this appeal cannot prevail. The plaintiff in this case is the purchaser of the rights and interests of Balkishan such as they were at the auction-sale of the 4th March 1885. The purchase being in execution of a simple money-decree, the plaintiff could acquire no higher title than the judgment-debtor possessed. This being so, it must be remembered that in respect of this very property Nathu Ram, whom the defendants-respondents represent, had already obtained a decree on the 27th January 1883, against Balkishan. That decree, as has already been observed, was passed on the deed of the 18th October 1875, and is so framed as to order sale of the property in enforcement of a simple mortgage. It is in all respect a mortgage decree. Now this being so, the title of Balkishan was necessarily subject to the decree when it was sold to the plaintiff on the 4th March 1885, and he is equally bound by its terms. In *Unnopoorna Dassee* v. *Nufur Poddar* (4) the Calcutta High Court held that the purchaser of property at execution sale is the representative in interest of the judgment-[52] debtor whose right, title and interest he has purchased. In *Rajaha Enayet Hossein* v. *Girdhari Lal* (5) the Lords of the Privy Council observed :—

"There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction to be made in favour of a person claiming under an execution sale as contradistinguished from the representatives of any person claiming under an ordinary assignment or conveyance. In the opinion of their Lordships, there is no foundation in principle or authority for any such distinction, but the person who comes here as the plaintiff, and who is the respondent in this case, must stand in the same position as the son, Bahadur, whose rights he bought would have stood in if he had been the claimant."

It is therefore clear that the plaintiff-appellant is as much bound by the terms of the decree of the 27th January 1883, in respect of the property which he has purchased as Balkishan himself would have been, and cannot therefore prevent the property from being sold under that decree except by paying up the decretal money.

For these reasons I agree with my brother, Young, in dismissing the appeal with costs.

Appeal dismissed (6).

(1) 8 B.H.C.R. 75 A.C. (2) 6 B. 19. (3) 6 B. 538. (4) 21 W.R. 148. (5) 12 M.I.A. 366.

(6) See also *Cooling* v. *Saravana* (12 M. 69), *Golla Chinna Guruvappa Naidu* v. *Kali Appiah Naidu* (4 M.H.C.R. 434), *Bapuji Balal* v. *Satya Bhama Bai* (6 B. 490), *Sadagopa Chariyar* v. *Ruthna Mudali* (5 M.H.C.R. 457), *Chetti Gaundan* v. *Sundaram Pillai* (2 M.H.C.R. 51), *Lakshmandas Sarupchand* v. *Dasrat* (6 B. 168).

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[53] PRIVY COUNCIL.

1890 JULY 12.

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PRESENT:

Lord Watson, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court for the North-Western Provinces.*]

RADHA PRASAD SINGH (*Defendant*) v. LAL SAHIB RAI AND OTHERS (*Plaintiffs*). [12th July, 1890.]

Civil Procedure Code ss. 13, 43—Res judicata—*Ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees and effect in execution of his representatives not being parties to the operative one—Mesne profits—Parties—Non-joinder.*

The dismissal of a suit to set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure, to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order or sale against which the dismissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

The question of the amount of mense profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs of the original judgment-debtors.

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money-decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it (1).

[R., 16 A. 390 = 14 A.W.N. 131; 21 A. 316 (317) = 19 A.W.N. 101; 25 A. 385 (387) = 23 A.W.N. 80; 24 B. 251 (F.B.); 19 C. 132 (137) (F.B.); 33 C. 867 (876) = 4 C.L.J. 141; 33 M. 78 (79) = 4 I.C. 1040 (1041) = 6 M.L.T. 187; 39 C. 220 = 16 C.W.N. 109 (113); 25 M. 244 (296) = 11 Ind. Cas. 939 (940); 10 C.W.N. 40 (42); 13 M.L.T. 79 (87) = (1913) M.W.N. 114 (121) = 24 M.L.J. 96 (104); 5 Ind. Cas. 325 (329); 18 Ind. Cas. 586 (591).]

[54] CONSOLIDATED appeal from two decrees (4th May 1887) of the High Court, one of which reversed a decree (21st July 1885) of the Subordinate Judge of Ghazipur and decreed the claim of the present respondent. The other dismissed a cross appeal preferred by this appellant to the High Court.

The plaintiffs, in the suit out of which this appeal arose, and their predecessors-in-estate, were pattidars of village Narhi, in the Ghazipur district, their village having originally comprised mauza Umarpur, which, about the year 1840, was cut away from Narhi by the river Ganges,

(1) S. 255 of Act X of 1877 (30th March 1877) enacted that if the decree be for mesne profits or any other matter, the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

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re-appearing some years after as diyara, or alluvial land, on the opposite, or Shahabad, side of the river. The defendant was the Maharaja Radha Prasad Singh, the proprietor of taluk Majhariya, in the Shahabad district. The litigation which took place about Umarpur diyara, between the defendant's father and the proprietors of Narhi, 264 in number, is stated in the judgment of the Sadar Diwani Adalat of 29th November 1759, reported in the S. D. A. reports for that year. The result was a decree in favour of the Maharaja, for the possession, with mense profits, of about 1,589 bighas and he obtained possession in 1874. Meantime, an order of the Government had placed Umarpur diyara within the jurisdiction of the Shahabad district. On the 1st March 1877 a decree was made by the Shahabad Court fixing the amount of mense profits and costs at Rs. 10,69,667, to satisfy which, an order was made in June 1878, also by the Shahabad Court for the attachment of the interest of the decree-debtors in Umarpur. On the 23rd June 1880, the present respondents filed their plaint against this appellant (who had succeeded his father as talukdar) in the Court of the Subordinate Judge of Shahabad to have set aside the sale of their share in Umarpur, on the ground that neither they, nor any of their ancestors were judgment-debtors in the decree held by the Maharaja. On the 21st July 1881, the Subordinate Judge dismissed that suit, with costs on grounds which he stated thus:—

"The case having come on to-day, an application has been made that the plaintiffs being residents of another district on the other side of the river could not attend, for what reason it was not [55] known, and it prayed for one month's time, and for the appointment of another date. This is not a sufficient cause. Two weeks have passed since the framing of the issues and the plaintiffs have done nothing towards the conduct of their case. Now one month's time cannot be allowed. The case should be dismissed for want of evidence."

The case having thus terminated in Shahabad, afterwards, on the 10th March 1881, the District Judge of Ghazipur made an order, on the application of the Maharaja, for execution of the decree of 1877, by attachment of lands in Narhi. Objections having been disallowed, the plaintiffs in this suit, describing themselves as "sons of Jaiparkash," who, in fact, were the sons of Jhanguri, brought this suit on 3rd March 1882. They claimed to be entitled as village shareholders to shares in Narhi, asli and dakhili valued at Rs. 74,888, alleging that neither they nor their ancestors were liable for the mesne profits. The Maharaja's defence was that they were. Execution proceedings had all along been taken against Jhanguri Rai, son of Achraj, as well as other proprietors; and it was contended that it was Jhanguri's son, Jaiparkash, whom the plaintiffs represented. The defence also relied on the dismissal of the suit which had been brought in 1882 in the Shahabad Court as barring this suit; and on this latter ground the suit was, in the first instance, dismissed by the Subordinate Judge of Ghazipur, whose decree, however, was on appeal reversed by the High Court, the suit being remanded for hearing on the merits.

On that remand the first Court held that the respondents' "ancestor" or grandfather, Jhanguri, had been a defendant in this suit in which this appellant's decree had been obtained, and that, therefore, his share of one moiety of the properties in suit was liable to be sold in execution of that decree, but that the other half, which under Hindu law belonged to the respondents as grandsons for Jhanguri, was not so liable; and the first Court, accordingly, gave the respondents a decree for the latter half, and

declared the other half liable to sale in execution of this appellant's decree.

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[56] Against that decree an appeal and cross appeal were preferred, on which the High Court remanded the suit for the determination and report of the first Court on three issues which were sent down for the purpose of ascertaining more perfectly whether Jhanguri, the respondent's grandfather, was a defendant in the suit, and whether process was served on him, and whether he or his son, Jaiparkash, the respondents' father, or the respondents were parties, at any time, and when, to the excution proceedings prior to the 12th July 1874, the date on which possession was obtained by this appellant of the decreed lands in respect of which the mesne profits were demanded.

On this remand, the first Court took further evidence, and reported that it was shown that Jhanguri, the respondent's grandfather, was at the time of the institution of the suit in which this appellant's decree was obtained, a co-parcener, and in possession of the lands decreed; but that this appellant, on whom the High Court had cast the burden of proof, had not satisfactorily shown that any process issued to Jhanguri in that suit, or that any proceedings in execution had been taken against the respondents, or their ancestor, before the 1st of March 1881.

Objections and cross-objections were taken to this report, which was returned to the High Court, and the case was re-argued.

The judgment of the High Court, delivered by STRAIGHT, J., concluded thus:—

"To sum the matter up, it comes to this, that the defendant says because there was a mention of the name of Jhanguri, who had a share in this particular village in the year 1856, and because all the co-sharers must be presumed to have been cited in that suit, and because a Jhanguri appears in the decree and in the subsequent execution proceedings, therefore it must be presumed that that Jhanguri is the grandfather of the present plaintiffs. On the other side, the plaintiffs say, and I think with justice, that it is by no means clear that Jhanguri was in existence in the year 1856; there is no proof that he was served with process in that suit before the decree was passed, or that he was subsequently made a party to any [57] proceedings in execution of the decree and in this respect the contention is supported more or less by the absence from the decree of any parentage of Jhanguri, and the same remark applies to the execution proceedings, so that under these circumstances it does seem to me to be asking us to take a leap in the dark to come to the conclusion upon such materials that this particular Jhanguri whose name appeared in that decree must necessarily be the Jhanguri the granfather of the plaintiffs in the present suit. It was urged for the defendant that by the name of Jhanguri appearing in or being mixed up with the names of the other members of the family who were cited in this suit, it must follow that he was the Jhanguri the ancestor of the plaintiffs. I confess it would be going a great deal too far, where there are so many Jhanguris appearing in the decree, and so many repetitions of other names, to come to the conclusion that he was the person the defendant says he was. I think I have said sufficient to explain why I think that there is no clear, satisfactory, or convincing proof which would warrant me in allowing the defendant to proceed with the execution of the decree against the property which is now in the possession of the present plaintiffs."

The decree of the High Court was accordingly in favour of the plaintiffs.

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Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellant, referred to the decision of the Subordinate Judge of Shahabad of 21st July 1881, dismissing the plaintiffs' suit in that Court; and they referred to ss. 13, explanation 4, and 43 of the Civil Procedure. They also adverted to the evidence relating to Jhanguri having been a party to the decree of 14th April 1856. They contended that he had remained a pattidar and co-parcener of Narhi, and that the entire interest of the plaintiffs in their ancestral lands was liable to attachment in execution of the decree.

Mr. *J. Graham*, Q.C., and Mr. *H. Cowell* for the respondents, argued that they were not affected by the decree of 1856 or bound by any of the proceedings taken under it. The proceedings taken by the defendant on the 1st March 1881 were not preceded by [58] any judicial finding that the present plaintiff represented the real judgment-debtors. The decision of the Shahabad Court had determined none of the issues in the present case and did not constitute *res judicata*.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by LORD WATSON.

JUDGMENT.

LORD WATSON.—The suit in which these consolidated appeals are taken was instituted by Lal Sahab Rai and others, the respondents, before the Subordinate Judge of Ghazipur in March 1882, for the purpose of obtaining relief against the attachment and sale, at the instance of the Maharaja Radha Prasad Singh, the appellant, of certain shares of immoveable estate in taluka Narhi and elsewhere, in satisfaction of a judgment-debt alleged to be due from their ancestor Jhanguri Rai. The respondents are the six sons of Jaipargash, the only son of Jhanguri, who was one of the five sons of Achraj Rai, a pattidar of Narhif and the shares sold in execution by the appellant were the ancestral property of the respondents, being one-fifth of the interest which belonged to their great-grandfather, Achraj Rai.

In order to appreciate the relative position of the litigants and the merits of the controversy raised by these appeals, it is necessary to revert to the legal proceedings in which the decrees were obtained which formed the warrant for the attachment and sale against which relief is sought.

Taluk Majharya, now belonging to the appellant, and taluk Narhi, already mentioned, are situated on opposite banks of the Ganges, Majharya being on the Shahabad and Narhi on the Ghazipur side of the river. Disputes arose between the proprietors of these two taluks with respect to the ownership of 1,589 bighas of alluvial land which had been deposited by the action of the river on its Shahabad side, the proprietors of Narhi, who appear to have been in possession, alleging that the disputed land was a re-formation upon a denuded area which originally formed part of their taluk. Consequently the Maharaja Bukhsh Singh, father and imme-[59]diate predecessor of the appellant, brought, in 1855, an action against 264 defendants pattidars of Narhi, before the Civil Court of Ghazipur for recovery of the disputed bighas and for mesne profits. The judicial record of that action perished in the Mutiny, but copies of the written statement lodged for 57 pattidars who appeared to defend, of their petition for leave to file documents, and of the ultimate decree passed by the Civil Judge of Ghazipur, have been produced and admitted without objection in this suit.

The decree, which is dated the 14th April 1856, assigned the disputed land to the Maharaja, and fixed its boundaries; and also found that he was "entitled to mesne profits from the date of the Deputy Collector's order

until he recovers possession." An appeal was taken by some of the defendants to the Sadar Court, who, on the 29th November 1859, varied the boundaries fixed by the Subordinate Judge favourably to the defendants, and directed "that mesne profits be adjusted accordingly." The Maharaja presented a petition for review, upon which the Sadar Court on the 27th April 1860 mondified its previous decision with respect to boundaries, in his favour. An appeal was then taken by the defendants to this Board, which was dismissed on the 31st March 1870 for want of prosecution. It is unnecessary to notice further these proceedings by way of appeal, because the decrees pronounced in them had reference merely to the extent of the land which the Maharaja was entitled to recover, and did not disturb the general finding of the Subordinate Judge of Ghazipur in regard to mesne profits.

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It having been judicially determined that the disputed land formed part of taluk Majharya, the action was, after the dismissal of the appeal to this Board, transferred to the Court of Shahabad, the district in which that taluk is situated. In 1874 the Maharaja was put in possession of the land in pursuance of the decree of the Sadar Court; but the question of mesne profits was not finally disposed of until 1877. On the 1st March 1877, the Subordinate Judge issued an order, which has become final, fixing the amount of mesne profits and costs due to the appellants as successor of the Maharaja at Rs. 10,69,667, for which he gave decree jointly against [60] all the parties whose names then appeared as defendants to the action.

In June 1878 an order issued from the Shahabad Court for attachment of the interests of the judgment-debtors in mahal Umarpur, in satisfaction of these mesne profits and costs of suit. In the course of the proceedings the respondents applied to have a 2 ganda 2 kauri $2\frac{1}{4}$ dant share which they alleged to belong to them, struck out of the inventory, but their objection was overruled, and the property sold in execution. The respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mahal was ancestral property, and that neither they nor their ancestors were judgment-debtors in the decree executed, or in anyway liable under it. The suit was resisted by the appellant, on the grounds that the respondents had no interests in Umarpur, and that they were not the respresentatives of Jhanguri and Jaipargash. After adjustment of issues the action was dismissed with costs, on the 21st July 1881, because of the respondent's failure to adduce evidence in support of their allegations; and the respondents took no steps to set aside that order, which has consequently become final. It would hardly have been necessary to refer to these proceedings in execution, had it not been for the fact that the appellant relies upon them as constituting *res judicata* in the present suit.

On the 1st March 1881, the appellant instituted proceedings for execution in the Court of Ghazipur against property of the judgment-debtors situated in that district, stating in his application (1) the names of the judgment-debtors, and (2) the names of those against whom his decree was sought to be executed. Amongst the former there occurs the name of "Chakauri Rai," which is synonymous with "Jhanguri Rai," and amongst the latter the names of all the respondents, who are described as "sons of Jaipargash Rai, deceased, heirs of Chakauri Rai, grandson of "Achraj Rai," So that in these proceedings the appellant rightly attributed to the respondents the character of the heirs of Jhanguri and Jaipargash, which he

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denied that they possessed in his previous execution suit. The respondents [61] lodged objections, praying for release of their interest on the ground that it belonged to them," and they were in possession thereof, and the judgment-debtors had no concern with it " but these objections were repelled by the Subordinate Judge of Ghazipur, on the 10th March 1881, in respect of their having been once before raised by the same persons in the Court of the Sub-Judge of Shahabad and were disallowed.

On the 3rd March 1882 the respondents brought the present suit, in which there has been an unusual amount of litigation. Their cause of action is thus stated in the plaint: —" The judgment-debtors have no connection or concern with this property, nor are the plaintiffs or their ancestors debtors under the decree under execution." In his written statement the appellant averred that the decree of 14th April 1856, and subsequent proceedings in execution, were taken against Jhanguri Rai and his son, Jaipargash Rai, and that these persons being judgment-debtors, the property, being ancestral was liable to attachment for their debt. He also pleaded that according to the provision of sections 13 and 43 of Act X of 1877, the claim put forward by the respondents was no longer, cognizable, inasmuch as it had already been adjudicated upon, in a regular suit, before the District Court of Shahabad.

The cause was tried upon six issues, which need only be noticed in so far as they relate to the main questions raised in these appeals :—

" III. Is the claim of the plaintiffs barred by section 13 and 43 of the Code of Civil Procedure ? "

" IV. Are the plaintiffs or their ancestors liable for the judgment-debt and is the property liable to sale or not ?"

The Subordinate Judge upon the 21st December 1882, sustained the appellant's plea in bar, and dismissed the suit with costs. His decree was carried by appeal to the High Court of the North-Western Provinces, by whom it was reversed on the 9th May 1885, and the case remanded to the Sub-Judge for disposal on the merits. [62] As the decision of the High Court on that occasion has been impeached in these appeals, it may be convenient to state here that, in the opinion of their Lordships, it was well-founded. None of the questions either of fact or law, raised by the pleading of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief. Assuming that the respondents are barred from seeking relief against the attachment and sale of their interest in mahal Umarpur, the decree of 21st July 1881 does not disable them from claiming relief against the attachment and sale of their interest in Narhi, or in any other property which was not included in the judicial sale of Umarpur.

Acting under the remit made to him by the High Court, the Subordinate Judge, on the 21st July 1885, found as matter of fact that the respondents' ancestor, Jhanguri Rai, was defendant in the suit of 1855 and was one of the parties decerned against, as liable for mesne profits by the judgment of the 14th April 1856. Upon that finding the learned Judge dismissed the respondents' suit with respect to one-half of the interests claimed by them, but sustained it with respect to the other half, which he held to have been vested by force of Hindu law, in their father,

Jaipargash, who was admittedly not made a party to the proceedings of 1855 and 1856 at the instance of the Maharaja. Against that decision both parties appealed to the High Court, who, on the 5th August 1886, made an order remanding the case for the trial of the following points, and distinct findings upon them :—

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(1) Was Jhanguri Rai, the grandfather of the plaintiffs, a co-sharer or in possession of the lands to which the litigation of 1855 related, and which ended in the decree of 14th April 1856?

[63] (2) If so, was any process of Court in that litigation issued or served upon him?

(3) When did the defendant first seek to execute his decree against the plaintiffs, either at Ghazipur or Shahabad; and were they or any of their ancestors, *viz.*, Jaipargash or Jhanguri, parties to the execution proceedings which ended in possession of the property in suit, to which the decree of 1856 related, being given to the defendant by proceedings which ended on the 12th July 1874?

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of s. 566 of the Civil Procedure Code. All the points remitted were substantially covered by the issues which had been previously sent for trial in the Court below; and it appears to their Lordships that there were sufficient materials for the decision of the case, to which little or nothing has been added by the evidence taken on remand.

On the 20th November 1886 the Subordinate Judge found upon the several points referred to him by the High Court. Upon the first point he found that Jhanguri was a co-parcener and in possession at the dates specified; upon the second, that the issue of process to Jhanguri was not proved; and, upon the third, that it was not clearly proved that Jhanguri was a party to the proceedings in execution which resulted in possession of the disputed property being given to the Maharaja in the year 1874.

These findings, together with the oral evidence taken on remand, were duly submitted to the High Court, who, on the 4th May 1887, reversed the Subordinate Judge's decree of the 21st July 1885, and gave judgment for the respondents in terms of their plaint with costs. The decision of the Court was delivered by Mr. Justice Straight, Mahmood, J., concurring. Their Lordships agree with the conclusion at which these learned Judges arrived, although they are unable to concur in all the reasoning upon which it is based. Mr. Justice Straight says, with reference to a statement made by the respondents' pleader on the 27th September 1882, "it seems to me, so far as the plaintiffs were then concerned or are concerned [64] now, the sole position for which they have contended was that their ancestor, Jhanguri, was not the judgment-debtor under the decree of the 14th April 1856." And the learned Judge adds "the whole matter, therefore, between the parties resolves itself into the single question of fact,—Was or was not Jhanguri, the ancestor of the plaintiffs, a judgment-debtor under the decree of the 14th April 1856?" The statement in question was not intended to be, and was not, a rehearsal of the whole facts relied on by the plaintiffs, but was made by their pleader in answer to specific questions put to him by the Subordinate Judge; and the issues which went to trial were not confined to that statement, but raised the general question whether the ancestors of the plaintiffs were judgment-debtors under the decree by virtue of which the

1890 July 12. — Privy Council. — 13 A. 53 (P.C.) = 17 I.A. 150 = 5 Sar. P.C.J. 600.

respondent had attached and sold their interest in the lands of Narhi and others. That misconception of the real issue probably led to the remand of the 5th August 1886, and it certainly induced the High Court, in its ultimate decision upon the merits of the case, to deal with many points which do not appear to their Lordships to require consideration.

The respondents endeavoured to prove that Jhanguri Rai predeceased his father, Achraj, some time before the year 1840; but their evidence on that point does not appear to be reliable, and their Lordships are disposed to think that the Subordinate Judge was right in holding that Jhanguri was a co-parcener in possession at the date of the decree of 1856, and was alive for many years afterwards. The terms of that decree, as well as of the written statement for the defendants, and of their petition for leave to file documents,—in all of which the name of Jhanguri occurs in connection with the whole other descendants and heirs of Achraj Rai then in life,—afford *prima facie* evidence that he was a party to the suit, and was included in the decree itself. Whether that inference is displaced by antecedent evidence derived from the pattidari papers of 1840, their Lordships do not think it necessary to determine. In their opinion, it is an obvious mistake to assume that the right of the appellant to take the respondent's land in execution for mesne profits wholly depends upon the fact of their ancestor being a party [65] to the decree of 1856. None of the defendants were, by that decree, made judgment-debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March 1877, when for the first time the appellant obtained a money decree which was capable of being put into execution. But, according to the testimony of the appellant's own witnesses, Jhanguri died at least twelve months before that date. It does not clearly appear whether his son, Jaipargash, was then alive; but it is matter of certainty that neither Jaipargash nor the respondents were made parties to the suit in room of Jhanguri.

An opertive decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The appellant must pay to the respondents their costs in these appeals.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Burton*, *Yeates*, *Hart*, and *Burton*.

Solicitors for the respondents: Messrs. *Ranken*, *Ford*, *Ford*, and *Chester*.

13 A. 66 = 10 A.W.N. (1890) 238.

[66] CIVIL REFERENCE.

1890 Oct. 29.

Civil Reference.

13 A. 66 = 10 A.W.N. (1890) 238.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

RADHA BAI (*Defendant*) *v.* NATHU RAM (*Plaintiff*).*
[29th October, 1890.]

Stamp—Promissory note not chargeable with duty of 6, 10 *or* 12 *annas—Such promissory note written on impressed sheet of proper value bearing the word "hundi"—Note duly stamped—Act I of 1879 (Stamp Act),* ss. 3 (10) 9, 33, 34, 57—*Rules by Governor-General in Council—Notification No.* 1288 *of 3rd March* 1882, *Rules* 3, 4, 6. *Notification No.* 2955 *of 1st December* 1882, *Rule* 6-*A.*

The effect of Notification No. 2955 of the 1st December 1882, amending the Rules made by the Governor-General in Council under s. 9 of the Stamp Act (I of 1879) and published in Notification No. 1288 of the 3rd March 1882, is not to prohibit all promissory notes except those chargeable with a duty of 6, 10 or 12 annas being written on impressed sheets bearing the word "*hundi*" A Rule which says that certain promissory notes shall be written on impressed sheets bearing the word "*hundi*", cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word "*hundi*"

A promissory note for an amount not exceeding Rs. 200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, is duly stamped if written on an impressed sheet of the value of two annas, though that impressed sheet bears the word "*hundi*."

[F., 21 P.R. 1891.]

THIS was a reference to the High Court under s. 617 of the Civil Procedure Code by the Judge of the Court of Small Causes at Allahabad. The order of reference was as follows :—

"This suit is based on an instrument which, according to the terms of it, is a promissory note, containing as it does, an unconditional undertaking to pay a certain sum of money to the plaintiff. It is written on an impressed sheet of the value of two annas, bearing the word '*hundi*.'

"The only plea raised on behalf of the defendant is that the instrument is inadmissible in evidence, not being duly stamped according to the rules laid down by the Government of India.

[67] "By s. 34 of Act I of 1879, no instrument chargeable with duty shall be admitted in evidence, unless such instrument is duly stamped.

"Under clause (10) of s. 3, 'duly stamped' means 'stamped or written upon paper hearing an impressed stamp, in accordance with the law in force in British India when such instrument was executed.

"S. 9 provides, that 'all duties with which any instruments are chargeable shall be paid, and such payments shall be indicated on such instruments, by means of stamps (*a*) according to the provisions herein contained, or (*b*) when no such provision is applicable thereto, as the Governor-General in Council may by rule direct." Rules so framed have by s. 57 the force of law.

"If therefore the instrument on which the claim in this case is founded has not been stamped according to those rules, it is not admissible in evidence.

* Civil Reference (Mis. No. 67 of 1890), under s. 617 of the Code of Civil Procedure by Babu Promoda Charan Banerji, Judge of the Court of Small Cause at Allahabad.

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"I may observe that the instrument in question is not one which might under s. 10 be stamped with an adhesive stamp of one anna.

"The question for consideration is whether the said instrument has been stamped in accordance with the rules made by the Governor-General in Council.

"Those rules were laid down in Notification No. 1288, dated 3rd March 1882, published in page 131 of the *Gazette of India* of that year. Rule 3 prescribes two kinds of stamps for indicating stamp duty, *viz.*, impressed stamps and adhesive stamps. The former includes impressed sheets, or sheets of paper bearing the impression of stamps of different values engraved thereon, and impressed labels.

"By Rule 4 all instruments chargeable with duty except *hundis* may be written on impressed sheets, and, except as provided by s. 10 of the said Act and by these rules shall be so written.

"Rule 6 provides that *hundis* shall be written on impressed sheets bearing the word, *hundi*,

[68] "The rules therefore lay down a distinction between impressed sheets bearing the word '*hundi*' and all other impressed sheets, and they seem to prescrible that *hundis* only should be written on sheets of the former description, and all other instruments on those of the latter description.

"This is further apparent from Rule 6-A prescribed by Notification No. 2955, dated 1st December 1882 (*Gazette of India*, p. 487), which runs thus:—

"Promissory notes drawn or made in British India and chargeable with a duty of annas, 6, 10 or 12 shall be written on impressed sheets of those values bearing the word '*hundi*.'

"This rule by implication directs that all promissory notes other than those mentioned in it should be written on impressed sheets not bearing the word '*hundi*,' so that if a promissory note which is not chargeable with a duty of annas 6, 10 or 12 be written on an impressed sheet bearing the word '*hundi*,' it cannot be held to be properly stamped in accordance with the rules framed by the Governor-General in Council. As the promissory note on which the claim in this case is based was chargeable with a duty of two annas only, it should not, according to those rules, have been written on an impressed sheet bearing the word '*hundi*,' and was not therefore duly stamped within the meaning of cl. (10), s. 3. In this view the contention of the learned Counsel for the defendant seems to be correct.

"The learned pleader for the plaintiff has, however, drawn my attention to the fact that the invariable practice in this district, including that of the banks here, has been for promissory notes to be written on impressed sheets bearing the word '*hundi*' and he argues that if the defendant's contention be allowed and the promissory note in suit and similar other promissory notes be held to be improperly stamped, the result will be that many dishonest debtors will be able to evade payment of just debts by taking advantage of their own neglect to execute properly stamped instruments. The circumstance cannot in my opinion be taken into consideration in the decision of the question now before me, but it certainly [69] makes it desirable that there should be an authoritative ruling on the point. The learned pleader has also filed copies of two unreported decisions of the Hon'ble High Court in which it was held that promissory notes payable on demand were properly stamped if written on impressed sheets bearing the word '*hundi*.' One of these cases was Small Cause

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Court Reference No. 106 of 1885, dated 15th June 1885, upon a reference made by myself from Agra. The other case was 1st Appeal No. 50 of 1885, decided on 16th November 1885. Those cases were not on all fours with the present suit, but the principle involved seems to have been the same, and the result of those rulings was that promissory notes written on '*hundi*' paper were properly stamped. The arguments for a contrary view were apparently not submitted to the Hon'ble Judges for their consideration.

"Having regard to the fact that these two rulings exist, and also to the fact noticed above that the practice hitherto has been for such instruments to be written on sheets bearing the word '*hundi*,' I deem it desirable to refer the case to the Hon'ble High Court for an authoritative decision on the following question :—

"Is a promissory note not chargeable with a duty of annas 6, 10 or 12, written on an impressed sheet bearing the word '*hundi*,' duly stamped within the meaning of the Stamp Act (I of 1879) and admissible in evidence?"

Mr. *A. H. S. Reid*, for the defendant, appeared in support of the objection that had been taken to the promissory note.

Pandit *Sundar Lal*, for the plaintiff.

JUDGMENTS.

EDGE, C.J.—This is a reference under s. 617 of the Code of Civil Procedure from the Officiating Small Cause Court Judge of Allahabad in which he asks :—"Is a promissory note not chargeable with a duty of annas 6, 10 or 12, written on an impressed sheet bearing the word '*hundi*' 'duly stamped' within the meaning of the Stamp Act (I of 1879) and admissible in evidence?"

The question is larger than that which we need consider in this particular case. I propose to confine my answer to the question as [70] applicable to the particular promissory note as to the admissibility of which the doubt arose. It was a promissory note payable otherwise than on demand, but not more than one year after the date. It was for an amount which did not exceed Rs. 200, and reading s. 5 of the Act in conjunction with clause 11 of the first schedule, it was a note which required a stamp of two annas only. The note in question was written upon stamped impressed paper of the value of two annas, but that paper bore the word "*hundi*," and the contention on behalf of the defendant in the suit is that inasmuch as the impressed paper bore upon it the word "*hundi*," it was impressed paper upon which a promissory note of this description could not lawfully be written so as to comply with the requirements of the Stamp Act and the rules framed by the Governor-General in Council under s. 9 of the Stamp Act, which rules have the force of law under s. 57 of that Act.

It is quite clear that a promissory note, in order to be duly stamped, must be written on impressed paper of an amount equivalent to the stamp required. It is also clear that *hundis* payable otherwise than on demand, but not more than one year after date or sight, and for amounts not exceeding Rs. 30,000 in individual value, must be written on impressed sheets bearing the word "*hundi.*"

It has been contended that the effect of Notification No. 2955 of the 1st December 1882, amending the rule published under Notification No. 1288 of the 3rd March 1882, is to prohibit all promissory notes except those chargeable with a duty of annas 6, 10 or 12, being written on impressed

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paper bearing the word "*hundi.*" I cannot so read the rules. The rule of the 1st December 1882, so far as it is material, is as follows:—

"(*a*) After Rule 6, the lollowing rule shall be inserted:—

"6 (A). Promissory notes drawn or made in British India and chargeable with a duty of annas 6, 10 or 12, shall be written on impressed sheets of those values bearing the word "*hundi.*"

That may, or may not, have been an absolutely unnecessary rule. Whether it was so or not it is not necessary to enquire; but [71] a rule which says that certain promissory notes shall be written on paper bearing the word "*hundi*" cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value, if that paper happens to bear the word "*hundi.*"

Under s. 9 of the Stamp Act the Governor-General in Council had power to regulate amongst other things (1) in the case of each kind of instrument the description of stamps which may be used, and (2) in the case of *hundis* the size of the paper on which they are written. Now, in this case the stamp impressed on the paper is of the full amount required for this particular promissory note, and the fact that that paper would be the paper required for a *hundi* requiring a two-anna stamp cannot alter the fact that the paper is of the full amount of stamp duty for the promissory note in question, or cause that promissory note to be considered as having been written on paper which was not duly stamped for that purpose. If the Governor-General in Council had enacted by rule that *hundis* should be written on blue paper, such an enactment alone could not be construed as prohibiting the writing of promissory notes on blue paper. Such a prohibition as is contended for in this case must be specifically enacted, if any such prohibition is intended. In my opinion the promissory note in question was written on duly stamped impressed paper of the requisite amount, and the promissory note, so far as it depends on the stamp, is admissible.

STRAIGHT, J.—By s. 5 of the Stamp Act it is declared that certain instruments shall be chargeable with duty the amount of which is to be found indicated in the first schedule to the Act. In that first schedule art. 11, a document of the kind to which this case has reference requires a two-anna stamp. By s. 9 of the Stamp Act it is declared that all duties with which instruments are chargeable shall be paid, and such payment shall be indicated, by means of stamps. This provision is to be given effect to, either in accordance with other provisions contained in the Act itself, or, where there is no such provision, in accordance with rules which may be made by the Governor-General in Council. These rules are to deal [72] with, firstly, in the case of every instrument, the description of stamp to be used; secondly, where impressed stamps are to be used, the number of stamps to be used; and, thirdly, in the case of *hundis* the size of the paper on which instruments of that sort are to be written. No doubt that section earmarks these particulars as amongst "other matters," which such rules may regulate; but, in my opinion, these rules must be limited within and confined to the purposes of that particular section, namely, the duties with which the instruments are chargeable and the indication of payment on such instruments. By s. 57 of the Stamp Act, rules, if made by the Governor-General in Council, have the force of law, and it is common ground between the parties in this case that the question of this reference must be answered upon the rules of March 1882, as amended by the Notification of the 1st December 1882. By the rules of the 3rd March 1882, it is declared, in accordance with the powers conferred by

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s. 9 of the Stamp Act, that there shall be two kinds of stamps for indicating the payment of duty on instruments under the Indian Stamp Act of 1879; *viz.*, (*a*) impressed stamps, which are divided into two classes, impressed sheets and impressed labels, and (*b*) adhesive stamps. It is admitted by the learned pleader for the plaintiff that the promissory note, upon which his client brought his suit, was required by s. 4 of the Governor-General's rules to be written on an impressed-sheet, *i.e.*, upon a sheet of paper bearing the impression of a stamp of a particular value, and that it was so written is not denied on the part of the defendant. It is contended for the defendant, however, that because upon the particular piece of paper on which this promissory note is written the word '*hundi*' appears, therefore the paper is not an impressed sheet of the kind contemplated by Rule 4. Both the learned Counsel for the defendant and the learned Small Cause Court Judge apparently based their arguments on the Notification of the 1st December 1882, *i.e.*, the argument is this, that because the Notification of the 1st December 1882, says:—Promissory notes drawn or made in British India and chargeable with a duty of annas 6, 10 or 12, shall be written on impressed sheets of those values bearing the [73] word '*hundi*,' therefore no other promissory note requiring a less stamp can be written on such impressed paper, and if it is written on such impressed paper it is neither more nor less than an unstamped document. Now it is, I believe, a golden rule of all Judges who have to administer the laws relating to stamps and cognate matters that the provisions of such laws are to be construed strictly, and whenever there is any ambiguity or doubt, in favour of the subject. Consequently, following such rule and believing it to be a sound and a just rule, I shall not hold that this document is an unstamped document unless I find anything in the Governor-General's rules which places it beyond all doubt that this is so. In my opinion there is nothing in those rules which says this, and I hold that the paper upon which this promissory note is written is none the less an impressed paper bearing the impression of a two-anna stamp, because it happens to have the word '*hundi*' written on it, and I therefore entirely agree with the answer to the reference proposed by the learned Chief Justice.

Mahmood, J.—I also agree, and agree so entirely with what has fallen from the learned Chief Justice, and also with what has been stated by my brother Straight, that I have no desire to deliver a separate judgment other than showing the reason why I concur with them. The first point which I notice is one of the curious things which do occur occasionally in legislation, namely, the passage of a bill through the Legislature without a preamble. This is one of those exceptional enactments, and I can imagine that it was convenient not to have a preamble to such an enactment, just in the same way as a preamble was apparently thought unnecessary in passing the Court Fees Act (VII of 1870.) The Legislature might not have been anxious to explain the reasons of these two enactments, but that reason can be nothing other than that they were taxing the Indian population, a statement which might not quite have suited the comfort of the Indian population had the enactment begun by saying something to this effect:—"Whereas it is expedient to impose further taxes upon the people of India, &c."

[74] I suspect this would be somewhat the imaginary preamble which would precede both these enactments, but the adage is right,—'sometimes silence is golden.'

Still the enacting part has to be attended to, and in doing so we look

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not only at the preliminary part, which is merely instructive, but also at the imperative mandate of the Legislature, and it says (s. 5):—"Subject to the exemptions contained in the second schedule, the following instruments shall be chargeable with duty of the amount indicated in the first schedule as the proper duty therefor respectively," and then follows the specification of documents which includes this promissory note of the 4th January 1887, for the sum of Rs. 200, payable after not more than one year, and bearing interest at 12 per cent. per annum. It is clear that, notwithstanding the absence of a preamble to the statute it is nothing other than a penal statute as understood in the law for the purposes of interpretation. It is also penal by dint of s. 34, *viz.*, that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer unless such instrument is duly stamped:" and then follows a proviso in three clauses to which I do not wish to refer. These two sections, namely, ss. 5 and 34, leave to me no chance of doubting that this statute should be interpreted in the fashion described by my brother, Straight, and indeed in cases of doubt it is impossible to do otherwise than interpret Acts in favour of the subject, that is, not in favour of the State.

There are three other sections of the enactment to which I wish to refer. The first is s. 55, which enables the Governor-General in Council to make rules consistent with the statute "for regulating the supply and sale of stamps and stamped papers, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons." The next section is s. 56, which gives to the Governor-General in Council power to "make rules consistent herewith to carry out generally the purposes of this Act," [75] and then comes s. 57 of the enactment which gives to the rules so made the authority of an Act so soon as they are published in the *Gazette of India.*

In this case all these ceremonies or formalities required by these three sections have been gone through, and in the present case the argument of Mr. *Reid* rests mainly on the notification of the *Gazette of India* in relation to these matters. The learned Chief Justice and my learned brother, Straight, have already dealt with these rules so well and so completely in accordance with my own judgment that, beyond saying this, I wish to say nothing about them.

But because I have always entertained for Sir Michael Westropp, the learned Chief Justice of Bombay, as high a respect as a lawyar and as a Judge as I entertain for the present Chief Justice of this Court, I wish to read one passage from a judgment of Sir Michael Westropp in the case of *Dowalatram Harji* v. *Vitho Radhoji* (1). Sir Michael Westropp said:—

"The imposition of such excessive and minute details would be pitfalls to the unwary and would, by frequently invalidating documents press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous result, in the form of revenue to the State, as would compensate it for the discontent which would be occasioned. The Legislature has avoided such stringent details, and it seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such

(1) 5 B. 188 (at p. 195).

a mode of penning the document as would admit of that stamp being used for or applied to any other instrument."

I have read this passage especially because it might be regarded by some as *obiter dictum*, and certainly, from one point of view, I do not deny that it may be so regarded. No doubt, Chief Justice Westropp in giving expression to these views felt it his duty to make it clear in his judgment that Judges when they are called upon to interpret, perhaps laxly-worded, statutes, must always remember the general rules of interpretation, which by dint of their [76] being trained lawyers they are able to keep present to their minds, in spite of the lax use of phrases and conjunctions whether disjunctive or conjunctive, and of the disregard of the proper use of pronouns.

In the present case, if it had not been my good fortune to agree so entirely with what has fallen from the learned Chief Justice and my brother, Straight, I should, in view of the rules framed by the Government of India, have had to think not once, but twice, as to whether or not they were "consistent" with the enactment within the meaning of ss. 55 and 56 of the Stamp Act (I of 1879).

I am saved from that necessity by the manner in which the case has been dealt with by the learned Chief Justice and my brother Straight and I have only to say that I agree with their order.

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APPELLATE CIVIL

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

SHIB SINGH (*Defendant*) v. SITA RAM (*Plaintiff*).*
[13th May, 1890.]

Execution of decree—Attachment of debt—Order prohibiting creditor from recovering debt—Suit for rent under attachment—Civil Procedure Code, s. 268 (a)—Act XV of 1877 (Limitation Act, s, 15)—Injunction or order staying a suit.

S. 268, clause (*a*) of the Civil Procedure Code, does not mean that, while a debt is under attachment, the person to whom the debt was originally owing, should be barred from bringing a suit in respect of it. What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor.

Semble.—An order of attachment under s. 268 of the Civil Procedure Code is not an injunction or order staying a suit within the meaning of s. 15 of the Limitation Act (XV of 1877).

[**F.**, 14 A: 162 (167) ; **Appr.**, 17 A. 198 (211)=22 I.A. 31 (**P.C.**)=6 Sar. 551 (557) ; **R.**, 7 Ind. Cas. 886 (890) ; 10 Ind. Cas. 569 ; 142 P.R. 1894.]

THE plaintiff in this case, Sita Ram, was zemindar and lambardar of a village Leha Alampur, and the defendant Shib Singh was his tenant. The suit was for recovery of Rs. 2,027-11-4, arrears of rent, under s. 93 (*a*) of the North-Western Provinces Rent Act (XII of 1881), and was instituted in the Court of the Assistant [77] Collector of Aligarh. It appeared that the rent for 1291 fasli, one of the years in respect of which rent was claimed, had been attached, by an order passed on the 2nd August 1886, in execution of a simple money decree held against the plaintiff by Kumar

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* Second Appeal, No. 892 of 1888, from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated the 6th March 1888, confirming a decree of Maulvi Muhammad Karim, Assistant Collector of Aligarh, dated the 30th March, 1887.

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Daryao Singh. The order of attachment was passed under s. 268 (*a*) of the Civil Procedure Code. On behalf of the defendant it was contended that the effect of this order was to bar the present suit so far as it sought recovery of the rent for 1291 fasli.

The Court of first instance disallowed this plea, observing :—"Though the rent was attached in execution of a decree against the plaintiff, he has yet a right to sue. The attachment means that the money should not be paid to the plaintiff. The plaintiff is by all means competent to sue." The Court decreed the claim. On appeal by the defendant, the District Judge of Aligarh concurred in the view taken by the Assistant Collector. He said :—"The second ground of appeal is that, under the provisions of s. 268 of the Civil Procedure Code, the rents of 1291-92 fasli having been attached, the respondent could not sue for them. This is untenable. The creditor is not barred from suing for the debt, whatever effect s. 268 might have in preventing his taking out execution of the decree. The District Judge dismissed the appeal. The defendant presented a further appeal to the High Court."

Mr. *A. H. S. Reid* for the appellant.

Babu *Jogindro Nath Chaudhri* for the respondent.

JUDGMENT.

EDGE, C.J., and BRODHURST, J.—This was a suit for rent. The plaintiff, it appears, was lambardar, but whether he was suing as the agent of the co-sharers, or as the zemindar, and himself entitled to the rent sued for, does not appear. That question may have an important bearing in the execution department. The rent in question had been attached by one Kuar Daryao Singh, on the 2nd August 1886, for a debt by the present plaintiff to him. It is contended that by reason of s. 258 of the Code of Civil Procedure that attachment so long as it existed barred a suit by the plaintiff for the rent which was attached. That contention is mainly based on cl. (*a*) of s. 268 of the Code of Civil Procedure. If the [78] Legislature had intended that, whilst a debt was under attachment, the person to whom the debt was originally owing should be barred from bringing a suit in respect of it, we would expect the Legislature to have used some such words as :—"During the existence of the attachment no suit shall be brought by the creditor against the debtor in respect of the debt attached." What s. 268 prohibits is the recovery of the debt and the payment of it by the debtor to the creditor. The debtor had an easy course provided for him under s. 268, as under that section he could have paid the money into Court and thus have avoided liability in this suit. That was not done here. Mr. *Chaudhri* contends, and we think with force, that if his client, the plaintiff, had not brought the suit when he did, a suit subsequently brought might be barred by limitation. On the other hand, Mr. *Reid* for the defendant-appellant says that the case would come within s. 15 of the Limitation Act. We do not think the case would be within s. 15 of the Limitation Act. We think it would be to read a good deal into s. 268 of the Code of Civil Procedure if we were to hold that an order of attachment under that section was equivalent to an injunction or an order staying a suit. The point seems to be a novel one, and, giving it our best attention, that is the opinion at which we have arrived. We express no opinion as to what may be the result of any proceedings in execution. We dismiss the appeal with costs.

Appeal dismissed.

13 A. 78=11 A.W.N. (1891) 1.

APPELLATE CIVIL.

1889 MAY 20. APPELLATE CIVIL. 13 A. 78= 10 A.W.N. (1890) 1.

Before Mr. Justice Mahmood.

SOHNA (*Objector*) v. KHALAK SINGH AND ANOTHER (*Petitioners*).*
[20th May, 1889.]

Jurisdiction—Exercise by Subordinate Judge of jurisdiction of District Court—Appeal—Bengal Civil Courts Act (*XII of* 1887), *ss.* 23, 24—*Power of Appellate Court to add respondent—Limitaiton—Civil Procedure Code, s.* 559—*Minor—Guardian—Bengal Minors Act* (*XL of* 1858), *s.* 7.

The words in s. 24 of the Bengal Civil Courts Act (XII of 1887) "subject to the rules applicable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore orders passed under that section by a Subordinate Judge in proceedings under the Bengal Minors [79] Act (XL of 1858) transferred to him under s. 23 (2) (*b*) of the former Act, are appealable to the High Court and not to the Court of the District Judge.

The power of an appellate Court to make a person a respondent, under s. 559 of the Civil Procedure Code, is not affected by the Limitation Act (XV of 1877).

In exercising its powers under s. 559 of the Civil Procedure Code, an appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant.

The grant of a certificate under s. 7 of the Begal Minors Act (XL of 1858) should not be based exclusively on considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed.

[Appl., 14 A. 154 (F.B.) (156); R., 4 O.C. 241; 11 O.C. 208 (211).]

THE facts of this case are stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellant.

Munshi *Madho Prasad* for the respondents.

JUDGMENT.

MAHMOOD, J.—This is a first appeal from order arising out of a litigation commenced under the Minors Act (XL of 1858) in respect of the guardianship of the person and property of a minor girl, Musammat Bakhtawari, daughter of one Sirdar Singh, deceased. The proceedings began with an application made by one Khalak Singh on the 8th September 1887, praying that he might be appointed guardian of the person and property of the minor. The application was opposed by one Bachcha Singh who claimed the certificate of guardianship in preference to the petitioner, Khalak Singh, and, his objection being allowed, the certificate was granted to him on the 7th January 1888, by the Subordinate Judge of Cawnpore, to whom the case appears to have been transferred under s. 23 of the Civil Courts Act (XII of 1887).

From the order of the Subordinate Judge an appeal was presented to this Court by Khalák Singh (Case No. 19 of 1888) and it came on for hearing before me sitting here as a single Judge, and was disposed of by me on the 26th April 1888. For the reasons stated by me in my judgment of that day, I decreed the appeal, and, setting aside the Subordinate Judge's order of the 7th January, 1888, remanded the case to his Court for trial *de novo*. On that occasion I held *inter alia* that the Subordinate Judge had misapprehended [80] the relative propinquity of the parties to the minor, and that in granting the certificate of guardianship

* First appeal No. 167 of 1888 from an order of Maulvi Shah Ahmadullah, Subordinate Judge of Cawnpore, dated the 18th August 1888.

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to Bachcha Singh he had omitted to notice the salutary rule contained in s. 27 of the Act prohibiting "the appointment of any person other than a female as the guardian of the person of a female."

The case having thus been sent back to the Subordinate Judge's Court, two female objectors appeared on the scene desiring to take part in the litigation as objectors to Khalak Singh's application, and as claimants of the guardianship of the minor girl Musammat Bakhatwari. One of these objectors-claimants was Musammat Batasia, a sister of Khalak Singh, and the other was Musammat Sohna, both of whom appear to have been made parties to the litigation which (as Mr. *Moti Lal* on behalf of the appellant has put it) then stood arrayed representing the original petitioner Khalak Singh as the plaintiff, and the original objector Bachcha Singh as the opposite party along with Musammat Batasia and Musammat Sohna. The parties being thus arrayed, the learned Subordinate Judge by his order of 18th August 1888, granted the certificate of guardianship to Musammat Batasia, and disallowed the claims of the petitioner Khalak Singh, and also of the objectors Bachcha Singh and Musammat Sohna.

It is from this order that this appeal was preferred only by Musammat Sohna, on the 6th November 1888, and to the appeal she made only Khalak Singh a party respondent. But on the 9th February 1889, she applied to this Court that the name of Musammat Batasia might be added as a party respondent to the appeal, and notice having been issued, this Court directed that the name Musammat Batasia be added as a party respondent to the cause, subject to such objections as to limitation as she might be advised to take when the appeal came on for disposal. This order was made on the 15th March 1889.

The case having thus come on for hearing before me, Mr. *Madho Prasad*, who appears for Musammat Batasia, has raised three preliminary objections to the effect that, so far as Musammat Batasia is concerned, the appeal is not maintainable. The first of [81] these objections is that inasmuch as the case had been transferred to the Subordinate Judge and has been disposed of by him, this appeal from his decision could lie only under s. 28 of the Minors Act (XL of 1858), and that it therefore lay to the District Judge and not to this Court under the purview of that section. The second objection is that the judgment now under appeal being dated the 18th August 1888, and the appeal being preferred only against Khalak Singh on the 6th November 1888, the appellant's application of the 9th February 1889, praying for the addition of Musammat Batasia as a party respondent to the appeal, was barred by limitation, and that the order of this Court dated the 15th March 1889, could not therefore be passed, and can be contested at this stage. The third objection is that inasmuch as in the lower Court, after the remand of the case, both Musammat Sohna, the present appellant, and Musammat Batasia were arrayed on the same side as objectors to the application of Khalak Singh, they cannot be arrayed opposite to each other in appeal.

All these points are contested by Mr. *Moti Lal*, on behalf of the appellant, and I wish to dispose of them before entering upon the merits of the case.

Upon the first point I am of opinion that the effect of the transfer of the case to the Subordinate Judge was to invest him with the same jurisdiction as that possessed by the District Judge in whose Court the application for certificate was originally filed. The terms of s. 28 of Act XL of 1858, like some other parts of that enactment, are not specifically

clear, but the interpretation which I put upon them is that they do not in themselves intend to lay down any rules as to the tribunals which are to hear appeals under that section, but leave the matter to other provisions of the law regulating jurisdiction as to hearing of appeals. In the present case such provision is to be found in the Civil Courts Act, XII of 1887, and s. 24 of that enactment lays down, after referring to the previous section (which includes clause (*b*) relating to transfer of proceedings under Act XL of 1858) goes on to say that such proceedings shall be disposed of by the Subordinate Court "*subject to the rules* [82] *applicable to like proceedings when disposed of by the District Judge.*" I am of opinion that the words which I have just quoted and emphasized include the rules relating to appeals, and since an appeal from a District Judge would lie to this Court, therefore an appeal from an order of the Subordinate Judge, when proceedings under Act XL of 1858 have been transferred to him also lies to this Court, and not to the Court of the District Judge. I am fortified in this view by the significant circumstance that in the proviso to the first clause of s. 24 of the Civil Courts Act (XII of 1887, the Legislature has specially provided that appeals from the order of a Munsif when such proceedings are transferred to him, shall lie to the District Judge, subject again to an appeal to this Court under clause (2) of the same section. The Legislature could not therefore have intended that proceedings transferred to a Subordinate Judge should stand upon the same footing, for purpose of appeal, as those of a Munsif. Nor can I hold that if the appeal lay to the District Judge, the Legislature intended that the judgments or orders passed upon such appeal should be final and exempt from appeal to this Court. The present appeal was therefore rightly instituted here.

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Upon the second point, which relates to the question of limitation, Mr. *Madho Prasad* relies upon the ruling of this Court in the case of *Ranjit Singh* v. *Sheo Prasad Ram* (1), where Stuart, C.J., and Spankie, J., in interpreting s. 32 (read with s. 582) of the Civil Procedure Code (Act X of 1877), whilst holding that the appellate Court was competent to add a respondent to the appeal, laid down the rule that such appellate Court was not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent was barred under s. 22 of the Limitation Act (XV of 1877). The learned pleader also relies upon the ruling of the Calcutta High Court in *The Corporation of the Town of Calcutta* v. *Anderson* (2) where it was held, *inter alia*, that the fact that the plaintiff's attorney on being served with notice of appeal, failed to notice that a party who had been a defendant in the Court below had not been made a respondent in [83] the appeal, coupled with the fact that the application made by the plaintiff to make such defendant a party respondent after the period of limitation had expired, was not made at the earliest opportunity possible, is not a sufficient ground under s. 5 of the Limitation Act for non-prosecution of the appeal within the period allowed. On the other hand, Mr. *Moti Lal* argues that the present case is not governed by s. 32 of the Civil Procedure Code, but by s. 559 which is independent of s. 32, and that the ruling of this Court in *Ranjit Singh* v. *Sheo Prasad Ram* (1) does not apply because it does not deal with the provisions of s. 559. The learned pleader also argues that the provisions of s. 559 impose a duty or confer a power upon the Court, and any action under that section is therefore exempt from any limitation such as that contemplated by the

(1) 2 A. 487. (2) 10 C. 445.

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Limitation Act (XV of 1877), and that therefore the order of this Court dated the 15th March, 1889 adding Musammat Batasia as a party respondent to the appeal, though made after the lapse of the period of limitation, was not *ultra vires*, being an action which the Court could have taken *suo motu* irrespective of the appellant's application. Further, the learned pleader argues upon the authority of a ruling of my brethren Brodhurst and Tyrrell in *Jamna* v. *Ibrahim* (1) that even if the order of 15th March 1889, whereby Musammat Batasia was made a respondent to the appeal, be taken to be the date of the appeal against her, the provisions of s. 5 of the Limitation Act (XV of 1877) would entitle her to the benefit of the discretionary power, as here the circumstances of the case indicate that the name of Khalak Singh was by a mere clerical error and accident entered in the memorandum of appeal as respondent, instead of the name of Musammat Batasia in whose favour the lower Court had passed the order granting the certificate of guardianship complained of in this appeal.

I am of opinion that so far as the question of limitation in this case is concerned, it rests upon the solitary question whether the action of a Court of justice under s. 559 of the Civil Procedure Code, is subject to any such rule of limitation as would fall within the purview of the Limitation Act (XV of 1877). Now I entertain no [84] doubt that the powers under s. 559 of the Code of Civil Procedure may be exercised by a Court *suo motu*, so long as that Court is seized of the case, and is empowered by the Civil Procedure Code to secure that the parties to the appeal are properly arrayed. That section occurs in the appellate Chapter XLI, and is independent of s. 32 of the Code.

In the case of *Dhan Singh* v. *Basant Singh* (2) in dealing with a cognate question (which related to the action of the Court under s. 206 of the Civil Procedure Code), I referring to the ruling of this Court in *Gaya Prasad* v. *Sikri Prasad* (3), went on to say :—

"On a former occasion in the case of *Raghunath Das* v. *Raj Kumar* (4) I respectfully expressed my inability to accept that ruling, holding, as I did then, and still do, that under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877) the rule of limitation is confined to the litigants and is inapplicable to acts which the Court may or has to perform *suo motu*. And I think that this view is supported by the principle upon which the rulings in *Roberts* v. *Harrison* (5), *Vithal Janardan* v. *Vithojirav Putlajirav* (6) and *Kylasa Goundan* v. *Ramasami Ayyan* (7) proceeded. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power, will not, in my opinion, render the action of the Court subject to the rule of limitation."

To the rulings which I then cited I may now add the case of *Manickya Moyee* v. *Boroda Prosad Mookerjee* (8) where McDonell and Field, JJ., concurred in holding that the discretionary power of directing a person to be made a respondent conferred on the appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision of the Limitation Act, XV of 1877. The question of principle was however, more fully discussed by Wilson, J., in *The Oriental Bank Corporation* v. *J. A. Charriol* (9) where that learned [85] Judge made

(1) 8 A.W.N. (1888) 58. (2) 8 A. 519. (3) 4 A. 23. (4) 7 A. 276. (5) 7 C. 333 (6) 6 B. 586. (7) 4 M. 172. (8) 9 C. 355. (9) 12 C. 642.

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an analysis drawing a distinction between those provisions of the Civil Procedure Code which enable parties, to take action for purposes of the array of parties, and those provisions which enable a Court to secure that any particular cause is properly arrayed with reference to the parties concerned. I fully agree in all that was said by Wilson. J., in that case as to the distinction which led him to the conclusion that no question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. The learned Judge, after showing that such powers vested in the Court as distinguished from the action of the parties, went on to say :—

"For the exercise of these powers and those conferred by other sections upon Courts, no period of limitation is provided, and they are to be exercised in my opinion whenever the necessity for doing so is made apparent so long as the case is *sub judice*. Any other view would, I think, lead to disastrous consequences. It was suggested in the present case that though the Court might act at any time of its own motion, it could not act on the application of any person if the right of that person to claim relief was barred. I do not think that is so. I do not see how the fact of any person making an application, whether in time or out of time, can take away from the Court a power given to it to act at any time either upon or without application."

This view of the law was accepted by Garth, C.J., and I accept it also, though I cannot help feeling that the *ratio* so far as it relates to the matter of principle is opposed to the Division Bench rulings of this Court in *Ranjit Singh* v. *Sheo Prasad Ram* (1), *Gaya Prasad* v. *Sikri Prasad* (2) and *Jamna* v. *Ibrahim* (3). I hold therefore that the order passed by me on the 15th March 1889, directing that Musammat Batasia might be made a party respondent to this appeal, was not subject to any objection upon the ground of the rules of limitation, and therefore I disallow the preliminary objection upon this point.

[86] I now pass on to the third preliminary objection raised by Mr. *Madho Prasad* against the appeal. The learned pleader, relying upon a ruling of my brethren Straight and Tyrrell in *Atma Ram* v. *Balkishen* (4), argues that because in the cause as it stood arrayed in the Court below both Musammat Sohna, appellant, and Musammat Batasia, were arrayed as opposite parties to the application of Khalak Singh, therefore, as a matter of procedure, Musammat Sohna, the appellant, and Musammat Batasia, the respondent, could not be arrayed on opposite sides in this appeal. So far as this point is concerned I may say that the ruling of my learned brethren is not in conformity with the conclusions arrived at by another Division Bench of this Court in a case which I have already cited, namely, *Ranjit Singh* v. *Sheo Prasad Ram* (1), where the power of the appellate Court to transpose the appeal on opposite sides was distinctly recognized, though that ruling took no notice of s. 559 of the Civil Procedure Code.

Under this state of things I think I must arrive at my own conclusions upon the question of law. I have already said enough about the question of limitation to preclude my being understood to hold that either s. 5 or s. 22 of the Limitation Act has any application to a case such as this. The matter really rests solely and entirely upon the interpretation to be placed upon a specific provision of the statute law, namely, s. 599 of the Code of Civil Procedure. In interpreting that section as in interpreting others, where in the Civil Procedure Code general terms are employed,

(1) 2 A. 487. (2) 4 A. 23. (3) 8 A.W.N. (1888) 58. (4) 5 A. 266.

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I have uniformly adhered to the view that the words of the statute when perfectly clear and devoid of qualifications, should not be subject to any qualifications which the Legislature itself has not thought fit to express. In s. 559 of the Code there is no qualification rendering it illegal for an appellate Court to make any party to the "*suit*" a party to the appeal as respondent. If there is any restriction, it consists of not being able to exercise the power of making a party to the "*suit*" an *appellant* as distinguished from a *respondent*. Analogical reason for such a restriction is to be found in the second [87] paragraph of s. 32 of the Code, which lays down that no person shall be added as a *plaintiff* without his consent.

The case here is not one of making a person a party *appellent*, but only one in which Musammat Batasia has been made party *respondent* and I hold that s. 559 of the Civil Procedure Code gave ample power to justify an order whereby Musammat Batasia was made respondent to this appeal where her interests are opposed to those of the appellant.

The result of these views is that all the three preliminary objections raised in this appeal by Mr. *Madho Prasad* on behalf of the respondent Musammat Batasia fail, and I have now to consider the merits of the case.

Upon the merits of the case I am of opinion that the learned Judge of the lower Court has not fully gone into the facts and circumstances of the case, and has limited his adjudication as to the rights of Musammat Batasia, the respondent, before me, to the circumstance of her relative position with reference to the minor Musammat Bakhtawari. I do not say that the circumstance of propinquity of relationship is not a circumstance to be taken into account for the purpose of deciding disputes, any more than I would say that the rules of Hindu law which indicate the relative position of the parties with reference to the rights as to property should not be taken into account. But I think the learned Judge of the Court below has dealt with the matter entirely with reference to the pedigree which his judgment contains, and with reference entirely to the question of propinquity of relationship, and he has not dealt with any other matter as to fitness which requires consideration under s. 7 of Act XL of 1858.

It seems to me that although the enactment is far from being complete so as to indicate the policy of the Legislature in framing the enactment, it contains enough to indicate that the grant of certificate of guardianship should not proceed upon mere questions of relationship and that the Court is in each case required to consider the circumstances thereof and to consult the interests of [88] the minor in connection with the appointment of guardians, and issue of certificates under the enactment. It does not necessarily follow that the nearest relative is the best guardian to the minor, and mere propinquity of relationship would not therefore entitle the person *ipso facto* to be entitled to hold the certifiicate under the Act. This view I think is apparent from the whole enactment, but the case has not been regarded by the lower Court in this light at all. It misunderstood my judgment whereby the case was remanded on the former occasion by interpreting it to mean that I laid down the rule that mere propinquity of relationship was quite enough to satisfy the requirements of the statute

In the present case there is a further difficulty than the one which I have already indicated, arising from the argument addressed to me by Mr. *Moti Lal* on behalf of the appellant. The difficulty is that

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the learned Judge of the lower Court has mixed up two duties which he had to perform under the statute, one being the appointment of the guardian of the person of the minor Musammat Bakhtawari under s. 11 of the Act, read with s. 27, and the other being the duty of appointing some one under s. 7 to manage the property of which she, the minor, was the owner. These two aspects of the case have not been clearly kept in view by the lower Court, and I think Mr. *Moti Lal* is entirely within his right when he contends that the appellant Musammat Sohna might possibly be a better guardian of both the person and property of the minor Bakhtawari.

I regret therefore that I find it necessary again to remand the case by setting aside the order of the lower Court, and to require that Court to deal with the questions raised with reference to the observations which I have made.

I decree the appeal, and setting aside the decree of the lower Court, remand the case under s. 562 of the Civil Procedure Code, read with s. 647 of the Code, and direct that costs will abide the result.

Cause remanded.

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13 A. 89=10 A.W.N. (1890) 186.

[89] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

ABUL MAJID (*Decree-holder*) *v.* MUHAMMAD FAIZULLAH AND ANOTHER (*Judgment-debtors*).* [4th June, 1890.]

Execution of decree—Act XV of 1877 (*Limitation Act*), *sch. ii. art.* 179 (4)—"*Step-in-aid of execution*"—*Application by transferee of decree for sale of hypothecated property—Non-registration of deed of assignment—Civil Procedure Code*, s. 232—*Act III of* 1877 (*Registration Act*), *ss.* 3, 17, 47, 49—*Effect of subsequent registration.*

On the 13th November 1886, the assignee of a decree for sale of hypothecated property applied, under s. 232 of the Civil Procedure Code, for execution of the decree, but, objection being raised, that the deed of assignment had not been registered, subsequently applied for the return of the deed that it might be registered, and it was returned accordingly. The deed was afterwards duly registered. The next application for execution of the decree was made on the 25th April 1888.

Held (i) that the deed of assignment was not a document which comprised immoveable property within the meaning of s. 49 of the Registration Act (III of 1877), a decree for sale not being immoveable property as defined in s. 3;

(ii) that consequently, although the assignee might not, under the latter portion of s. 49, use the deed for the purpose of proving his title, there was no provision in the Act saying that he should not take title, under the deed;

(iii) that the position of the assignee when he made his application on the 13th November 1886, was that he was unable to prove that there was a title by assignment in himself;

(iv) that the subsequent registration cured the absence of registration on the 13th November 1886, and, under s. 47 of the Registration Act, the document thereupon had full effect, and related back to its execution ;.

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* Second Appeal No. 1136 of 1889 from a decree of A. M. Markham, Esq., District Judge of Aligarh, dated 2nd August 1889, confirming a decree of Baboo Sheo Sahai, Munsif of Kasganj, dated the 15th March 1889.

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(v) that the application of the 13th November 1886 was a step-in-aid of execution of the decree within the meaning of art. 179 (4) of sch. ii of the Limitation Act (XV of 1877), and that the application of the 25th April 1888, was within time.

[F., 34 B. 68 (71)=11 Bom. L.R. 1281 (1284)=4 Ind. Cas. 582 ; Appl., 1 Ind Cas. 57 (60) ; R., 26 A. 603=24 A.W.N. 148 ; 30 A. 233 (240)=A.W.N. (1908) 99=5 A.L.J. 607 ; 13 C.W.N. 533=9 C.L.J. 443 ; 18 Ind. Cas. 492 (493); 190 P.L.R. (1905)=1 P.R. (1906).]

THE facts of this case appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* for the appellant.

Munshi *Madho Prasad* and Babu *Rajendro Nath* for the respondents.

JUDGMENT.

EDGE, C.J., and BRODHURST, J.—This appeal arose out of proceedings in execution. The question here is, whether an application [90] which was made on the 25th April, 1888, was made within time having regard to art. 179, sch. ii of the Limitation Act. That application was made by an assignee of a decree-holder, to whom the original decree-holder has assigned the decree and all benefits arising thereunder. That assignment was made on the 16th September 1886, and on the 13th November 1886, the assignee, appellant here, applied under s. 232 of the Code of Civil Procedure to have his name substituted and for execution. Notices were issued, and on the 30th November 1886, the original decree-holder appearned and admitted that he had assigned the decree to Abdul Majid, the assignee. On the 10th January 1887, the judgment-debtor raised objections on the ground that the deed of assignment had not been registered, and on the 11th February 1887, Abdul Majid, the assignee, through his vakil, applied to the Court for an adjournment of his application, that it might stand over for a fortnight, and that the deed of assignment which was on the file might be returned to him in order that it might be registered. On the same day the Munsif ordered the deed to be returned, and passed an order to the effect that the case may be struck off for the present. The deed of Abdul Majid was duly registered after it had been returned by the Munsif. Now, if the application of the 13th November 1886, was a step-in-aid of execution or can be treated as such, the present application of the 25th April 1888, has been made within time. Mr. *Rajendro Nath*, for the respondents, here judgment-debtors, has contended that Abdul Majid had no title on the 13th November 1886, as assignee, and that the application which was made on that day could not be treated as made by an assignee of the decree-holder, and, as it was not by the original decree-holder himself, he contends there was no step-in-paid of execution on the 13th November1886, within the meaning of art. 179, sch. ii of the Limitation Act. He has cited several authorities. Those authorities are as follow: *Gopal Narayan* v. *Trimbak Sadashiv* (1), *Koob-Lal Chowdhry* v' *Nittyanand Singh* (2), *Ulfatunnisa* v. *Hosain Khan* (3), *Raju Balu* v. *Krishnaray Ram Chandra* (4), *Mattongeney Dossee* [91] v. *Ram Naraian Sadkhan* (5),*Martin* v. *Sheo Ram Lal* (6). It appears to us that those authorities are wide of the question we have got to decide here. Those authorities show that a document which must be registered under the Registration Act cannot, until it is registered, be given in evidence so as to affect immoveable property. Being carefully looked at, those authorities appear to decide no more. Now it appears to us that in order to support Mr. *Rajendro Nath*'s contention, that is, that the assignee on the 13th November 1886 had no title in fact as assignee, it would

(1) 1 B. 267. (2) 9 C. 839. (3) 9 C. 520.
(4) 2 B. 273. (5) 4 C. 83. (6) 4 A. 232.

be necessary to hold that this deed of assignment was a document which comprised immoveable property. If it did comprise immoveable property, there is no doubt that being unregistered on the 13th November, 1886, it came within the earlier part of s. 49 of the Registration Act, which says "No document required by s. 17 to be registered shall affect immoveable property comprised therein." What was comprised in the document in question was an assignment of a decree which had been passed on an hypothecation bond, which decree could have been enforced by bringing an immoveable property which was comprised in the bond to sale. It would in our opinion be straining the language to hold that a decree for sale on a hypothecation bond was immoveable property; certainly it would not appear to be immoveable property as immoveable property is defined in s. 3 of the Registration Act. If this document was not a document which comprised immoveable property within the meaning of s. 49 of the Registration Act, we cannot see any provision in that Act which says that the assignee should not take title under it. It is quite another question whether he could use it for the purpose of proving his title. The distinction may appear a fine one, but we must remember that the Registration Act prescribes a penalty for non-registration and cuts down the free action of the parties; therefore we ought not to construe it so as to cut down the action of the parties further than the wording of the Act compels us to do. The provision in the latter portion of s. 49, namely, that a document such as this which requires to be registered under s. 17 shall not **[92]** be received as evidence of a transaction affecting immoveable property, appears to us to apply. In effect the object which the Legislature had in view in passing the Act was to make registration a condition precedent in a case like this, not to the existence of the title in an assignee, but to the proof that such title existed. In our opinion the document having been subsequently duly registered, it had full affect and related back to its execution: that appears to be the effect of s. 47, and the mere fact that it was not registered on the 13th November, 1886, was cured by the subsequent registration. As we regard the position of the parties, it was this; the assignee, in fact, of the decree when he made his application on the 13th November, 1886, was unable to prove that there was a title by assignment in himself. It was a case of failure of evidence, and we consider that the application he made on the 11th February, 1887, was a reasonable one, and was not an application in any sense to withdraw his application of the 13th November, 1886. We think that the Munsif on the 11th February, 1887, did not treat Abdul Majid's application of that date an application to withdraw. The fair meaning of his order was that the case might stand over for the present, and not that he dismissed the application. In the case of *Ganapat Pandurang* v. *Adarji Dadabhai* (1) an adjournment was allowed to a party to obtain registration of a deed under which that party claimed. In conclusion we are of opinion that the application of the 13th November, 1886, was a step-in-aid of execution, and that the application of 25th April, 1888, was within time. The decrees in the Court below will be set aside, and the case will be remanded to the first Court, which will reinstate the application of the 25th April, 1888, and proceed to dispose of it according to law. The appellant here will have the costs here and hitherto below.

Cause remanded.

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(1) 3 B. 312.

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13 A. 93
(P.C.)=
5 Sar. P.C.J.
638=17 I.A.
199.

13 A. 93 (P.C.)=5 Sar. P.C.J. 638=7 I.A. 199.

[93] PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

IN THE MATTER OF F. W. QUARRY. [5th July, 1890.]
Act XVIII of 1879, *Legal Practitioners Act*, s. 13.

A pleader's professional misconduct having amounted to "reasonable cause," within the meaning of s. 13 of the Legal Practitioners Act, XVIII of 1879, for suspending him from practice, their Lordships declined to interfere with the decision of the High Court as to the punishment, it not being clearly shown that the *quantum* awarded was unreasonable and excessive.

[R., 29 C. 890 (F.B.)=6 C.W.N. 556; 34 M. 29 (37)=8 M.L.J. 22 (27)=6 Ind. Cas. 313=M.W.N. (1910) 163=11 Cr.L.J. 310=20 M.L.J. 500 (509).]

APPEAL from an order (3rd December 1889) of the High Court.

The appellant, who in August, 1871, had obtained a certificate under the Pleaders Act, XX of 1865 and had practised as a pleader at Mussorie for some years, had been professionally concerned on behalf of the Delhi and London Bank, through their agent at that place, until the latter had ceased to employ him. After his employment by the Bank had ceased, a correspondence commenced between him and a suitor against whom the Bank had taken proceedings to recover a debt. It was alleged in the Court below that this correspondence showed unprofessional conduct on his part. The result was his suspension from practice for twelve months under s. 13 of the Legal Practitioners' Act, XVIII of 1879.

Mr. *J. H. A. Branson*, for the appellant, argued that the correspondence was open to a construction more favourable to him than that which the High Court had placed upon it. Even if that construction was correct, the sentence of suspension was in excess of what the circumstances required.

Their Lordships' judgment was delivered by LORD WATSON.

JUDGMENT.

LORD WATSON.—The appellant, Mr. F. W. Quarry, was heard last Saturday on an application to stay the execution of an order of the High Court of the North-Western Provinces pending an appeal at his instance, and their Lordships on that occasion directed the petition to stand over, and allowed the appellant to be heard to-day on the merits of his appeal.

[94] The letters produced appear to their Lordships to afford ample evidence, under the hand of the appellant, that, in his professional capacity, he was guilty of grave improprieties which the Court could not overlook when the matter was regularly brought under its notice. Such conduct, in the opinion of their Lordships, amounts to "reasonable cause" for suspending a certificated pleader within the meaning of s. 13 of the Act XVIII of 1879.

That being so, the only question which remains for consideration is, whether the learned Judges of the High Court have erred in visiting the offence with twelve months' suspension from office. It must be borne in mind that the Court which awarded that penalty were in a much better

position than this Board to estimate the degree of punishment which, in the whole circumstances of the case, and in the interests of the profession and of the public, ought to follow such misconduct on the part of one of its pleaders. Their Lordships cannot, in a case like the present, interfere with the decision of the Court below unless it is clearly shown that the *quantum* of punishment was unreasonable and excessive. Notwithstanding the able and temperate argument of Mr. Branson, they are unable to come to that conclusion, and they will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.

1890 JULY 5. — PRIVY COUNCIL. — 13 A. 93 (P.C.) = 5 Sar. P.C.J. 638 = 17 I.A. 199.

Solicitors for the appellant :—Messrs. *W. Carpenter and Son.*

Appeal dismissed.

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13 A. 94 = 10 A.W.N. (1890) 231.

CIVIL REFERENCE.

Before Sir John Edge, Kt., Chief Justice.

PIRBHU NARAIN SINGH (*Plaintiff*) *v.* SITA RAM AND OTHERS (*Defendants*).* [10th July, 1890.]

Court-fee—Mortgagee—Redemption—Decree for redemption conditional on payment of a certain sum—Appeal by mortgagor—Court-fee payable on memorandum of appeal—Act VII of 1870 *(Court Fees Act), s. 7, ch. ix.*

Where a mortgagor sues for redemption on the allegation that the mortgage debt has been satisfied, and a decree for redemption is passed on payment of a certain [95] amount and the mortgagor appeals against the amount he is ordered to pay, the court-fee payable on the memorandum of appeal must, under s. 7, cl. ix of Act VII of 1870, (Court-fees Act), be computed according to the principal money expressed to be secured by the instrument or mortgage, and not according to the balance which the mortgagor alleges to be due.

Semble.—If the decree had allowed redemption on payment of a certain sum, and the defendant mortgagee was appealing on the ground that the amount due was greater than that sum, the court-fee should be calculated on the difference between the sum mentioned in the decree and the amount alleged by the appellant to be due.

[**Diss.**, 27 A. 447 (448) = A.W.N. (1905) 40 = 2 A.L.J. 105 ; 11 Ind. Cas. 198 (199) = 213 P.L.R. 1911 ; 134 P. W. R. 1911 ; **N.F.** 30 A. 547 (549) = 5 A.L.J. 531 = A.W.N. (1908) 247 = 4 M.L.T. 448 ; 29 M. 367 (369) = 16 M.L.J. 287 ; 5 N.L.R. 130 (133) ; **R.** 14 M. 480 (483) ; 2 O.C. 87 (89) ; 9 O.C. 153 (154)].

IN this case the memorandum of appeal came before the Registrar of the Court on a question as to the sufficiency of stamp. The Registrar referred the question for decision, under s. 5 of the Court Fees Act, in these terms :—

"This is an appeal in a redemption of mortgage case by the plaintiff in the suit.

"The lower Court granted a decree for redemption on payment of Rs. 2, 15,446-15-6, while the plaintiff claimed that the whole mortgage money had been paid.

"The appellant appeals against the amount he is ordered to pay for redemption, and the question of the right to redeem is not in contest.

"The question is, whether under these circumstances the memorandum of appeal should be stamped under s. 7, cl. IX of the Court Fees Act, according to the principal money expressed to be secured by the instrument of mortgage, or on the difference between the sum awarded and that which the appellant admits to be due.

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* Reference under s. 5 of the Court Fees Act.

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JULY 10.
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3 A. 94= 10 A.W.N. (1890) 231.

"There are three rulings to the point. The first, in which this Court (Ram Lakhan Rai v. Bendan Rai (1).) held that a suit might change its nature in appeal, was in nature very similar to this case, and it was held that the proper stamp was on the money value of the appeal.

"The next case was also decided by this Court. It was in a pre-emption case, (Hafiz Ahmad v. Sobha Ram (2).) but the principle laid down is clear and equally applicable to a redemption [96] of mortgage case. It says that when the right to pre-empt is in question an appeal should be stamped on the value of the property as in the original suit; but when the question in appeal relates solely to the amount to be paid by the pre-emptor the fee should be calculated *ad valorem* on the amount actually in dispute.

"The last case deals with redemption cases.

"The case itself is hardly to the point, as the right to redeem was in issue, but the case quoted in note A (Umar Khan v. Muhammad Khan (3).) seems to the point. It is not very clear whether the right to redeem was also in issue, but the last paragraph but one from the bottom of the page would point to its not being so. If this is so, the Bombay High Court held that in any appeal connected with redemption the stamp should be calculated as in the original suit on the principal amount secured by the mortgage-deed.

"The principle laid down by this High Court in I.L.R. 6 All. 488, commends itself to me as the sounder for the following reasons:—

"(*a*) It recognises that the appeal may lie from only part of the decree, which the Bombay ruling does not seem to do, but which is clearly recognized by s. 16 of the Court Fees Act.

"(*b*) S. 7 of the Court Fees Act relates only to stamp valuation in suits, and is nowhere made applicable to appeals. In many instances the value in appeal may be definite, whereas in the original suit it could not be ascertained (were provision not made in the Act) until the suit were decided.

"The question involved is one of considerable importance, and the difference in fee in this case is large, and as there seems a difference of opinion between this High Court and that of Bombay, I refer the matter to the Judge appointed to decide such questions under s. 5 of the Court Fees Act.

"If the stamp be leviable on the amount secured by the instrument of mortgage, the memorandum seems to be properly stamped.

"[97] If the stamp should be calcuated on the sum contested by the appellant there is a deficiency of Rs. 1,825 (2,025—200). I would note that the period of limitation expires on the 17th instant."

On the above reference the Chief Justice made the following order:—

ORDER.

EDGE, C. J.—I am of opinion that the stamp is sufficient, and I so decide for the following reasons.

S. 7, sub-s. 9, of the Court Fees Act, VII of 1870, enacts that in suits such as this the amount of fee payable shall be computed according to the principal money expressed to be secured by the instrument of mortgage, and does not make the amount of the fee to depend on the balance which the mortgagor may say is due, or on that which the mortgagee alleges to be due. In the suit the mortgagor claimed a decree

(1) Legal Remembrancer, Vol. I, p. 162. (2) 6 A. 488. (3) 10 B. 41.

for redemption on the allegation that the mortgage debt had been satisfied. So far as the court-fee on the plaint was concerned, it was immaterial whether the mortgage debt had in fact been satisfied, or whether redemption could only be had on payment of Rs. 2,15,446-15-6.

1890 JULY 10. — CIVIL REFERENCE. — 13 A. 94 = 10 A.W.N (1890) 231.

This is the plaintiff-mortgagor's appeal, and it appears to me that the relief which he is claiming in this appeal is a decree for redemption of the mortgaged property on payment of the amount, if any, which is due. That appears to me to be a relief which it is impossible to value. In my opinion we must apply s. 7, sub-s. ix.

If, on the other hand, the decree below had decreed redemption on payment of, say, Rs. 500, and the defendants, mortgagees were appealing on the ground that the amount due was Rs. 2,00,000, I am of opinion that the amount of court-fee should be calculated on the difference between Rs. 500 and Rs. 2,00,000.

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13 A. 98 = 10 A.W.N. (1890) 232.

[98] REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Young.

JAWITRI (*Defendant*) v. H. A. EMILE (*Plaintiff*).* [131st October, 1890]

Trespass—Building on plaintiffs land—Damages—Mandatory injunction—Suit for further damages—Alleged disobedience of mandatory injunction—Cause of action—Suit not maintainable.

The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass, and an injunction, and a decree was passed for damages and for a mandatory injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition. Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobediuce of the mandatory injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate, was likely to fall. There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit.

Held, that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in executiion. *Mitchell* v. *Darley Main Colliery Company*(1) distinguished.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Dwarka Nath Banerji*, for the petitioner.

Mr *J. E. Howard* and Babu *Bishan Sahai* for the opposite party.

JUDGMENT.

EDGE, C.J., and YOUNG, J.—The plaintiff in this case was the owner of Thespic Lodge, Mussooree. His property was on a lower level than that of the defendant. The defendant, in order to secure his property, which had been damaged by a slip, proceeded to build a "pushta" or retaining wall, and, unfortunately for him, commenced to build that wall on the plaintiff's premises, and thereby undoubtedly committed a trespass. It would appear that at the time of the slip some soil and other matters had come down the hillside on to the plaintiff's premises. The plaintiff

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* Miscellaneous Application under s. 622 of the Civil Procedure Code.

(1) L. R. 11 App. Cas. 127.

1890 OCT. 31. — REVISIONAL CIVIL. — 13 A. 98 = 10 A.W.N. (1890) 232.

brought a suit in which he asked [99] for damages for the wrongful trespass of the defendant, and also sought an injunction. The plaintiff got a decree for damages and obtained a mandatory injunction by which the defendant was ordered within two months to remove the wall from the plaintiff's premises and to restore the plaintiff's premises to the condition in which they were before. The plaintiff proceeded to execute that decree, but execution appears to have been resisted by the defendant; whether it was properly pressed on or not by the plaintiff we need not inquire. In 1889, two years subsequently, the plaintiff brought the present suit in which he sought damages, alleging his cause of action to be that the defendant had not obeyed the mandatory injunction. The damages which he proved were that people were deterred from becoming tenants of some rooms in his house, fearing that, owing to what the defendant had done, the hillside might come down and overwhelm them. The plaintiff obtained a decree for Rs. 300. There was in fact no structural or other damage done to the plaintiff's property other than that which was done before the commencement of the previous suit. The question for us is, whether this suit will lie. It has been contended by Mr. Howard on the authority of *Mitchell* v. *Darley Main Colliery Company* (1), that this suit lies. On the other hand, Mr. *Banerji* relies on the case of *Serrao* v. *Noel* (2) in the Court of Appeal. The *Darley Main Colliery Company* case was a case in which the defendants had lawfully excavated their own coal, but, unfortunately for them, had not taken the precaution to leave support for the surface. In that case a subsidence occurred and damaged the property of the plaintiff. Compensation was made for that damage, and many years subsequently a fresh subsidence occurred, and the majority of the House of Lords ultimately decided that the fresh subsidence gave a fresh cause of action. In *Buckhouse* v. *Bonomi* (3), the House of Lords had decided that a cause of action did not arise until subsidence occurred. The House of Lords, following the principle of that case, held that each fresh subsidence gave a fresh cause of action. To take that case, if Mr. Mitchell, after compensation had been made [100] for the original damage, had brought a suit in which he claimed damages on the ground that people were deterred from taking his surface lands for building purposes owing to a fear that there might be fresh subsidence, we apprehend that such a suit would not have lain. In this case the cause of action was the wrongful act of the defendant in building the "pushta" on the land of the plaintiff. For that wrongful act compensation was awarded in the first suit, and a further remedy was decreed in the form of a mandatory injunction. All that has happened since has been that people have been afraid to take the rooms in the plaintiff's house fearing that some injury might happen to them. We need not decide whether the plaintiff would have any remedy or not, if, by reason of the original acts of the defendant, structural or other damages should happen to his property. In our opinion this suit does not lie for damages for non-compliance with the mandatory injunction to compel the performance of which the plaintiff had his remedy in execution. It is always dangerous to give illustrations, but it appears to us that it might equally well be contended that plaintiff who had obtained a money decree might bring a subsequent action for the non-payment of the decretal amount. We set aside the decree below and make an order dismissing the suit with costs here and below.

Appeal allowed.

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(1) L.R. 11 App. Cas. 127. (2) L.R. 15 Q.B.D. 549. (3) 34 L.J.Q.B. 181.

13 A. 100=11 A.W.N. (1891) 5.

1890 DEC. 5. — APPELLATE CIVIL. — 13 A. 100= 11 A.W.N. (1891) 5.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

RAMZAN (*Petitioner*) v. GERARD (*Objector*).*
[5th December, 1890.]

Surety, liability of—Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss. 336, 344.

A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor [101] files his petition under s. 344 to be declared insolvent. *Koylash Chandra Shaha* v. *Christophoridi* (1) approved.

[F., 19 B. 210 (212); Appl., 16. A. 37 (38)=13 A.W.N. 203; R.; 100 P.R. (1894) U.B.R. Civil (1892—1896), Vol. II. 269.]

THIS was a reference to the High Court, under s. 617 of the Civil Procedure Code, by the Subordinate Judge of Dehra Dun. The order of reference was as follows:—.

"Under the provisions of s. 617 of the Civil Procedure Code, I have the honour to forward a bond of F. B. Sakloth's under s. 336, together with the whole record, for orders.

"Briefly, Mr. Gerard was arrested in execution of a decree, and Mr. F. B. Sakloth gave the bond. Mr. Gerard did make his application under s. 344 of the Civil Procedure Code, but that application was rejected, as on the day fixed for the hearing he did not appear. A previous application had been rejected on the merits by the District Judge of Rawal Pindi. Subsequently to Mr. Gerard's application, F.B. Sakloth gave in a petition to the effect that "he understands his responsiblity is now ended, but should it be otherwise, petitioner hereby revokes his suretyship so far as it involves further responsibility." Therefore he was ordered to produce Mr. Gerard. This was on the 23rd September, and up to the 8th November, the date fixed for the hearing under s. 347 of the Civil Procedure Code, he did not do so.

"The question is, was F. B. Sakloth released from his bond when Mr. Gerard applied under s. 344 of the Civil Procedure Code?

"I am of opinion that he was not. The bond, though drawn up by Mr. Melviil, a vakil of longstanding, is not in the form prescribed on p. 326 of the Circular Book, and this escaped my notice at the time it was presented. However, it seems essentially the same in its provisions, which are, first, that 'I, Mr. Gerard, shall apply &c., and, second, that 'he shall appear when called on.' This last I take to mean until the decision of the insolvency case. Both conditions appear in s. 336 of the Civil Procedure Code, Mr. Melvill, however, has referred me to *Koylash Chandra Shaha* v. *Christophoridi* (1), which seems to be against me. The reasons for [102] that decision, however, do not appear in the report of the case. Possibly it may have been based on the terms of the bond.

"I have the honour then to ask whether I am to follow that ruling, and, if I am, what procedure am I to adopt on a person's applying under s. 344 to secure his subsequent attendance till discharged or otherwise."

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* Reference under s. 617 of the Civil Procedure Code, by C. Steel, Esq., Subordinate Judge, Dehra Dun, dated the 1st November, 1889.

(1) 15 C. 171.

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DEC. 5.

APPELLATE CIVIL.

13 A. 100=
11 A.W.N.
(1891) 5.

OPINION.

EDGE, C.J., and TYRREL, J.—We are of opinion that the case of *Koylash Chandra Shaha* v. *Christophoridi* (1) was rightly decided and applied, and that the surety is discharged. The record will be returned.

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13 A. 102.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HAKIM-UN-NISSA (*Plaintiff*) *v.* DEONARAIN AND OTHERS (*Defendants*).*
[17th July, 1888.]

Act IV of 1882 (*Transfer of Property Act*), s. 135—*Actionable claim—Transfer of claim for an amount less than its value—Suit by transferee to enforce claim—Defendant not entitled to plead that terms of transfer were unconscionable.*

A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806, his heirs, who were out of possession, executed a deed of assignment to a third person, transferring to him the rights acquired by the mortgagee under that order. At the time of the execution of the deed no steps had been taken by the mortgagee or his heirs to bring a suit for declaration of their title and for possession of the property. A suit for that purpose was brought by the assignee, the defendants being the conditional vendors and also the assignors under the deed above mentioned. The latter made no defence, but admitted the justice of the claim, and a decree was passed in favour of the plaintiff against them as well against the other defendants.

Held, that the answering defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has an actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor.

Held also that the answering defendants were entitled to the benefit contained in the first paragraph of s. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off the plaintiff's hands by paying to him the price and incidental expenses of the sale with interest [103] on that price from the day that the plaintiff paid it to the date of its repayment to him. *Jani Begam* v. *Jahangir Khan* (2) followed *Grish Chandra* v. *Kashisauri Debi* (3), and *Khosheb Biswas* v. *Satar Mondol* (4) dissented from.

[R.—18 A. 265 (267) ; 20 A. 327=18 A.W.N. 54 ; 21 C. 568 (575) (F.B.)]

ON the 18th October 1862, Manbasi Rai, Tehlu Rai and Ajib Rai, executed a deed of conditional sale of immoveable property to Behari Bhagat, for Rs. 400. In June, 1873, Ram Ghulam and Bhusi, representatives of Behari Bhagat, instituted foreclosure proceedings under Regulation XVII of 1806, and an order for forclosure was passed on the 16th June, 1874. On the 30th July, 1884, Ram Ghulam and Bhusi, being out of possession, and not having commenced any suit for declaration of their title and for possession by virtue of the order for foreclosure, executed a deed of assignment in favour of Musammat Hakim-un-Nissa Bibi, by which they transferred to her all their rights as conditional vendees. The deed recited the inability of the assignors to find funds to prosecute a suit, and contained the following passage :—

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* Second Appeal, No. 161 of 1887, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 22nd December, 1886, reversing a decree of Pandit Ratnan Lal, Subordinate Judge of Ghazipur, dated the 29th Septemper, 1885.

(1) 15 C. 171. (2) 9 A. 476. (3) 13 C. 145. (4) 15 C. 436.

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"And if, after proper endeavour, the aforesaid rights above specified in this deed do not anyhow come into the purchaser's possession, or the principal with interest is not realized, the purchaser will be entitled to the refund of Rs. 200, *i.e.*, half the consideration mentioned in this bond, also of whatever cost the purchaser may have actually incurred in her attempt to obtain possession of the said rights and of whatever sum she may have paid to any party as costs, &c., or any other sum that the purchaser may have to pay in connection with this transaction will be recoverable from the person and property, moveable and immoveable, of the executant."

The present suit was brought by Musammat Hakim-un-nissa for proprietary possession of the property comprised in the conditional sale-deed of the 18th October, 1862, and affected by the foreclosure order of the 16th June, 1874, she impleaded as defendants to the suit the heirs of the original conditional vendors, and also her assignors under the deed of the 30th July, 1884, Ram Ghulam and Bhusi. [104] These latter admitted the claim and did not defend the suit. The other defendants resisted the claim on the ground, *inter alia*, that the deed of the 30th July, 1884, was a champertous transaction which the Courts ought not to enforce.

The Court of first instance (Subordinate Judge of Ghazipur) decreed the claim. On appeal, the lower appellate Court (District Judge of Ghazipur, reversed the first Court's judgment and dismissed the suit, on the ground that the terms of the deed of the 30th July, 1884, were extortionate and inequitable, and contrary to public policy. This view was principally based on the smallness of the consideration for the deed. The District Judge observed—"If the litigation succeeded, the plaintiff got Rs. 2,498 odd, or the zemindari while Ram Ghulam and Bhusi got nothing save perhaps the Rs. 200 shown to the Registrar: if it did not succeed, they were to pay her Rs. 200 and every cost, legitimate and illegitimate, the woman chose to demand. She could say what she liked as to costs and payments out of Court. I find that this suit is one contrary to public policy and therefore not maintainable."

The plaintiff appealed to the High Court.

Kunwar *Shivanath Sinha*, Pandit *Ajudhia Nath* and Pandit *Sundar Lal* for the appellant.

Mr. *Amir-ud-din* and Munshi *Kashi Prasad* for the respondents.

JUDGMENT.

STRAIGHT, J.—The suit to which this appeal relates was one of some peculiarity. In order to make the question which has been raised in appeal and the view I take of it intelligible, it is necessary that I should state briefly the main facts out of which the litigation arises. It appears that in the year 1862, three persons, by name Manbasi Rai, Tehlu Rai and Ajaib Rai, were owners of a thirteen *gandas* share of *mauza* Mahwari Kalan, situate in the Ghazipur district. On the 18th October, 1862, those three persons, for a consideration of Rs. 400, made a conditional deed of sale, the term of which was to expire on the 31st October, 1868, in favour of one Behari Bhagat, who is now dead and is represented by two persons named Ram [105] Ghulam and Bhusi. In the year 1873, certain proceedings for foreclosure under the old Regulation then in force were taken by Behari Bhagat under his conditional sale-deed, and upon the 16th June, 1874, an order of foreclosure was made. Nothing appears to have been done upon that order by Behari Bhagat

1888 JULY 17. — APPELLATE CIVIL. — 13 A. 102.

or by Ram Ghulam and Bhusi, his heirs. On the 30th July, 1884, by a deed of assignment executed by Ram Ghulam and Bhusi, in favour of Musammat Hakim-un-nissa, the plaintiff-appellant before us, those two persons transferred to Musammat Hakim-un-nissa the rights that they had acquired under the foreclosure order of the 16th June, 1874. That right, the vendors not being in possession of, or having obtained possession of the share originally conditionally sold to Behari Bhagat, consisted of a right to go into Court, if resisted by the conditional vendor, to have it declared that under the foreclosure order they had good title to the property as proprietors, and to have possession of the same by ejectment of the vendor in possession. I have no doubt that, upon the face of that assignment of the 30th July, 1884, what was sold by Ram Ghulam and Bhusi to Musammat Hakim-un-nissa was an actionable claim of the kind and description I have mentioned. Upon the strength of that assignment the plaintiff has come into Court with her present suit. It is unnecessary for me, for the purpose of dealing with this case up to the point it has reached in the Court below, to say any more than this, that among the defences raised on the part of the defendants was a defence that the agreement, as between the plaintiff and her vendors, was open to objection on the ground of its being champertous, and that accordingly it ought not to be recognized as giving the plaintiff a title upon which she can come into Court and sue. The Subordinate Judge, who tried the case as a Court of first instance, decreed the plaintiff's claim for proprietary possession of the property, holding, so I understand, that the foreclosure order of the 16th June, 1874, was a good and binding order, and that upon the strength of it the plaintiff as the assignee of the conditional vendees had a good title, upon which she could prefer the claim put forward by her in the present suit. The defendants appealed to the learned Judge [106] and his judgment is entirely occupied with the discussion of the single question, as to whether the plea of champerty put forward by the defendants was a good plea and defeated the claim of the plaintiff-respondent before him. He has come to the conclusion, for the reasons stated in his judgment, that the transfer by the vendees of their right under the foreclosure order to the plaintiff was a champertous transaction, that the consideration given was wholly inadequate for the interest passed, and that the condition requiring the vendor to make good to the vendees all the money expended by her in the course of the litigation and otherwise, in the event of her failing to succeed in the suit to be brought by her, was a most onerous condition, which no Court ought to enforce.

It seems to me that the judgment of the learned Judge and his finding of fact has proceeded upon a misapprehension of the ruling of the Privy Council to which he refers. He has forgotten the circumstance that in this case there is no conflict as between the vendors to the plaintiff and the plaintiff in regard to the *bona fides* of the transaction or its fairness. The vendors were defendants to the suit in the Court below, but they made no defence. On the contrary, they admitted the justice of the plaintiff's claim; and, that being so, a decree was passed as against them, as well as against the other defendants. It must be taken as now finally determined that they have no right to assail their assignment to the plaintiff upon the ground that it was an unconscionable bargain, and so inequitable that the Court should not enforce it. That being so, it appears to me that the answering defendants-respondents before us and the appellants in the Court below cannot take advantage of the terms of this arrangement between the plaintiff and her vendors for the

purpose of defeating the plaintiff's claim. Because, if a person who has an actionable claim against another chooses to sell it cheap, that is no reason that that other is to stand cleared and discharged altogether from the liability that he is under to the assignor. In the present case, assuming—it must be understood I am not deciding this question, because it was never entered into by the Court below—that the foreclosure order was a good one, and that the defendants are themselves or represent the original conditional vendor, [107] and that there are no legal obstacles in the shape of limitation or otherwise standing in the way, there is no reason that I can see why they shoud not be made to pay what, I will presently point out, the law requires them to pay, or surrender the property.

Now the learned Judge in his judgment apparently was not aware of the provisions which are contained in s. 135 of the Transfer of Property Act. No doubt in the two rulings of their Lordships of the Privy Council, one *Chedambara Chetty* v. *Renja Krishna Muthu Puchanja Naickar* (1) and the other *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2), their Lordships have justly remarked that there is no law of champerty or maintenance in force in India, at any rate, in the *mufassil*. I have had myself occasion on more than one occasion to make the same observation. But in the case of *Jani Begam* v. *Jehangir Khan* (3), I took occasion very carefully to point out what appeared to me to be the departure, so far as India is concerned, that has been taken in that respect by the Transfer of Property Act. I regret that the view I expressed in that case was in difference with one that had found expression from the learned Judges of the Calcutta High Court in the case of *Grish Chandra* v. *Kashisauri Debi* (4), and I cannot help further regretting that I still find myself in conflict with another judgment of the same Court of the learned Chief Justice and Tottenham, J., in *Khoshdeb Biswas* v. *Satar Mandol* (5).

But I see no reason to alter the opinion I expressed in the ruling to which I have referred, and it seems to me that that ruling must be applied and ought to be applied to the present case. I do not think that the defendants are entitled to take advantage of the terms of the contract by which the rights under the foreclosure order of the 16th June 1874 were passed to the plaintiff. It is not found by the learned Judge nor is it suggested that there was no contract and no real sale: what is suggested is that there was a contract and a real sale, but for a most inadequate price. As I have said, I do not think that the defendants are entitled to take advantage of [108] that circumstance, but I do think they are entitled to the benefit of the provision that is contained in the first paragraph of section 135 of the Transfer of Property Act. Hereafter when the appeal comes to be tried upon the merits and in reference to the evidence upon the record, and it has been found what was the true and real consideration for the assignment to the plaintiff of the rights under the foreclosure of the conditional sale-deed, the defendants will be entitled, subject to their not succeeding upon other pleas, to take the bargain off the hands of the plaintiff by paying to the plaintiff the price and incidental expenses of the sale with the interest on that price from the day that the plaintiff paid it to the date when it is repaid to her. That being the view I take of this case, it is clear that the judgment of the learned Judge cannot stand, and that it must be and it is set aside. This appeal being allowed, the case will be remanded to the lower appellate Court under section 562 of the Civil

(1) 1 I. A. 241. (2) 4 I. A. 23. (3) 9 A. 476.
(4) 13 C. 145. (5) 15 C. 436.

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Procedure Code for restoration to the file of pending appeals and for disposal upon the merits. Costs will be costs in the cause.

BRODHURST, J.—I concur in allowing the appeal and remanding the case under section 562 of the Civil Procedure Code.

Cause remanded.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAMPHUL TIWARI AND ANOTHER (*Defendants*) *v.* BADRI NATH (*Plaintiff*).* [13th August, 1888.]

Act IX of 1859, s. 20—Forfeiture of rebel's property—Limitation.

A Hindu widow in possession of a six-annas zemindari share of her husband's sold the share in 1855 to persons who, in 1858, were convicted of rebellion, and their estates, including the share, were confiscated by Government. The share was granted to other persons as a reward for loyalty, and remained in their possession until 1886, when a suit for possession and mesne profits was brought, just before the expiry of twelve years from the widows' death, by a reversioner to her husband's estate, on the ground that the sale of 1855 could not affect more than the widow's life-interest, and that nothing more had been confiscated by the Government in 1858 [109] and granted to the defendants. The plaintiff had taken no steps in 1855 to question the sale, or in 1858 to assert his claims as reversioner.

Held that the suit was barred by s. 20 of Act IX of 1859. *Ram Dhun* v. *Rajah Bhowanee Singh* (1), *Bhugwan Dass* v. *Banee Dalal* (2), and *Mahomed Bahadur Khan* v. *The Collector of Bareilly* (3), referred to.

THE facts of this case are fully stated in the judgment of Brodhurst, J.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad* for the appellants.

Munshi *Juala Prasad* for the respondent.

JUDGMENT.

BRODHURST, J.—Lala Badri Nath, the plaintiff-respondent, sued the Secretary of State for India in Council and Ramphal and Kashi Prasad, Brahmins, to obtain proprietary possession of a six-annas share in *mauza* Sukurdeha, pargana Dhuriapara, zilla Gorakhpur, by avoidance of a sale-deed, dated the 25th October 1855, by cancellation of mutation proceedings and of the grant made to the defendants and by dispossession of the defendants, and for the award of Rs. 277-8 0 as mesne profits, with interest.

The plaintiff in his plaint alleged that his brother, Munshi Ganesh Prasad, purchased the share above referred to at auction sale; that he died without issue; that after his death his widow, Musammat Gangan Kuari's name was entered in the Government records by right of inheritance, in that she remained in possession by right of life-interest; that she sold the share in dispute to Sheogobind Chand and Lalbehari Chand, co-sharers in the village, on the 25th October 1855 without legal necessity, and that false allegations were inserted in the deed of sale; that in 1858 the purchasers of the share were convicted of rebellion; that all their estates, including six-annas share in the suit, were consequently confiscated by the

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* Second Appeal No. 338 of 1887, from a decree of R. J. Leeds Esq , District Judge of Gorakhpur, dated the 6th December 1886, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 31st July 1886.

(1) N. W. P. H. C. R. 1868, p. 139. (2) S.D.A. N.W.P. 1864. vol. ii. p. 220. (3) 1 I.A. 167.

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Government; that the six-annas share was granted by the Government to the defendants as a *jagir*, and that they are now in possession of it: that Musammat Gangan Kuari had only a life-interest in the six-annas share; that she died on the 9th March [110] 1874; that since her death the defendants have had no right to the share, and that their possession against the plaintiff is illegal.

The Secretary of State in Council pleaded limitation and prayed exemption. The other defendants, in their written statements, averred that the share in suit was confiscated by the Government in 1858, as admitted by the plaintiff, because its then proprietor had been convicted of rebellion; that it was granted to the defendants, who have ever since been in proprietary and adverse possession; that Musammat Gangan Kuari did not transfer merely her life-interest in the share to Sheogobind Chand and Lalbehari Chand, but for legal necessity made an absolute sale to those persons of the share, with all its rights and interest; and that as the plaintiff did not sue to establish his claim within the period of one year from the date of attachment or seizure of the property in suit, his claim is barred by s. 20 of Act IX of 1859. The Subordinate Judge who tried the suit framed five issues and held that the plaintiff's right and interests were not confiscated; that the plaintiff had no right to get possession of the share during the lifetime of Musammat Gangan Kuari; that s. 20 of Act IX of 1859 did not apply, and that the suit was not barred by special or general limitation; that Gangan Kuari died on the 9th March 1874, and that the suit which was instituted on the 6th March 1886, was within time from that date; that as the widow of Ganesh Prasad had only a life-interest in the six-annas share, it must be considered that her life-tenure only was transferred under the deed of sale; that no cause of action had accrued to the plaintiff as against the Secretary of State in Council, and that the sum of Rs. 243 was due by the other defendants to the plaintiff as mesne profits.

The Subordinate Judge decreed the plaintiff's claim for possession of the share in suit and for Rs. 243 as mesne profits against the defendants Ramphul and Kashi Prasad, and, exempting the Secretary of State for India in Council, dismissed the rest of the claim. The defendants preferred an appeal against this decree, and the District Judge in his decision by which he disposed of the appeal observed:—"Two questions are raised by this appeal; *first* [111] that of limitation under s. 20, Act IX of 1859; *second*, that of mesne profits. On the first point the appellant's contention appears to me obviously wrong. The order of confiscation is not on the record, but it cannot be assumed that Government intended to confiscate other than the absolute existing rights of the rebel, and the claim of reversioners or mortgagors, being in no wise affected by such confiscation, they are not required to come in within the period prescribed in the Act referred to. S. 20, in my opinion, applies only to persons who claimed present rights in the confiscated property. There are two rulings which, in my opinion, support this view: the one *Ram Dhun* v. *Rajah Bhowanee Singh* (1) and the other *Bhugwan Doss* v. *Banee Dalal* (2). On the second point very little has been said and there is in truth nothing to say. The plaintiff, having established his title, is clearly entitled to mesne profits, and no reason has been shown for refusing to accept the amount as determined by the lower Court. I dismiss the appeal with costs and the usual interest thereon."

(1) N.W.P.H.C.R. 1868, p. 139. (2) S.D.A. N.W.P. 1864, vol. ii. p. 220.

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Mr. *Kashi Prasad* for the defendants-appellants takes before us, in second appeal, the plea that the suit is barred by s. 20 of Act IX of 1859, and, in support of this plea, he cited the ruling of their Lordships of the Privy Council in *Mahomed Bahadur Khan* v. *The Collector of Bareilly* (1).

On the other hand, Mr. *Ram Prasad*, in supporting, on behalf of the plaintiffs-respondents, the judgments of the lower Courts, refers not only to the two rulings noticed by the lower appellate Courts but also to a ruling of the Privy Council in *Gouri Shunker* v. *The Maharaja of Bulrampore* (2).

Taking these three rulings in the order given above, I observe that the judgment reported in N. W. P. H. C. Rep. 1868, p. 139, is by Morgan, C. J., and Spankie, J. and is as follows :—

"The Principal Sadr Amin's decision cannot be supported. There is nothing in the records to show that the estate in suit was absolutely forfeited ; on the contrary, it would appear that only [112] the mortgagee's rights and interests were confiscated, and that only these rights were granted to the defendants ; s. 20 of Act IX of 1859 does not apply to fix the plaintiffs' rights as mortgagors. These rights were not affected by the confiscation or the grant, which related only to the mortgagee's right. We decide this upon the present record. But the record itself is in a very defective condition. Neither the confiscation proceedings nor the grant is among the papers. The case is remanded for trial. We inform the Principal Sadr Amin (if he finds that the confiscation and the grant was confined to the mortgagee's interest) that the limitation of one year is not applicable, and that the suit should be heard on the merits.

The judgment reported on page 220 of S. D. A. N. W. P. Rep. for 1864 is by Roberts and Spankie, JJ. The headnote at the foot of the case referred to is as follows :—

"To constitute a bar under s. 20 of Act IX of 1859 there must be on the part of Government dispossession of the incumbent, or some open act inconsistent with the pretensions of the holder to put him upon taking measures to assert his claim."

The ruling of the Privy Council reported in *Gouri Shunker* v. *The Maharaja of Bulrampore* (2) is under a law specially enacted for the province of Oudh, and therefore, as admitted by Mr. *Ram Parsad*, it is not directly applicable to this case. It is, I think, obvious that none of these three rulings is in point.

Next, as to the ruling relied upon by Mr. *Kashi Prasad*, and which is reported in L. R.. 1 I. A., 167, the appeal in this case was from a judgment of a Bench of this Court, Morgan, C.J., and Roberts, J.—That judgment and the judgment reported in N. W. P. H. C. Rep., 1868, p. 139, and which is relied upon by the plaintiff-respondent, were both written by Sir Walter Morgan,.and they are not in conflict.

The headnote of the Privy Council ruling which I have now to consider is as follows :—

[113] "*A* died, the ostensible owner of certain lands, leaving two sons under age. Upon *A's* death *B*, alleging that he was himself the real owner of the lands, caused himself to be recorded as owner in the Collector's books, and took possession. Some years later *B* was convicted and executed as a rebel, and all the property in his possession confiscated, including the land so taken by him.

"The sons of *A* sued for the recovery of the lands of which they had been dispossessed by *B*.

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(1) 1 I. A. 167.

(2) 4 C. 839.

"The suit was brought more than a year after the younger plaintiff came of age and more than a year after the passing of Act IX of 1859, which allows (s. 20) only one year to sue and does not save the rights of persons under disability.

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"*Held*, that the enactment applied to all Courts, and that the claim was barred by limitation"

From what is stated on page 171 it appears that the District Judge who tried the suit held that "both the plaintiffs had a right in equity; that the elder plaintiff was barred by law; that the younger plaintiff was not barred; and the Court decreed the claim of the younger plaintiff less the share of Bustee Begum, the mother, with costs in proportion."

On appeal to this Court, Morgan, C.J., and Roberts, J., in disposing of the appeal, observed—"In the view which we take of the case it is not necessary that we should consider whether or not the property claimed really belonged to the plaintiff's father and on his death descended to the plaintiff. It appears certain that at and previous to the time of the conviction of Khan Bahadur Khan it was in his possession and under his control, and that it was seized and confiscated as a portion of his possessions. If so, the plaintiff's right of suit to recover it is now barred by the operation of s. 20 of Act IX of 1859. By that section the rights of persons not charged with the offences therein referred to in respect of any property seized or forfeited are saved. But such saving is subject to the stringent proviso in the latter part of the section, whereby all rights of suit in respect of such property are taken away, unless the suit [114] is instituted within one year from the seizure. The law being conceived in general terms, the Courts are not at liberty to introduce into it any exceptions, however just and reasonable they may appear and however consistent with the principles on which laws of limitation are ordinarily based. The law in question is a special law, and this provision was probably designed to promote the speedy ascertion and adjudication of all rights put forward to forfeited property. The exceptions in favour of minority and other legal disability which the general law of limitation of suits (Act XIV of 1859) contains, have no place in this Act and cannot be introduced by the tribunals, which are bound to give full effect to the law. Upon this principle the plaintiffs, notwithstanding that they were minors at the time of the seizure, can claim no exemption from the operation of s. 20, and assuming the property sued for to have really belonged to them, yet as it was seized as a part of the confiscated property of Khan Bahadur Khan, they can now maintain no suit for its recovery, more than one year having elapsed from the time of seizure. The appeals Nos. 16, 21 and 25 are decreed and No. 9 is dismissed, but without costs.

The decision of their Lordships of the Privy Council was pronounced by Sir Montague Smith, and it contains the following passages:—

"The only question in this appeal, which comes before their Lordships in the shape of a special case, is whether the suit brought by the appellants against the Collector of Bareilly and the purchasers from the Government, to recover certain landed property in Bareilly, is barred by limitation.

"The Act of Limitation which is relied on by the Government is Act IX of 1859. That Act was passed for the special purpose of providing a Court for the adjudication of claims by innocent persons upon the property of rebels which had been forfeited to the Government. It established a special Court, consisting of three Commissioners, and suspended the action of all other Courts in respect of such claims. Special modes of proceeding are established and various clauses in the Act relate to that special course

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of procedure. [115] But these are provisions in the Act which relate not merely to the Court so established and the procedure under it, but are of a general character and apply to the property forfeited in whatever Court the claims may be made regarding it. Ss. 17 and 18 are also clauses of a general nature, and so it appears to their Lordships is s. 20 which contains the limitation on which the Government rely. The clause is this, 'nothing in this Act shall be held to affect the rights of parties not charged with any offence for which, upon conviction, the property of the offender is forfeited in respect to any property attached or seized as forfeited or liable to be forfeited to the Government; provided that no suit brought by any party in respect to such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates.'

"It was suggested that this limitation was meant to apply only to claims prosecuted before the Court of Commissioners established by the Act, and it was contended that the Act was of a temporary nature, and that its provisions fell with the purpose for which it was passed. But the Act is not made temporary by any enactment. It was in part repealed by the general repealing statute of 1868, that is, Act VIII of 1868, and the mode of repeal is significant. It is not altogether repealed, for the general clauses to which I have referred, including s. 20, are saved from the operation of the repealing Act. The repeal and saving are both found in the schedule to Act VIII. It is clear from their being thus saved that these clauses were at that time considered by the Legislature to be of a general nature affecting claims to property which had been forfeited before whatever Court those claims might be prosecuted. The words are perfectly plain. No suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of the Act, and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment, and [116] that although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any person in respect of forfeited property.

"Assuming then that the case is within the Act, their Lordships will consider the other objections which have been raised. The answer first put forward was that this limitation could be held only to apply to some right, title and interest, using the words of the ordinary execution acts of the rebel himself. Now it is obvious that this cannot be the right construction of the Act. It would be a wholly insensible enactment if it were, because the Act assumes that the interest of the rebel is forfeited and it is only in respect of claims other than his that this limitation could operate. The Act is declared not to affect the rights of the parties in respect of the property seized. The property is the thing seized as forfeited, whether it be land or a jewel, and the right referred to is the right of an innocent party, other than the right of a rebel in that property.

"Another contention, which seems to have been the only one urged in the High Court so far as it appears from the judgment, is that a saving with respect to parties under disabilities must be taken to be by equitable construction implied in this clause. Their Lordships, however, think it is impossible that any Court can add to the statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has

prescribed to persons under disability. Where such enlargements have been intended they are found in the Acts containing the limitation as in the general Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it.

"It was said that the clauses in the general Statute, Act XIV of 1859, relating to disabilities might be imported into this Act, but this cannot properly be done. Act XIV is a code of limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it. It is to be ob-[117]served that, if it could be done, it would not assist the appellants because the limitation of Act IX is one year only, and the saving in favour of minors in s. 11 of Act XIV would not bring them within time, as a year elapsed after they came of age before the bringing of the present suit.

"One other objection requires to be noticed, that this Act was not retrospective. Undoubtedly Mr. *Doyne* was able to suggest cases in which hardship might arise to persons who would not have a full year to claim before they would be barred under the provisions of this Act, or even where the year might have elapsed between the date of the confiscation and passing of the Act. Although hard cases may arise, their Lordships consider that the Act is plainly retrospective in its operation, and includes claims to forfeited property which had been confiscated previously to its passing.

"Their Lordships are of opinion that the judgment of the High Court is right, and they must humbly advise Her Majesty to affirm it."

Reverting to the present case, I observe that Sheogobind Chand and Lalbehari Chand were zemindars of a ten annas share in mauza Sukurdeha and lambardars of the whole village, and they took illegal possession of the remaining six annas share that had been purchased at public auction by Ganesh Prasad. His widow, Musammat Gangan Kuari, alone sued them for possession, and in 1854 she obtained a decree. In 1855 she also dealt with the share as if she were the sole and absolute owner of it, for she sold it with all its rights and interests to Sheogobind Chand and Lalbehari Chand.

The plaintiff Badri Nath was separated in estate from his brother Ganesh Prasad, but he had a reversionary interest in the six annas share left by Ganesh Prasad, and when his brother's widow made an absolute sale of the share to Sheogobind Chand and Lalbehari Chand, he might have instituted against the vendor and vendees a suit, such as is now constantly brought in our Courts, to have the absolute sale declared to be void. He preferred no claim at all until 1886, and a suit of the description above referred [118] to has been barred for the last twenty years or more. In 1858 the purchasers of the six annas share became rebels, and consequently their estates, including the entire sixteen annas share of mauza Sukurdeha, were confiscated by the Government, and that village and other villages were granted to the defendants-appellants in compensation of losses they had sustained at the hands of the rebels, other estates having been awarded to them in reward of their loyal services. These are facts that are admitted by the plaintiff-respondent.

Judging from the deed of sale of 1855, neither Ganesh Prasad nor his widow, Gangan Kuari, was ever in possession of the six annas share in Sukurdeha; but even if that was not the case Sheogobind Chand and Lalbehari Chand had the whole sixteen annas share of Sukurdeha in their possession and under their control from the 25th October 1855, the date of

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the sale, and the whole village was seized and confiscated by the Government as a part of their estates on their becoming rebels in 1858.

At the time the village was confiscated by the Government Musammat Gangan Kuari had for nearly three years past ceased to have any interest whatever in mauza Sukurdeha. If Badri Nath considered that he had a right to the six annas share he should, when he saw the whole village confiscated by the Government and granted to the defendants-appellants, have immediately preferred his claim to the share in Court, as any person of ordinary intelligence and prudence would have done. Had he thus acted, his claim would have been adjudicated upon, and possibly he might have obtained a decree which would, on his sister-in-law's death, have given him possession of the share. He, however, omitted to have recourse to a procedure that he obviously should have adopted, and his claim is now, in my opinion, undoubtedly barred by s. 20 of Act IX of 1859, as explained by their Lordships of the Privy Council.

Badri Nath is not entitled to any sympathy. In 1854 when litigation about the share was going on between his sister-in-law and Sheogobind Chand and Lalbehari Chand, in 1855 when his [119] sister-in-law sold the property with all its rights and interests to the same two persons, in 1858 when Sheogobind and Lalbehari who were in proprietary possession of the whole of Sukurdeha, including the share in suit, were convicted of rebellion and the village was confiscated by the Government and was granted to the defendants, on all these occasions Badri Nath stood by and took no action whatever to assert his claims. He did not sue for possession when his sister-in-law died in 1874, and he did not bring this suit until the 6th March 1886, that is, only two or three days before the expiration of a period of twelve years from the death of Gangan Kuari and of about twenty-eight years, thirty-one years and thirty-two years respectively from the confiscation and grant, from the sale and from the decree above referred to. Apparently for thirty years or more he had no intention of preferring a claim for the share, and probably he was induced by some speculation or other to institute a suit when the period of twelve years from his sister-in-law's death was just about to close.

I would allow the appeal, reverse the decrees of the lower Courts and dismiss the suit with all costs.

STRAIGHT, J.—I am of the same opinion. *Appeal allowed.*

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13 A. 119 = 11 A.W.N. (1891) 16.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

HARGU LAL SINGH (*Defendants*) *v.* MUHAMMAD RAZA KHAN AND ANOTHER (*Plaintiffs*) *. [9th December, 1890.]

Execution of decree—Attachment—Incorrect description of property sought to be attached—Subsequent purchase of same property under a decree for pre-emption—Civil Procedure Code, s. 274.

In execution of a simple money decree against the holders of a *muafi* interest in a certain village, who did not possess any zamindari interest in that village, an attachment was obtained by the decree-holder in 1884 of "an eight biswas zemindari share of mauza *D*," and under that attachment a sale took place in

* First Appeal, No. 194 of 1888, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 26th June 1888.

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January 1886. Meanwhile, in December 1885, a decree for pre-emption in respect of a sale by the judgment debtors in 1881 of their *muafi* interests in the village, was decreed in favour of persons who were not parties to the litigation in which the attachment of 1884 was [120] effected. The plaintiffs (who were in possession) sued for a declaration of their right to the *muafi* interests as against the auction-purchaser under the sale of January 1886.

Held that the attachment in 1884 was not a good attachment of the *Muafi* interests of the judgment-debtors, and the auction-purchaser could not be held to have purchased those *Muafi* interests, and the title of the plaintiffs under their pre-emptive decree of December 1885 must prevail.

THIS was a suit for a declaration of the plaintiffs' right to certain property under a decree for pre-emption passed on the 21st December 1885, as against the defendant, who had obtained "formal possession" only of the same property under a sale in execution of a simple money decree, the sale having taken place on the 20th January 1886. The plaintiffs were in actual possession. The material facts of the case are stated in the judgment of Straight, J.

Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. *Abdul Majid* and Maulvi *Zahur Hussain*, for the respondents.

JUDGMENT.

STRAIGHT, J.—I am of opinion that the Subordinate Judge has rightly decided this suit in favour of the plaintiffs. The question between them and the defendant is a very simple one, and appears, from the following short facts which I may conveniently state.

On the 18th December 1880, one Imdad Husain obtained a money decree for a small sum against Bedar Shah. Bedar Shah was the father of Mahmud Shah, Firoz Shah, Timur Shah and Maksud Shah. Imdad Hussain sold his decree to two persons named Behari Lal and Makund Ram. On the 5th June 1881, Mahmud Shah and his two brothers executed a sale-deed of their *muafi* interests in Mauza Dhak Sahid, pargana Sambhal, in favour of one Mozaffar Ali for a sum of Rs. 6,500. The present plaintiffs, such sale having come to their knowledge, instituted a pre-emption suit, and upon the 21st December 1885, obtained a decree upon payment to the vendee-defendant of the sum of Rs. 5,580. Even if the title of the plaintiffs to the *muafi* interests of Mahmud Shah and two of his brothers therefore cannot be thrown back to an earlier date, they became by their pre-emptive decree the proprietors of that interest from the 21st December 1885. On the 20th January [121] 1886, Makund Ram and Behari Lal brought to sale the interests of Mahmud Shah and his two brothers in mauza Dhak Shahid, and the defendant purchased for a sum of Rs. 225. Upon the strength of that purchase he invoked the aid of the Civil Court executing that decree to give him possession, and formal possession was given him. In addition to that he obtained from the Revenue Court an order entering his name in lieu of Mahmud Shah and his two brothers in the revenue records. This is the cause of action for the institution of the present suit, and it is admitted that the plaintiffs are in actual possession and enjoyment under the title acquired by them upon the strength of their pre-emption decree. At first sight upon the statement of the facts, it would appear to be conclusively clear that the plaintiffs have a title, dated not later, at any rate, than the 21st December 1885, to the whole of the property of Mahmud Shah and his two brothers. That title must have a superior claim over and above that of the defendant, which was not acquired until the 20th January 1886. But Mr. *Jogindro Nath*, on behalf of the defendant-appellant, has ingeniously and ably

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argued that as an attachment was put upon the interest of Mahmud Shah and his two brothers at the instance of Makund Ram and Behari Lal on the 11th May 1884, and as the execution sale of the 20th January 1886, took place under that attachment, his title, so far as resisting the title of the plaintiffs is concerned, relates back to the date of his attachment order, or at least that the attachment of the 11th May 1884, was a prohibition to the sale by the judgment-debtors of their interests to Mozaffar Ali upon the 5th June 1884.

The question in my judgment before us, and before the learned Subordinate Judge below, therefore, fines down to this, was a good attachment of the *muafi* rights of Mahmud Shah and his two brothers put upon those rights on the 11th May 1884? I have asked Mr. *Jogindro Nath* to point out to me any other document beyond that numbered 21 and to be found at page 11 of the respondents' book, bearing upon the attachment. He was unable to do so, and indeed, with the exception of one other that we ourselves have discovered, and which is to be found at page 14 of the same [122] book, there is no other documentary evidence in this record to throw light upon the circumstances and the character of the attachment. There is, however, the oral evidence of a witness Bhola Nath, who was pleader for the decree-holders, who effected that attachment. He informs us to a certain extent as to what happened at the time it was made, and what he says does not help the defendant. Now taking the document at page 14, which bears date the 22nd April 1884, that appears to be an attachment issued in pursuance of s. 273 (s. 274 it ought to be) of the Civil Procedure Code, and the attached property is there described as the 8 biswas "*zamindari*" share of mauza Dhak Shahid, bearing a *jama* of Rs. 60, the property of the defendants. Document No. 21, at page 11, is a list of the property of Mahmud Shah and others, judgment-debtors, to be attached in the case of execution of decree of Behari Lal and Makund Ram and others, plaintiffs, against Mahumd Shah and others, judgment-debtors, situate in mauza Dhak Shahid, pargana Shambhal, dated the 11th May 1884. This, although professing to be a list, is in reality a document showing that an 8 biswas " *zamindari* " in mauza Dhak Shahid, bearing a revenue of Rs. 60 and belonging to the defendants, was attached, and that document is signed by the Amin, who did effect the attachment, and by the Munsif of the Court who had ordered that attachment to take place. It is perfectly clear to my mind that in both these documents, *viz.*, the formal orders under s. 274 of the Civil Procedure Code, and the report of what had been attached, what the decree-holder was attaching and had attached was an 8 biswas "*zamindari*" share of his judgment-debtors in the particular mauza, which *zamindari* share was stated as liable to a revenue of Rs. 60 a year.

Mr. *Jogindro Nath* for the appellant very frankly and rightly has admitted that Mahmud Shah and his brothers had no *zamindari* interests in Dhak Shahid at the time of this attachment, but that the interest they had was a *muafidar's*, which would necessarily be of very considerably greater value than a mere *zamindari* interest, such as that which was in fact attached.

[123] Not only have we the contents of these two documents, but again reverting to the deposition of Bhola Nath, who was the pleader acting on behalf of the decree-holders, Makund Ram and Behari Lal, he said—

"It did not appear to me from the *khewat* whether the property was *zamindari* or *muafi*, and therefore I described it to be *zamindari* property

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in the application. The *khewat* did not show that it was *zamindari*. I had stated it to be *zamindari* according to my judgment. With reference to the word *malguzari* mentioned in the 12th column of the copy of the *khewat*, I had considered it to be *zamindari*. I don't remember whether the Collector inquired of the Munsif that that property did not stand in the names of the judgment-debtors, but in that of Mozaffar Ali Khan. I don't remember whether any objection was taken. This case was transferred to the Collector and the sale was made by him." To the plaintiff's pleader :—"I got the property of the defendants attached considering it to be *zamindari*. I considered that property to be *zamindari*, and got the *zamindari* attached."

There can be no question that what was intended to be attached was the *zamindari* interest of the judgment-debtors, and what was attached was that *zamindari* interest. For the purposes of disposing of this appeal I do not think it necessary to go further and deal at length with what was in fact sold, though the proclamation of sale and the actual sale certificate, which is the document of title, leave no doubt in my mind that what was actually sold was the *zamindari* interest of Mahmud Shah and his two brothers, and what the certificate of the sale gave a title to was a *zamindari* interest.

The contention for the appellant comes to this, that where an attachment has been made of a judgment-debtor's *zamindari* interest and a sale has taken place in pursuance of that attachment and a certificate of sale granted for the *zamindari* interest, though the judgment-debtors possess no *zamindari* interest but a *muafi* interest, yet the auction-purchaser must be taken to have purchased a *muafi* interest. It would be a very strong thing to hold any such [124] view. It must be remembered that we are dealing with parties as plaintiffs, who had no share in the litigation under which the attachment was put upon the interests of the judgment-debtors in that matter. They are third parties wholly outside that litigation, who obtained a clean title upon the 1st December 1885, unless the attachment of 11th May 1884, can be maintained. I think that they are entitled to put the defendant upon strict proof that the attachment under which the sale to him took place was a good attachment in law, and that there was no such misdescription in it of the interests of the judgment-debtors as would mislead either purchasers at the auction to bid or persons interested in the property to refrain from coming forward and making any claim. For these reasons I think that the Subordinate Judge was right. I dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

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Before Mr. Justice Straight and Mr. Justice Tyrrell.

KALLU RAI AND OTHERS (*Judgment-debtors*) *v.* FAHIMAN AND OTHERS (*Decree-holders*).* [18th December, 1890.]

Civil Procedure Code. s. 206—Application to bring decree into conformity with the judgment—Execution of decree—Limitation—Act XV of 1877, *sch. ii, art.* 179 (4)—"*Step-in-aid of execution.*"

The granting of an application under s. 206 of the Civil Procedure Code to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holder; nor is such an application a "step-in-aid of execution" within the meaning of art. 179, schedule ii of the Limitation Act (XV of 1877).

Kishen Sahai v. *The Collector of Allahabad* (1) distinguished.

[F., 20 A. 304 (306)=18 A.W.N. 43; 27 A. 575 (578)=2 A.L.J. 287=A.W.N. (1905) 108; R., 17 A. 39 (40)=14 A.W N. 191; 25 A. 385 (386)=23 A.W.N. 80; 10 C.L.J. 467 (469)=3 Ind. Cas. 391 (392).]

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Madho Prasad*, for the appellants.

Mr. *Abdul Raoof* and Mr. *Abdul Majid* for the respondents.

JUDGMENT.

[125] STRAIGHT, J.—This appeal must prevail. On the 29th September 1883, a money decree was passed by the Court of the Subordinate Judge of Ghazipur in favour of the decree-holders, respondents. On the 28th June 1884, in consequence of there being some arithmetical defect in the decree, an application was made by the decree-holders to the Court which passed it under s. 206 of the Code of Civil Procedure for amendment of the decree. It is to be observed that an application under s. 206 contemplates that the judgment is correct, but the decree is not in conformity with, but is at variance with, the judgment. In the present case the decree was amended in the way prayed for by the Subordinate Judge on the 25th November 1885. The first application for the execution of the decree was made on the 5th November 1886. It was contended before the Subordinate Judge below, and it is contended here, that the execution of the decree of the 29th September 1883, was barred by limitation, because the first application for execution of the 5th November 1886, was made more than three years after the date of the decree. It was answered by the decree-holder that he is entitled to treat the order amending the decree of 25th November 1885, as giving him a new period of limitation and a fresh starting point; and that this view has been adopted by the learned Subordinate Judge upon the authority of *Kishen Sahai* v. *The Collector of Allahabad* (1). The judgment-debtor appeals to this Court, and his contention is, first, that the case is inapplicable, but that, if it is applicable, it is unsound, and the decree-holder is not entitled to calculate the period of execution of decree from the 25th November, 1885. With regard to the case of *Kishen Sahai* v. *The Collector of Allahabad* (1) I have looked into the facts as set out in the report and I find that the passage where Mr. Justice Oldfield in delivering the

* First Appeal, No. 33 of 1889, from an order of Babu Lalta Prasad, Subordinate Judge of Ghazipur, dated the 26th November 1888.

(1) 4 A. 137.

judgment remarks "the proceedings under this application were substantially of the nature of a review of judgment" probably had reference to the peculiar circumstances of a very peculiar case, in which the proceedings ostensibly under s. 206 of the Code of Civil Procedure were of such a character as that they could only properly have been dealt with by review of judgment. I therefore do not [126] think that the authority of *Kishan Sahai* v. *The Collector of Allahabad* (1) stands at all in my way in allowing this appeal. The application for amendment, which was made by the decree-holders in the case on the 28th June, 1884, was an application for amendment of decree pure and simple, and all that was asked for was to make a correction in it in a statement of certain figures, so as to make it a decree corresponding with the directions as to costs given in the judgment. It was suggested that we should regard the proceedings under s. 206 as amounting to a step-in-aid of execution, namely, under para. IV of art. 179, sch. II of the Limitation Act. I cannot take this view. The Court which has to deal with applications under s. 206 of the Code of Civil Procedure is the Court which passed the decree, and not the Court which is executing the decree. Further more it may be said in this case, that no application for execution of the decree has ever been made, and therefore no foundation has been laid for an application to take some step-in-aid of execution, that is to say, in furtherance of the execution of decree. I think that the application of the 5th November, 1886, was barred by limitation, and for these reasons I allow the appeal, reverse the decree of the lower Court and hold that the decree of the 29th September, 1883, was time-barred and cannot be executed.

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TYRRELL, J.—I entirely agree. *Appeal allowed.*

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BINDA (*Plaintiff*) v. KAUNSILIA AND ANOTHER (*Defendants*).*
[7th May, 1890.]

Hindu Law—Suit for restitution of conjugal rights—Desertion—Cruelty—Limitation—Act XV of 1877 *(Limitation Act)*, s. 23, *sch. ii, Nos.* 34, 35 *and* 120.

The texts of the Hindu law relating to conjugal cohabitation and imposing restrictions upon the liberty of the wife, and placing her under the control of her husband, are not merely moral precepts, but rules of law. The rights and duties which they create may be enforced by either party against [127] the other and not exclusively by the husband against the wife. The Civil Courts of British India, as occupying the position in respect of judicial functions, formerly occupied in the system of Hindu Law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband.

It is not necessary, as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant. The provisions of arts. 34 and 35 of the second schedule of the Limitation

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* Second Appeal, No. 1194 of 1887, from a decree of Babu Promoda Charn Banerji, Judge of the Court of Small Causes (exercising the powers of a Subordinate Judge) of Allahabad, dated the 3rd May 1887, reversing a decree of Babu Ganga Prasad, Munsif of Allahabad, dated the 25th February 1889.

(1) 4 A. 137.

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Act cannot be taken as applicable to suits of this description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Muhammadans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with s. 23 of the Limitation Act.

Desertion by a wife of her husband is permitted by the Hindu Law under certain circumstances, but the insanity of the husband will not justify his desertion by the wife. In any case desertion does not terminate the relation of husband and wife. A suit for restitution of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant.

[N.F., 28 M. 436 (437); F., 27 A. 96 (97)=A.W.N. (1904) 173=1 A.L.J. 433; Appl., 28 C. 751 (762)=5 C.W.N. 673; R., 34 A. 412 (415)=9 A.L.J. 784 (788) =16 Ind. Cas 124; 16 B. 714 (716); 21 B. 610 (613); 3 B. 307 (311); 28 C. 37 (45)=5 C.W.N. 195; 34 C 971 (984)=9 C W N 510=1 C L.J. 283; 11 A.L J. 160 (164); 1 C.L.J. 73 (75); 18 Ind. Cas. 713 (714); 31 P.R. (1908)= 76 P W.R (1908)=152 P.L.R. (1908); Com., 25 B. 644 (655) (F.B.)=3 Bom. L.R. 371 (377); D., 13 Ind. Cas. 609 (612).]

THE facts of this case were as follows :—

The plaintiff, Binda, instituted a suit against his wife, Musammat Kaunsilia, and one Bechu, who was alleged to be harbouring her, for restitution of conjugal rights and for recovery of his wife, on the 16th November. 1886. The Court of first instance decreed the plaintiff's claim. The lower appellate Court reversed the decree of the first Court and dismissed the suit as barred by limitation. The plaintiff then appealed to the High Court and the case came before Mahmood, J., who, by his order of 17th July, 1888, referred it to a Bench consisting of Straight, J., and himself. On the 31st July, 1889, the Bench so constituted remanded the case under s. 566 of the Code of Civil Procedure to the lower appellate Court for determination of the following issue :—Whether on the 24th October 1886, or about that time, as asserted in paragraph 4 of the plaint, there was a demand made by the plaintiff to his wife, the defendant, Musammat Kaunsilia, to return to him and a refusal by [128] her to do so?" On this issue the lower appellate Court recorded certain findings on the 16th September, 1889, which findings are fully set forth in the judgment of Mahmood, J. The case then came on for hearing before Straight and Mahmood, JJ.

Pandit *Sundar Lal* for the appellant.

Mr. J. *Simeon* for the respondent.

JUDGMENT.

MAHMOOD, J.—The preliminary facts of this case and the points of law to which they give rise were set forth by me in my order of the 17th July, 1888, whereby the case was referred to a Bench of two Judges consisting of my brother Straight and myself, and upon the case coming on for hearing before us, we, by our order of the 31st July, 1889, remanded the case under s. 566 of the Code of Civil Procedure to the lower appellate Court for a clear finding on the issue, whether on the 24th October, 1886, or about that time (as asserted in paragraph 4 of the plaint) there was a demand made by the plaintiff to his wife, the defendant, Musammat Kaunsilia, to return to him, and a refusal by her to do so.

Under this issue the learned Judge of the lower appellate Court has found that the elopement of the plaintiff's wife and his demand for her return and her refusal took place more than five years before suit, that

Musammat Kaunsilia, the defendant, had ever since been co-habiting with Bechu, defendant, and by him has given birth to two children, one of whom is still alive, and that neither demand by the husband nor refusal by the wife of conjugal rights was proved to have been made within two years before the suit.

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To these findings no objections have been taken by either party under s. 567 of the Civil Procedure Code, but the learned pleader for the respondent argues that these findings are fatal to the suit. He contends :—

First, that a remedy by suit for restitution of conjugal rights by enforcing return and cohabitation is not contemplated by the Hindu Law, and therefore a suit of this character is not entertainable by the Civil Court.

[129] *Secondly*, that even if such a suit is maintainable, a definite demand and refusal of restitution of conjugal rights is a condition precedent to the maintainability of such an action.

Thirdly, that after such demand has been made the lapse of two years will bar the action for ever under clauses 34 and 35 of sch. ii of the Limitation Act (XV of 1877).

Fourthly, that under the circumstances of this case the defendant, Musammat Kaunsilia, must be treated as a deserted wife and no longer amenable to the husband's demand for restitution of conjugal rights under the Hindu Law, and

Fifthly, that in any case the granting of a decree for restitution of conjugal rights is entirely within the discretionary power of the Court, which, under the circumstances of this case, should not be exercised.

The argument for the appellant contests all these points and aims at showing that the suit is maintainable, that it is not barred by limitation, and should be decreed under the Hindu Law.

It will be convenient to consider the case in the order of the points urged on behalf of the respondent.

Upon the first point I am of opinion that there is ample authority in the Hindu Law to show that it is the duty of a wife to live with her husband in conjugal cohabitation, discharging such functions as the domestic law of the Hindus assigns to her. These authorities are collected in Colebrooke's Digest of Hindu Law, Volume II, Book IV, Chapter I and Chapter II, and, when read together, furnish a very interesting and instructive picture of the domestic conjugal life of the husband and wife as contemplated by the Hindu Law.

Some of these texts may be quoted here. Perhaps the most important is one of Manu, with which Chapter II of Colebrooke's Digest (Vol. II, page 137) opens, on the duties of a wife :—

"In childhood must a female be dependent on her father; in youth on her husband; her lord being dead, on her sons;...a [130] woman must never seek independence. Never let her wish to separate herself from her father, her husband, or her sons; for, by a separation from them she exposes both families to contempt. She must always live with a cheerful temper, with good management in the affairs of the house, with great care of the household furniture and with a frugal hand in all her expenses. Him to whom her father has given her, or her brother, with the paternal assent, let her obsequiously honour, while he lives; and when he dies, let her never neglect him. The recitation of holy texts and the sacrifice ordained by the Lord of creatures are used in marriages for the sake of procuring good fortune to brides; but the first gift or *troth plighted* by the husband is the primary cause and origin of *marital dominion*. When the

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husband has performed the nuptial rites with texts from the *Veda* he gives bliss continually to his wife here below, both in season and out of season; and he will give her happiness in the next world. Though inobservant of approved usages, or enamoured of another woman, or devoid of good qualities, yet a husband must constantly be revered as a *God* by a virtuous wife." (Manu, Ch. V, vv. 148-54). "Day and night must women be held by their protectors in a state of dependence; but in lawful and innocent recreations, though rather addicted to them, they may be left at their own disposal. Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence" (Manu, Ch. IX, vv. 2 and 3). "Woman must, above all, be restrained from the smallest illicit gratification; for, not being thus restrained, they bring sorrow on both families. Let husbands consider this as supreme law ordained for all classes; and let them, how weak soever diligently keep their wives under lawful restrictions (Manu, Ch. IX, vv. 5 and 6). Let the husband keep his wife employed in the collection and expenditure of wealth, in purification and female duty, in the preparation of daily food and the superintendence of household utensils" (Manu, Ch. IX, v. 11). The production of children, the nurture of them when produced, and the daily superintendence of domestic affairs are peculiar to the wife. From the wife alone proceed offspring, good household management, solicitous attention, most [131] exquisite caresses and that heavenly beatitude which she obtains for the manes of ancestors and for the *husband* himself. She who deserts not her lord but keeps in subjection to him her heart, her speech and her body, shall attain her mansion in heaven, and, by the virtuous in this world be called *Sadhevi* or *good and faithful*. But a wife by disloyalty to her husband shall incur disgrace in this life, and be born *in the next* from the womb of a *Shakal*, or be tormented with horrible diseases which punish vice." (Manu, Ch. IX, vv. 27—30).

These texts from Manu are supported by many other sacred texts of the Hindu Law jutifying what Dr. Gurudas Banerji has said:—

"No system of law has ever surpassed our own in enjoining on the wife the duty of obedience to the husband and veneration for his person." (Tagore Law Lectures, 1878, p. 120).

"It follows from the very nature of the matrimonial relations that the husband and the wife must each be entitled to the society of the other. It is one of the express conditions in the nuptial vow of the Hindus that each party is to become the associate of the other." (*ib.*, p. 114). This is well fortified by original authorities and the text of *Harita*, in propounding the conduct enjoined to married women, begins by saying:—

"The wife is the home; a man should not consider his home a habitation ungraced by a wife; therefore is she another home." The text which Colebrooke has fully quoted (Vol. II, pp. 141—143) goes on to give minute details of the domestic duties of the wife; but as illustrative of them I may quote the more succinct text of *Sancha* and *Lichita* (*ib.*, p. 139.)—

"For every succeeding day let the wife clean the vessels used at meals; let her sweep the dwelling-house and gate, when clean, preserve it so; let her provide curds, rice, *durva* grass, new leaves and blossoms for oblations; let her reverently salute her husband's parents, and afterwards perform the necessary business of the household; let her eat nothing before the Gods and guests are satisfied, [132] nor before her husband *has eaten* except drugs *swallowed* medicinally."

Dr. Gurudas Banerji in his Hindu Law of marriage (Tagore Law Lectures, 1878, p. 118) sums up the general effect of the authorities in the following words :—

"Under the Hindu Law, as indeed under most other systems, the liberty of the wife is liable to be considerably restrained by the husband. The duty of attendance on her husband, which is so strongly inculcated, obliges her to follow him wherever he chooses to reside ; and it is a general principle of law that the domicile of the wife follows that of her husband. She is also bound to refrain from going to any place where her husband forbids her to go."

I have dwelt upon these authorities especially in view of the circumstance that in such cases relating to marriage we are expressly required by s. 37 of the Civil Courts Act (XII of 1887), which has only reproduced the provisions of s. 24 of Act VI of 1871, to apply the Hindu Law and adopt that law as the rule of decision. The rules of that law are explicit in defining the reciprocal duties and obligations of the husband and the wife, and, whilst the husband is bound to maintain and support her and protect her, the wife is bound to reside with him in conjugal cohabitation, discharging such domestic functions as the law has prescribed for her. The sacred Hindu texts on the subject in describing the duties of a wife no doubt prescribe many matters of detail which can be regarded as only moral precepts, as distinguished from legal obligations, and such distinction is apparent from the context of the texts themselves, and the words in which the precepts are expressed ; but I am convinced that the texts, so far as they relate to conjugal cohabitation and impose restrictions upon the liberty of the wife and place her under the control of her husband, are rules of law creating a legal right in the husband based upon the jural relation which exists between him and the wife. Such rights are not to be confounded with mere moral precepts, for they are based upon texts similar to those which impose upon the husband the corresponding duty of maintaining [133] his wife and discharging other obligations which the law recognizes and enforces.

To this extent, indeed, it cannot be seriously contended that the right of conjugal cohabitation is not a legal right under the Hindu Law of marriage, mutually available to the husband and the wife. What has been, however, seriously contended is, that, notwithstanding such rights being legal rights under the Hindu Law, that system does not prescribe and does not contemplate any remedy when either the husband or the wife infringes the obligations which those rights create, and that therefore a suit for restitution of conjugal rights is unknown to the Hindu Law and cannot be maintained in our Courts.

I am of opinion that this argument is unsound, both upon general principles of jurisprudence, and also as matter of Hindu Law. The maxim *ubi jus ibi remedium* is a maxim of universal application, because the law does not recognize a right which cannot be enforced. It would be needless to enter into any discussion that the rules of law and equity which justify a Court in declining to grant specific relief, or authorize them to impose limitations upon a right when decreed, form no contradiction of the general maxim which I have cited. I hold therefore that the right of conjugal cohabitation when infringed may, upon general principles be enforced by a suit for restitution of conjugal rights. In *Moonshee Buzloor Ruheem* v. *Shumsonnissa* (1), the Lords of the Privy Council

(1) 11 M.I.A. 551.

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said, "If the law which regulates the relation of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and, unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice."

So far as the Hindu Law as to restitution of conjugal right is concerned, the question was raised before Mr. Justice Pinhey of the Bombay High Court in the well-known case of *Dadaji Bikaji* v. *Rukhmabai* (1), and that learned Judge, accepting the plea of the wife, who was defendant, held that such a suit was unmaintain-[134]able as it was not recognized by the Hindu Law. The decision of the learned Judge was however appealed to a Bench consisting of Sargent, C.J., and Bayley, J., (2) and the report shows that much learned and able argument was addressed to the learned Judges on both sides of the question and all the principal authorities were cited. It was there argued by Mr. Telang (*vide* p. 307), on behalf of the wife who was resisting the suit, that although the Hindu Law prescribes duties of husband and wife, it does not provide any mode of enforcing their performance, that such duties are merely religious and cannot be enforced by the civil Courts. The learned counsel upon the authority of *Khetramani Dasi* v. *Kashinath Das* (3), drew a distinction between moral as distinguished from legal obligations and pointed out that "the civil Courts now exercise the authority which belonged to the King when the Hindu Law books were written; so that functions of the Court are to be ascertained by reference to what are laid down as the duties of the King"; and with this premise he affirmed that the only mode of enforcing conjuugal duties was by fine to the King, and that the only case contemplated by the Hindu Law was that of a husband abandoning his wife when the only result would be a fine to the King, but that there was no provision at all for the case of a wife separating from her husband. And in the absence of such provision it must be assumed that a similar remedy or punishment would be applicable to her, but that in neither case was restitution of conjugal rights ordained or provided for. For this contention the learned counsel relied mainly upon the *Vyavahara Mayukha*, Chap. XX. (Stokes Hindu Law Books, p. 164), and emphasized it by saying that the *Vyavastha Chandrika* contained no provision for restitution. I do not think that the argument can be more ably put than the manner in which it was addressed by Mr. Telang on that occasion, and I will examine it from the Hindu Law point of view itself, especially as the learned Judges of the appellate Bench, who rejected Mr. Telang's argument and reversed the decree of Pinhey, J., based their judgment upon the state of the case law rather than upon any consideration of the texts of the Hindu Law.

[135] Now there can be no doubt that under the system of Hindu jurisprudence the administration of justice is one of the functions of the sovereign, and that references to his authority in the Hindu Law books must be taken as a guide by our Courts in administering the Hindu Law in such cases. But, whilst this is so, it must also be affirmed as an undoubted proposition that throughout the Hindu Law texts the King, as the arbiter and dispenser of justice, is regarded as the potector of rights, the punisher of wrongs and the awarder of remedies to injured parties. Without these three powers, which must of course be exercised according to law, it would

(1) 9 B. 529. (2) 10 B. 301. (3) 2 B.L.R.A.C. 15,

be vain to assign to the King what the Hindu Law undoubtedly assigns to him, namely, judicial functions.

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What then are the behests of the Hindu Law as to the effects of marriage upon the parties thereto? To use the language of an eminent Hindu lawyer, Shyama Charan Sarkar, in his *Vyavastha Chandrika* (Vol. II, p. 480).

"The effect of marriage is the union of the bride and bridegroom, upon the performance of the nuptial ceremonies and rites, more especially by the recitation of this text of the *Veda*: 'Bones (identified) with bones, flesh with flesh, and skin with skin,' the husband and wife become as it were one person. So, *Manu* says:—The 'husband is even one person with his wife.' So also *Virhaspati*:—'In Scripture, and in the Code of Law, as well as in popular practice, the wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives.'"

Such being the legal contemplation of the effects of marriage, the same learned author sums up the result of the authorities (p. 485, s. 719) by laying down that "marriage properly contracted by the performance of the nuptial rites is indissoluble, and the reciprocal relation of the married pair endures even after the natural death of one or both of them." He bases this conclusion especially on the text of *Manu* (Ch. IX, v. 46). "Neither by sale nor desertion can a wife be released from her husband; thus we fully acknowledge the law enacted of old by the Lord of creatures." [136] We then have the text of *Narada*:—"It is a crime in them both, if they desert each other, or if they persist in mutual altercation, except in the case of adultery by a guarded wife."—(Colebrooke's Digest, Vol. II, p. 130, Text LXIII).

Now the argument of Mr. Telang before the Bombay Court, was that this prohibition against desertion was only a moral or religious obligation and could not be legally enforced by the King, his power being limited to fine. The learned advocate however seems to have overlooked, or perhaps underrated, some of the sacred texts to be found in Colebrooke's Digest (Vol. II. p. 129). Text LIX is from *Narada*:—"A husband who abandons an affectionate wife, or her who speaks not harshly, who is sensible, constant and fruitful, *shall be brought to his duty* by the King with a severe chastisement."—Now reading this text as I do, it distinctly contemplates authority in the King to enforce the performance of conjugal duties by the husband, and chastisement is mentioned there as the means for enforcing those obligations. It is true, as the text of *Vishnu* (LX) shows, that "the man who deserts a faultless wife shall suffer the same punishment" as a thief, and it is also the fact that a punishment is prescribed by other sages also:—For instance *Yajnyawalcya* lays down:—

"He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son and speaking kindly, shall be compelled to pay the third *of his wealth*, or, if poor, to provide a maintenance for that wife."

These and other penalties are no doubt prescribed by the law for the husband who illegally deserts his wife, but it does not follow (and indeed such a supposition is expressly contradicted by the text of *Narada* which I have already quoted) that the judicial authority of the sovereign is limited to chastisement and does not extend to enforcing the performance of conjugal obligations. The words of *Narada's* text are:—*shall be brought to his duty by the King with a severe chastisement*"—so that the text fairly read shows that punishment is ancillary to the remedy of restitution of

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conjugal rights. So these texts have been interpreted by the eminent Hindu [137] lawyer, Shyama Charan Sarkar, in his *Vyavastha Chandrika* (vol. II, p. 487, s. 721) where he sums up the rule in the following terms:—

"Without any of the faults recognized by the law, as above, a wife must not be deserted. He who deserts a good or faultless wife must be brought to his duty by the ruling power, or compelled to pay a third of his wealth, or, if poor, to provide a maintenance for her."

This, in my opinion, is a correct statement of the Hindu Law on the subject of unlawful desertion of a wife by the husband, and it leaves no doubt in my mind that restitution of conjugal rights at the instance of the wife is contemplated by the Hindu Law.

But Mr. Telang's argument before the Bombay Court went further, as the learned advocate broadly affirmed, with reference to the Hindu Law texts, that "there is no provision at all for the case of a wife separating from her husband," and that, although the caste might interfere, the King is nowhere referred to as having any authority in the matter of a wife unlawfully deserting her husband. This argument has been repeated in this case, as indeed the other portions of Mr. Telang's argument, by the learned pleader for the respondent, who has indulged in an equally broad negative of the King's authority over a deserting wife. But it seems to me that this broad negation proceeds upon ignoring some important texts of the Hindu Law. For instance *Manu* (Ch. IX, v. 83) prescribes:—

"If a wife legally superseded shall depart in wrath from the house, she must either instantly be confined, or abandoned in the presence of the whole family."

The reasonable interpretation to be placed upon this text is that the confinement contemplated by it is a lawful confinement to be awarded by the lawful authority after some sort of adjudication, such authority being naturally the King. In other words, I am strongly inclined to hold that the confinement contemplated by the text is much the same as the imprisonment of a judgment-debtor who disobeys a decree for restitution of conjugal rights provided by s. 260 of our Code of Civil Procedure. But the authority of the King over a wife wrongfully deserting her husband does not rest [138] upon this inference or analogy alone. There is an express text of *Manu*, which I quote with all the greater emphasis because it is characteristic of the ancient spirit of the Hindu Law and shows how extensive are the powers of the King in respect of wrongful desertion of her husband by the wife. The text stands in that sacred institute as verse 371 of Ch. VIII:—

"Should a wife proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the King condemn her to be devoured by dogs in a place much frequented."

It is true this text occurs in the chapter on Criminal Law, but, as I have repeatedly said, the Courts of justice in interpreting such an ancient system of law as Hindu jurisprudence, and in applying its rules to modern life must not forget that in those ancient times juristic arrangement of legal ideas, as now understood, was not known or recognized, and the institutes of *Manu* as a Code are themselves a very good illustration of how those sacred law-givers mixed up religious, civil and criminal rules of law. To this I may add the observation that in regard to matrimonial disputes in particular, other systems also, such as the Muhammadan, and even the English law, do not always draw marked lines of distinction between the ecclesiastical, civil and criminal aspect of the case, and proceedings in

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such causes are regarded as *quasi*-criminal. Bearing this in mind it cannot be contended that the texts of Hindu Law give no temporal power to the King over a deserting wife, and that the only punishment or remedy contemplated is of a moral or religious character. It is of course clear that, once the extreme authority of the sovereign is established, the manner in which he is to protect rights or enforce them is to be regulated by the conditions of the times. Our Courts cannot of course condemn a deserting wife to any such punishment as that contemplated by the text; but it stands to reason that if the King could in ancient times "condemn her to be devoured by dogs." Our Courts in modern times must be held to have the much lesser power of imprisoning her if she, having illegally deserted her husband, refuses to obey a decree for restitu-[139]tion of conjugal rights under s. 260 of the Code of Civil Procedure.

I think I have said enough to show that according to the spirit and letter of the Hindu Law itself, enforcement of conjugal right by judicial authority awarding restitution does not fall beyond the scope of the King's functions, and therefore not beyond the jurisdiction of the Civil Courts in modern times. This conclusion is fully borne out by a long course of authoritative decision of the Courts, as was pointed out by Sargent, C.J., in his judgment in *Dadaji Dhikaji* v. *Rakhmabai* (1), and I wish to quote a passage from that judgment, as it represents in language better than any I can use the manner in which I myself regard the subject and the views and conclusions at which I have arrived in this case. Referring to the case-law on the subject, Sir Charles Sargent went on to say :—

"We could not, therefore, with propriety entertain any objection which goes to the root of the jurisdiction such as that urged by Mr. Telang, *viz.*, that the Hindu Law books do not recognize a compulsory discharge of marital duties, but treat them as duties of imperfect obligation to be enforced by religious sanction. We may, however, remark that, although no text may be found in the Hindu Law books which provides for the King ordering a husband or wife to return, no text was cited forbidding or deprecating compulsion, and that it was admitted that the duties appertaining to the relationship of husband and wife have always been the subject of caste discipline, and, therefore, that with the establishment of a systematic administration of justice, the Civil Courts would properly and almost necessarily assume to themselves the jurisdiction over conjugal rights as determined by Hindu Law, and enforce them according to their own modes of procedure."

This leads me to the second part of the argument addressed on behalf of the respondent, namely, that a definite demand by the husband of conjugal rights and refusal by the wife is a condition precedent to the maintainability of such a suit:—It is conceded that there is no text of the Hindu Law which enjoins any such [140] rule, but it is contended that the matter is one of procedure and must therefore be decided by affirming the necessity of an antecedent demand upon general principles of procedure. Now, so far as general principles are concerned, I am of opinion that the elopement of a wife and her wrongful withdrawal of herself from her husband's home and cohabitation with him is sufficient to constitute a cause of action for a suit for restitution of conjugal rights, the fact of the wrongful desertion itself being an infringement of a right which can be enforced. The use the language of Sargent, C.J., in *Dadaji Bhikoji* v. *Rukhmabai*(1) "the gist of the action for restitution of conjugal

(1) 10 B. 301.

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rights is that married persons are bound to live together, and that one or other has withdrawn himself or herself without lawful cause." Taking the analogy of other systems, the rule contained in s. 32 of the Indian Divorce Act (IV of 1869) seems to me to proceed upon sound general principles. It lays down that "when either the husband or wife has without reasonable excuse withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly." There is nothing said as to the necessity of an antecedent demand as a condition precedent to a petition for restitution of conjugal rights, and the section seems to proceed upon the general principle of the English Law and practice of the Divorce Court till such practice was altered comparatively recently by a new rule (No. 175) by the Judge Ordinary under the power conferred upon him by statutes of Parliament. The rule is printed in an Appendix to Browne's Treatise on Divorce and Matrimonial causes (4th ed., p. 548). The general effect of the rule is that there must be a written demand of cohabitation by the petitioner and the lapse of reasonable opportunity of compliance therewith before the petition is registered; but there are some cases cited by Mr. Browne at page 90 of his work showing that the strictness **[141]** of the rule is liable to be dispensed with and its application modified in cases where personal service of the written demand cannot be had on the party respondent. The rule itself was not framed till 1869, and I am not aware that it has ever been introduced into India even in cases governed by the Indian Divorce Act. Much less am I aware of any such rule being applied by our Courts to cases of restitution of conjugal rights among Hindus.

But it is contended on behalf of the respondent as preliminary to the third part of the argument that the general rule has been altered by the provisions of Nos. 34 and 35, sch. II of the Limitation Act (XV of 1877). The former of these clauses prescribes limitation of two years for suits for the recovery of a wife, and the time from which the period begins to run is stated to be "*when possession is demanded and refused.*" Similarly the latter clause in prescribing the same period of limitation for suits for the restitution of conjugal rights states that such period is to be reckoned from the time "*when restitution is demanded and is refused by the husband or wife being of full age and sound mind.*" It is contended that the necessity of a demand being a pure matter of procedure *ad litis ordinationem*, and the law of limitation appertaining to the same branch of law, the words of the Limitation Act which I have quoted must by necessary implication be taken to abrogate, modify, or add to the rules of the personal law of the Hindus and Muhammadans on the subject, and that therefore there can be nothing inconsistent with the protection of native laws guaranteed by s. 37 of the Civil Courts Act (XII of 1887), if in such cases of restitution of conjugal rights the Court insists upon a demand and refusal *ante litem motam* being established, and throws out the suit as barred *in limine* where no such demand has been made.

I have considered this contention with all the greater anxiety as the well recognized rule of interpreting statutes cannot be ignored that the Legislature, is not to be unnecessarily credited with either surplusage or inconsistency, and before I express my opinion upon this point I think it is necessary to realize the exact extent to which the argument logically

leads. The argument, [142] relying as it does mainly upon the words of the third column of No. 35, must necessarily involve the result that for the maintainability of a suit for restitution of conjugal rights, not only are a demand and refusal indispensable, but also that such demand or refusal must be made by the husband or the wife, when he or she is "*of full age and sound mind.*" So that, in other words, if the contention is sound, the Limitation Act must be taken to render restitution of conjugal rights unavailable either by or against minors and insane persons, and to abolish such a suit where either of the parties is suffering from such disabilities.

Then arises the serious question: Did the Legislature by framing No 35 of the Limitation Act intend or comtemplate any such serious results, involving, as they do, interference with the native personal laws of marriage and conjugal relations? In order to answer this question it is necessary to bear in mind some of the most important rules of the interpretation of statutes. "The preamble of a statute has been said to be a good means to find out its meaning, and, as it were, a key to the understanding of it, and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted for the purpose of solving any ambiguity or of fixing the meaning of words which may have more than one, or *of keeping the effect of the Act within its real scope*, whenever the enacting part is in any of these respects open to doubt." (Maxwell, p. 52.) "But the preamble cannot either restrict or extend the enacting part, when the language of the latter is plain, and not open to doubt, either as to its meaning or its scope." (*ib.*, p. 56)

Similar is the effect of what Mr. Wilberforce has stated to be the rules in his work, and I have no doubt that the preamble of a statute is the most important source of information for ascertaining the object and intention of the Legislature and the scope of the enactment. This being so, there are other equally well recognized principles of interpretation, which have been well stated by Mr. Maxwell in his well known work on the interpretation of statutes (pp. 95, 96). "Before adopting any proposed construction of a [143] passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the Legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is found sometimes necessary to depart not only from the primary and literal meaning of the words, but also from the rules of grammatical construction when it is improbable that they express the real intention of the Legislature; it being more reasonable to hold that the Legislature expressed its intention in a *slovenly manner* than it intended something which it is presumed not to intend. One of these presumptions is that the Legislsture does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakeable implication, or in other words, beyond the immediate scope and object of the statute. In all general matters beyond the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with *irresistible clearness*, and to give any such effect to general words, simply because in their widest and perhaps natural sense they have that meaning, would be to give them a meaning in which they were not really used. It is therefore an established rule of construction that general words

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and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the Act, and as not altering the general principles of the law."

An illustration of the application of these rules is given by Mr. Maxwell (p. 104) on the authority of *Vane* v. *Vane* (1), where "it was held that the provision of the statute of Limitations, 3 and 4 Will. IV, Cap. 27, s. 26, which deprives the owner of lands of the right of suing in equity for their recovery, on the ground of fraud, from a purchaser who did not know or have reason to believe that any such fraud had been committed, was to be construed, subject [144] to the presumption that the Legislature had not intended, by its general language, to subvert the established principles of equity on the subject of constructive notice, and was therefore read as meaning that the purchaser did not know or have reason to believe either by himself, or by some agent whose knowledge or reason to believe is, in equity, equivalent to his own."

I have dwelt upon these principles of interpretation because I think they apply with equal force to the statute law of British India, and I will now consider what effect they have upon the interpretation of the Indian Limitation Act (XV of 1877) with reference to the particular question now under discussion.

First, then, we find that the preamble in defining the object and scope of the enactment mentions limitations of suits, &c., and acquisition of ownership of easements and property as the subjects in regard to which legislation was undertaken. There is not a word in the preamble to show that any alteration of the nature of personal laws of marriage and conjugal relations was intended, and in the absence of explicit declaration, either in express terms or unmistakable implication, the scope of the enactment cannot be extended beyond the preamble, unless the body of the Act points to a different conclusion by employing enacting words of "irresistible clearness." To hold otherwise would be credit the Legislature with disturbing well-settled existing rights of persons and property by indirect and almost surreptitious methods; and this is one of the reasons why in interpreting statutes it is important to bear in mind the distinctions between words and phrases which are intended to be merely declaratory or enabling and those which are employed to convey a mandate or prohibition by directory or imperative terms. A legislative mandate cannot be evolved from inferences based upon mere use of words without expressly enacting terms, and this rule applies with especial force where a mandate or prohibition is sought to be evolved from words in the body of the Act referring to matters which fall beyond the scope and purview of the Act as represented in its preamble.

[145] Now it is clear that the words employed in clauses 34 and 35 of sch. II of the Limitation Act are merely descriptive and in no sense enacting words conveying in themselves any mandate or prohibition. The first column describes the nature of suits, the second mentions the period of limitation, and the third states the starting point of such period. Taking the three columns together by themselves there are no enacting words expressing any mandate or prohibition, directory or imperative in its nature, and it is only when they are read with the enacting s. 4 of the enactment that they can have any permissive or prohibitive efficacy. But what does s. 4 say? It simply lays down that suits, &c., filed after the period of limitation prescribed therefor by the second schedule

(1) L.R. 8 Ch. 383.

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of the Act shall be dismissed. It does not say that words and phrases employed in the third column of the schedule to describe the starting point of the period of limitation are intended to serve more than a descriptive purpose, and that from them may be evolved rules conveying mandate or prohibition, abrogating, modifying or adding to the rules of the substantive laws falling beyond the scope and purview of the preamble. Holding these views I am unable to hold that the words in the third column of No. 35 of the Limitation Act are to be read or interpreted as if the statute laid down the following propositions :—

(1) No suit for the restitution of conjugal rights shall be maintained unless restitution is previously demanded and refused.

(2) No suit on behalf of a minor, or a person of unsound mind, for restitution of conjugal rights shall be maintainable.

Yet such is the necessary logical result of the contention for the respondent in this case. I hold that the words in the third column of Nos. 34 and 35 are merely descriptive of the starting point of the period of limitation, that they only proceed upon an assumption that the Native laws governing marriage and conjugal relation require a demand, but that they are not enacting words laying down any rules involving any abrogation or modification of the Native laws or addition to them. They must be taken to leave the Native laws undisturbed, and the effect of the two articles [146] cannot therefore be more than that of furnishing a general indication that the Legislature intended two years to be the period of limitation for such suits to be calculated from the starting point described in the third column, where such description applies; but that in other cases the matter would be governed by the ordinary rules of applying limitation calculating it from the time when the right to sue accrues. In other words, I hold that in cases where the personal law of the parties does not require antecedent demand, nor deprives minors and persons of unsound mind of the conjugal right of cohabitation, No. 35 of the Limitation Act has no application, nor No. 34, but that the suit would fall under the general provisions of No. 120 of the Limitation Act. This interpretation no doubt impairs and fritters away the efficacy of Nos. 34 and 35 by limiting their applicability, but I am afraid such must necessarily be the case where the Legislature employs terms which either omit to provide for cases which may arise, or which limit the application of any particular rule to any particular class of cases. Instances of this are to be found in the reported cases.

In *Nath Prasad* v. *Ram Paltan Ram* (1), a Full Bench of this Court, whilst deploring the anomaly which their ruling involved, held that No. 10 of the Limitation Act, which provides one year's limitation for suits for pre-emption, did not apply to a suit to enforce a right of pre-emption in respect of a conditional sale of a share of an undivided *Mahal*, and that such suit therefore fell under the general provisions of No. 120 which prescribes six years' limitation. This was followed in *Rasik Lal* v. *Gajraj Singh* (2) and *Ashik Ali* v. *Mathura Kandu* (3) and the rule was carried further in *Durga* v. *Haidar Ali* (4) and *Udit Singh* v. *Padarath Singh* (5).

Nor is the applicability and efficacy of Nos. 34 and 35 impaired and frittered away only by the considerations which I have described.

[147] Their efficacy, as furnishing a bar by limitation, is almost dissipated also by other considerations which I now proceed to discuss. I

(1) 4 A. 218. (2) 4 A. 414. (3) 5 A. 187. (4) 7 A. 167. (5) 8 A. 54.

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have already pointed out that the enacting words which convey a mandate rendering these two articles operative as bars by limitation, are the terms of s. 4 of the Limitation Act, which imperatively require the dismissal of suits instituted after the lapse of the period of limitation prescribed in the second schedule. But this imperative mandate in express terms qualifies itself by subjecting the limitation contained in the schedule to the provisions contained in s. 5 to s. 25 of the Limitation Act. One of the most important of those sections is s. 23 which runs as follows:—

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

Before I discuss the effect of this section I must point out that the section as it now stands in the Limitation Act (XV of 1877) has taken the place of ss. 23 and 24 of the old Limitation Act (IX of 1871), the former of which related to successive and continuing breaches of contract whilst the latter was confined to cases of "*continuing nuisances*" and provided fresh periods of limitation and fresh rights to sue. The present section has abrogated both those sections and lays down a much wider rule prescribing a fresh period of limitation beginning at every moment in the case of continuing breaches of contract and continuing torts alike. Another change is that the present No. 34 stood as No. 41 in Act IX of 1871, and the present No. 35 stood as No. 42 in the same Act, without the words "*by the husband or wife being of full age and sound mind.*"

With reference to the law standing as it did under the Limitation Act IX of 1871, a Full Bench of the Punjab Chief Court, consisting of Messrs. Plowden, Smyth, and Elsmie, had to consider the case of *Gaizini* v. *Mussammat Mehran* (1), which was a suit between Muhammadans of a nature similar to this, and the Judges formulated the question for decision in the following words:—

[148] "In a suit between Muhammadan parties when a husband claims as against his wife restitution of conjugal rights, and, as against the person detaining her, recovery of his wife, such suit being instituted more than two years after a demand and refusal (*a*) of restitution of conjugal rights, and (*b*) of possession of his wife, the relation of husband and wife still subsisting, is the suit barred (*a*) as against the wife by No. 42 of schedule II of Act IX of 1871, (*b*) as against the order defendant by No. 41 of the same schedule."

In answering the question Sir M. Plowden, who delivered the leading judgment in the case, after stating that "it is abundantly clear that according to the Muhammadan Law marriage is a civil contract, that it imposes upon the wife the obligation of cohabiting with her husband, unless there be just cause for withholding herself, and that a suit will lie to compel her to return to him." went on to say:—

"This being so, the unjustifiable withholding of her person by the wife is a breach of the contract of the marriage, and a breach which continues so long as her person is so withheld; and upon consideration I can find no sufficient ground for holding that this is not a continuing breach of contract within the meaning, as it is within the terms, of s. 23 of the Limitation Act. Then if that section applies, as it appears to me that it does, No. 42 of the schedule does not govern the disposal of a suit of the kind under notice." The learned Judge then pointed out that No. 42

(1) P.R. Vol. 14 p. 157.

(which corresponds to No. 35 of the present Act) was overridden by s. 23 which rendered it "inoperative in respect to a suit like the present by a Muhammadan husband against his wife." The learned Judge further explained himself by saying :—

"It does not by any means follow that No. 42 is rendered wholly inoperative by s. 23, for it will continue to be applicable to all suits of the kind described where by the general law of those parties marriage is not a civil contract, and to which, consequently, s. 23 is not applicable. Virtually therefore, the suit of a Muhammadan husband against his wife for recovery of his wife is not capable of being barred by limitation."

[149] Before quoting further from the judgment, I wish to point out that the distinction which the passage I have just quoted draws between marriage when it is a civil contract and marriage which is a sacrament, as among the Hindus, ceases to have any effect in view of the circumstance that s. 23 of the present Limitation Act applies equally to "*a continuing breach of contract*" and "*a continuing wrong independent of contract*," so that the reasoning of the learned Judge would now apply equally to the case of Hindu marriages. For the same reason no distinction would remain between the effect of s. 23, upon suits for recovery of a wife (No. 41, Act IX of 1871, corresponding to No. 34 of the present Act) against a third party, and suits for restitution of conjugal rights against the wife (No. 42, Act IX of 1871, corresponding to No. 35 of the present Act), for, in the former case there would be a continuing wrong by a person who is no party to the contract of marriage, and in the latter case there would be a continuing breach of contract by a party to the contract, the continuing infringement of the obligation in either case being covered by s. 23 of the present Act.

After specifically laying down that suits for restitution of conjugal rights among Muhammadans could not be barred by any limitation so long as the marriage subsisted, the learned Judge made further observations which would apply to Hindu and Muhammadan marriages alike, so far as limitation of suits for restitution of conjugal rights is concerned. He observed :—

"I may add, before quitting this point, that practically the same result would be reached, that is to say, that the husband could enforce by action his right to recover possession of his wife, after any length of time, if it be held that s. 23 does not apply to a contract of marriage, and that the withholding of herself by the wife is not a continuing breach of contract within that section. For if it be supposed that No. 42 does apply, and a suit for restitution of conjugal rights were dismissed upon the ground that the suit had not been brought within two years of the demand and refusal proved, it would still, in my opinion, be competent to the husband [150] to make a fresh demand and institute a fresh suit if it were not complied with. The marriage would still subsist and the right, to the wife's society would likewise subsist and there would be, quite independently of s. 23 of the Act, a right to compel the wife to fulfil her obligations. There is no provision in the Act, similar to that in s. 29 as to suits for the possession of land or an hereditary office, extinguishing the right of the husband to the society of his wife, and the mere dismissal of the former suit on a plea of limitation would not bar the second suit to enforce the right."

As to the limitation (under No. 41 of Act IX of 1871, corresponding to No. 34 of the present Act) against a third party who was harbouring a wife, the learned Judge held that s. 23 of the old Act (IX of 1871) was not

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applicable as it related to continuing breaches of contract nor was s. 24 applicable, being limited as it was to one kind of continuing injury, namely, a continuing nuisance, and the suit would therefore be barred by two years' limitation from the date of demand and refusal. This distinction, as I have already stated, vanishes in view of the more comprehensive nature of the provisions of s. 23 of the present Act, and moreover, as the learned Judge himself points out towards the end of his judgment, his reasoning as to the practical efficacy of a repeated demand in defeating limitation is applicable alike to suits against the wife and against a third party who is harbouring her.

The views thus expressed by Sir M. Plowden, as the Senior Judge of the Punjab Chief Court, were adopted by his learned colleagues, and I have quoted them at such length, as the case in which they were expressed is the only reported ruling to be found in the published reports. There appears, however, to be a decision of the Bombay High Court in *Hemchand Harjivan* v. *Shiv*, which is inaccessible to me, as it does not appear in any of the authorised reports, but is referred to by Mr. Starling in his note on s. 23 and No. 35, as having been printed in some printed judgment of the Bombay High Court for 1883, at pp. 124—26. It is also cited in Mr. Mittra's work on Limitation (2nd ed., p. 512), and he states [151] that the case is referred to in Branson's Digest of *unreported* judgments of the Bombay High Court at p. 210. The effect of the ruling is represented by Mr. Starling to be that the refusal of a wife to return to her husband and allow him the exercise of his conjungal rights, and the retention of the wife by a man in whose house she is living constitute continuing wrongs, giving rise to constantly recurring causes of action, of demand and refusal, and the learned author in summing up the effect of the Punjab case and of the Bombay case states the law to be that "the right of a husband to the possession of his wife is one which continues so long as the marriage bond continues, consequently it would seem that so often as he chooses to demand possession of her or restitution of conjungal rights, and is refused, so often would a new cause of action arise. The practical result of this is that there would be no limitation to his bringing a suit for possession or restitution so long as he brought it within two years from some demand and refusal" (Starling's Limitation Act, p. 107).

The Punjab case was a suit between Muhammadans, whilst the Bombay case was a suit between Hindus, and I agree in those rulings so far as they lay down that the jural relation created by marriage involves the continuing obligation of conjugal cohabitation upon the husband and the wife, that so long as this jural relation subsists the unlawful infringement of the obligation, whether by the husband or the wife, or by a third person (as in the case of one who harbours a runaway wife) amounts to a continuing wrong or breach of the obligation within the meaning of s. 23 of the present Limitation Act (XV of 1877), so that "a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

It is not necessary for me in this case to determine how far I am prepared to accept those rulings in so far as they may be understood to lay down that seccessive demands and refusals are either required or could be made as foundations of successive actions for restitution of conjugal rights with the result that there would be no limitation or any other plea *in limine* barring such suits so long [152] as they were brought within two years from some demand and refusal. I may, however,

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observe that much doubt and difficulty have arisen in consequence of not realizing clearly the distinction between a demand which by the substantive law terms an essential element of the cause of action, that is, the gist of the action and, as such, a condition precedent to the enforcement of the right by suit, and demands which do not constitute the gist of the action and which therefore the law does not render indispensable.

Of the former class a very apt illustration is to be found in the rule of the Muhammadan Law of pre-emption, which renders the preliminary demands necessary as conditions precedent to the enforceability of the right, and the omissiom of which would render the suit unmaintainable. Of the latter class of demands, namely, those which are optional, illustrations are furnished by the Limitation Act itself in Nos. 59 and 73, where, although the agreement rendered the money payable on demand, the date of the loan in the one case, and the date of the bill or the note in the other, are the starting points of limitation, so that a suit may be maintained without any previous demand. Whether such a rule is well founded in jurisprudence is a subject of considerable interest and was well discussed by Sir Louis Jackson in *Tarini Prasad Ghose* v. *Ram Kishna Banerii* (1) where, upon the authority of the views of Austin, the learned Judge held that demand was of essence of the cause of action, whilst Holloway, J., in *Eathamukala Subbammah* v. *Ragiah* (2) and *C. Vencataramanier* v. *Manche Reddy* (3) strenuously repudiated the doctrine of Austin and held that the absence of demand and refusal in the case of a confessing defendant was only a matter affecting the question of costs. I need not, however, enter into a discussion upon this question, because, for the purposes of this case, it is enough to hold, as I said, that the Hindu Law of marriage does not prescribe a previous demand and refusal of conjugal rights as a condition precedent to the enforcement of those rights against a wife who unlawfully withdraws herself from cohabitation with her husband, and that therefore the provisions of s. 23 [153] of the Limitation Act, to which Nos. 34 and 35 are subject, save this suit from being barred by limitation, either against the wife, or the third party who is barbouring her, although the demand and refusal of conjugal rights was superfluously made in this case about five years before suit. The effect of my view is to apply the general No. 120 to the present case, and, reading it with s. 23 of the Act, to hold that limitation does not bar the suit, either against the wife, or against the other person who is harbouring her, and to entertain this suit without requiring the plaintiff to accept the dismissal of this suit, and to make a fresh demand as the foundation of another suit against the same parties, and for the same relief. It is not necessary for me to decide whether such a second suit would be maintainable, because this is not such a second suit. At all events, considering the rulings of the Punjab Chief Court and the Bombay High Court, and the views which I have expressed here, I cannot help feeling that it would have been much better if the Legislature had altogether omitted to frame Nos. 34 and 35 of the Limitation Act, for conjugal disputes among Hindus and Muhammadans are governed by the general provisions of their personal laws, and, as I have already shown, No. 120 is sufficient to make provision for them. Such an omission to provide any special periods of limitation for conjugal disputes among the native population, would be consistent with the policy upon which clause (*a*) of s. 1 of the Act proceeds by saving

(1) 6 B.L.R. 160. (2) 7 M.H.C.R. 293. (3) 7 M.H.C.R. 298.

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from limitation suits under the Indian Divorce Act. The practical effect, however, as I have shown, is much the same, for Nos. 34 and 35 must be read as inapplicable to suits such as the present, and therefore virtually superfluous. Any other view of those articles would in effect amount to holding that the lapse of two years after demand and refusal of conjugal rights would either amount to dissolution of marriage or divorce, or separation irremediable by law. In other words, such an interpretation would involve the conclusion that the Legislature by a side-wind effectually introduced divorce into the Hindu Law, of which the spirit abhors the notion, and the letter does not recognize it, and that in the case of Muhammadans a serious innovation has been introduced by the statute of which the scope and objects did not contemplate [154] any interference with their Native Law of marriage and conjugal relation. I have already said enough to show why I cannot credit the Legislature with any such intentions and also why I repudiate any such interpretation as would involve such serious results.

I now pass on to the fourth point of the argument on behalf of the respondent, namely, that under the circumstances of this case the defendant, Musammat Kaunsilia, must be treated as a deserted wife and no longer amenable to her husband's, the plaintiff's, demand for restitution of conjugal rights under the Hindu Law.

It is clear that under s. 37 of the Civil Courts Act (XII of 1887) we are bound to decide this question according to the Hindu Law. That law contains in itself provisions for justifying a woman in forsaking her husband, and enumerates the conditions under which she may do so. The text of *Devala* translated by Colebrooke (Digest, Vol. II, page 164, text CLI) lays down :—

"A husband may be forsaken by his wife, if he be an abandoned sinner, or an heretical mendicant, or impotent or degraded, or afflicted with phthisis, or if he have long been absent in a foreign country," and it goes on to say (text CLII) "whether such a husband be alive or dead, his wife may take another lord, for the sake of obtaining progeny, not through female independence." Then the same author (Vol. II, at pp. 165-66, texts CLIV and CLV) cites texts describing the period for which an absent or missing husband is to be waited for by the wife before she can take another husband, and this period varies according to the caste or class to which the parties belong. The *Vyavastha Chandrika* of Shyama Charan Sarkar (Vol. II, page 489) quotes a text of *Parashara.* "If the husband be missing, dead, quit the condition of a householder, be impotent, or degraded ; in (any of) these five calamities it is lawul for a woman to have another husband," and the learned author comments upon the texts by saying :—"Thus *Parashara* having declared it lawful for a woman to take another husband in case her former husband be in one of the said circumstances *a fortiori* then it must be inferred that according to his doctrine a woman may desert her husband when so circumstanced." Sir [155] William Macnaghten in his work on Hindu Law (Vol. I, p. 61) states the law in the following words :—

"Adultery is a criminal but not a civil offence, and an action for damages preferred by the husband will not be against the adulterer. It is not a sufficient cause for the wife to desert the husband and there are not many predicaments in which such an act on her part is justifiable. Insanity impotence and degradation are, perhaps, the only cirsumstances under which her desertion of her husband would not be considered as a punshiable offence." In this passage the learned author adds the husband's

insanity to the list of justifiable grounds for his wife's forsaking him and the authority on which he relies is the text of *Manu* (Chap. IX, v. 79). "She who is *averse* from a mad husband, or a deadly sinner or an eunuch, or one without manly strength, or one afflicted with such maladies as punish crimes, must neither be deserted nor stripped of her property." The author of the *Dattaka Chandrika* (Vol. II, p. 489, footnote) contests this view, and, adopting the interpretation of *Kulluka-Bhatta* interprets the *aversion* from a husband to mean only want of diligent attention to him, and the author then affirms that there is no authoritative text to support the view that *insanity* of the husband would justify a wife in forsaking him. This view is inkeeping with the corresponding right of the husband in the text of *Devala* (Colebrooke's Digest, Vol. II, text LXII, p. 129) which lays down that:—" A man may exclude from his bed or from pilgrimage, a wife who is afflicted with leprosy, degraded from her class, barren, or insane, whose courses are stopped, or who is wicked, but he may not exclude her from all business." I am therefore inclined to agree with the author of the *Dattaka Chandrika* in the opinion that insanity is not a legal ground for desertion either of the husband or of the wife any more than it would be under the English law. I also agree in the view (at p. 490) that although a married pair can desert each other under the circumstances above noticed, yet desertion does not render their marriage dissolved, for *Manu* says: neither by sale nor *desertion* can a wife be released from her husband—thus we fully acknowledge the law enacted of old by the Lord of creatures." (Chap. IX. v. 46).

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[156] From what I have said it seems clear to me that, under the Hindu law, desertion does not terminate the jural relation created by the sacrament of marriage, and that it is only in certain specified circumstances that the parties may forsake each other; and it follows as a corollary that where the husband or the wife deserts the other without lawful cause, a suit for restitution of conjugal rights would be maintainable, and could be successfully resisted only by establishing that a legally sufficient cause for desertion existed and continues. This view seems to me just and reasonable on general principles and is supported by the analogy of the English law, which lays down that "in a suit for restitution of conjugal rights no facts are sufficient to bar the proceeding except such as would be sufficient to have entitled the parties to a divorce on an original suit. Facts pleadable in bar to a suit for restitution are such only as, upon proof, will entitle the party who pleads them to a sentence of separation, such sentence being prayed for" (Browne's Divorce, 4th edition, p. 140), a similar rule has been adopted in the Indian Divorce Act, of which s. 33 lays down that "nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation, or for a decree of nullity of marriage."

What would be sufficient cause for divorce or for judicial separation must necessarily depend upon the personal matrimonial law of the parties concerned, so that in this case the Hindu law would govern the decision of the question, and, as I have already said, that law does not provide that unlawful desertion whether by the husband or the wife would clear a suit for restitution of conjugal rights. Even under the English law desertion was not formely held to constitute a ground for judicial separation, and it was the rule that the remedy for desertion was restitution. Mr. Browne (p. 46) quotes the words of Sir William Scott in *Evans* v. *Evans*.

" To say that the Court is to grant a separation, because the husband

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has thought fit to separate himself would be to confirm the desertion, and to gratify the deserter."

[157] The author then on the authority of *Manning* v. *Manning* (1) says that "according to *the law of Ireland*, desertion by a wife, even though wilful, is no bar to a suit by her for restitution of conjugal rights," but that "it is very questionable how far this decision is in accordance with English Law," (p. 142). He goes on to point out (p. 46) that "recent legislation, however, has expressly recognized desertion as a ground for judicial separation," and he explains that "to sustain the charge of desertion, the act relied upon as such must have been done *contrary to the will of the person charging it*." The same is the rule adopted in clause (9) of s. 3 of the Indian Divorce Act, which lays down that "*desertion* implies an abandonment against the wish of the person charging it," and it is clear that it is only such desertion which under s. 22 of the Act would constitute a ground for judicial separation, or furnish a defence under s. 33 to a suit for restitution of conjugal rights. "No one can desert who does not actually and wilfully bring to an end an existing state of co-habitation; if the state of co-habitation has ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed; the refusal by either, after request of the other, to resume conjugal relations does not constitute the offence of desertion," (Browne, p. 47). But "though the separation be not desertion in its inception it may become such afterwards; for where a husband whilst living apart from his wife, under circumstances which did not constitute desertion, suddenly broke off all communications with her, and formed an adulterous connexion with another woman, it was held that these facts showed that the husband had resolved to abandon his wife and therefore constituted desertion," (*ib.* p. 49).

What facts would constitute complete desertion under the Hindu Law does not clearly appear from the texts, and if I have referred to the English Law upon the subject, it is because, following the example of Sargent, C. J., in *Dadaji Bhikaji* v. *Rukhmabai* (2), I think that the analogy furnished by that law may be [158] applicable, to this case, as a rule of justice, equity and good conscience which must necessarily be applied where the law upon any particular point is totally silent. Under the English Law as under the Indian Divorce Act, "*desertion without reasonable excuse for two years or upwards*" would under s. 22 constitute a ground for judicial separation and would under s. 33 defeat a suit for restitution of conjugal rights. But this rule is the creation of the statute and does not rest upon any such general principle as would justify its importation into the Hindu Law, either in respect of allowing judicial separation or in respect of adopting the arbitrary period of two years' desertion as a valid defence to a suit for restitution of conjugal rights. But the broad advantage of consulting the English Law upon the subject remains, because by analogy it affords valuable help in deciding what amounts to desertion and in holding that where there has been desertion for lengthened period, such desertion, in conjunction with the other circumstances of the case, may constitute one of the elements of considering whether the Court should decree restitution of conjugal rights.

Whether any such discretionary power exists in our Courts in dealing with such suits under the Hindu Law, is the subject of the fifth and last

(1) 7 Ir. R. Eq. 520. (2) 10 B. 301.

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point in the argument for the respondent. Under the English Law "if a wife does not prove that she was justified in withdrawing from co-habitation either by proving her husband's adultery or cruelty, the Court will pronounce her under the obligation to return. Nor has the Court any discretionary power to refuse a decree in a suit for restitution of conjugal rights, on the ground that the suit was instituted by the petitioner, not in order that he might regain the society of his wife, but for some collateral object: the petitioner in a suit for restitution of conjugal rights is entitled to a decree, unless he is proved to have committed a matrimonial offence, which would be ground for a judicial separation;" (Browne, p. 89).

This rule which in English Law is based principally upon the authority of *Scott* v. *Scott* (1) was applied by Sargent, C. J., to [159] the case of Hindus in *Dadaji Bhikaji* v. *Rukhmabai* (2) where the learned Chief Justice said:—"It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties, but, as long as the law remains as it is, Civil Courts, in our opinion, cannot, with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances,) recognize any plea of justification other than a marital offence by the complaining party, as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott* v. *Scott*."

But whilst the rule has been so laid down by the Bombay High Court, Garth, C.J., in *Jogendoronundini Dossee* v. *Hurry Doss Ghose* (3) said: "Now although we entertain no doubt that, as a matter of law, a suit for restitution of conjugal rights may be maintained by a Hindu in this country, we are not at all prepared to say that the same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, would be equally so in the case of a Hindu. The habits and customs of a native community, especially as regards the marriage state, are so different from ours, that we think in such a matter as a suit for restitution of conjugal rights, the Hindu and the European cannot always be fairly judged by the same rules." The proper rule in such cases was laid down by the Lords of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsconnissa* (4). Since the rights and duties resulting from the contract of marriage vary in different communities, so specially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties." In the present case the wife among her pleas pleaded both desertion and cruelty, and whilst I have already dealt with desertion, I think it is necessary to consider the Hindu Law also as to legal cruelty, as a defence to a suit for restitution of conjugal rights. The text of *Manu* (Ch. V, v. 154), which I have already quoted, prescribes that even a wicked [160] husband and misbehaved "must constantly be revered as a god," whilst another text (Ch. VIII, v. 299) allows that wives "may be corrected when they commit faults, with a rope or a small shoot of cane." There are not many texts which describe the husband's behaviour of kindness towards his wife, but there are passages which indicate that kind and gentle treatment should be extended to virtuous wives. *Manu* (Ch. III, v. 55) lays down that "married women must be honoured and adorned by their fathers and brethren, by their husbands and by the brethren of their

(1) 34. L. J. P. M. and A. 23. (2) 10 B. 301. (3) 5 C. 500.
(4) 11 M. I. A. 551.

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husdands, if they seek abundant prosperity," and there are other texts (vv. 56-62) which go to show that kind treatment to wives is prescribed in terms, which, by a liberal interpretation, may be taken to be not only moral and religious precepts but to amount to legal obligations. It is only from inferences which may be drawn from such texts that the prohibition of cruelty may be evolved; but there is no precise text to show that under the Hindu Law, which throughout favours the husband's control, even cruelty would justify a wife in deserting her husband or in forsaking cohabitation with him. The general principles of humanity upon which our Courts act in such matters have, however, led to a long course of decisions which recognize the rule that legal cruelty of the husband would be a sufficient cause for refusing restitution of conjugal rights, or otherwise affect the claim. The Lords of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa* made certain observations which seem to be equally applicable to Hindu and Muhammadan cases and which must now be taken to enuncitate the rule which must be followed by the Courts in British India. They said: "It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him, for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court, and, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband." [161] In *Yamunabai* v. *Narayan Moreshwar Pendse* (1), the Bombay High Court laid down that the Hindu Law on the question what constitutes legal cruelty sufficient to bar a claim for restitution of conjugal rights would not differ materially from the English Law; that to costitute legal cruelty there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it, and that mere pain to mental feelings, such for instance as would result from an unfounded charge of infidelity, however wantonly caused or keenly felt, would not come within the definition of legal cruelty.

I think the principles thus laid down are applicable to this case and must govern the decision of the plea of cruelty set up by the defendant Musammat Kaunsilia. I may notice here another point of similarity between the Bombay case and this case, that there the husband was "admittedly a man of very low mental capacity, on the border line of idiocy, and here the learned Judge of the lower appellate Court in his finding upon remand has observed that "the plaintiff is a half demented old man and he is not even aware that he brought a suit in the Munsiff's Court for the recovery of his wife, and that it is therefore clear that some one else has put him up in this case." The Bombay Court did not regard mental weakness of the husband as a sufficient ground for refusing restitution of conjugal rights, nor would I in this case allow such a plea to prevail.

The case of *Moola* v. *Nundy* (2) furnishes an illustration of a peculiar class of cases. There a Hindu husband and a wife had been married thirteen years ago, whilst the latter was a girl of about 13 years of age. She had co-habited with him for a few months but was ill-treated and

(1) 1 B. 164. (2) N.W.P.H.C.R. 1872, p. 100.

expelled by him in consequence of his having formed an illicit connection with his brother's widow, whom he made an inmate of his house, and had three children by her, and was still keeping her as his mistress. The wife ever since her expulsion by her husband had been living with her father and the husband had not contributed to her support. It appeared that the dispute had been considered by a *panchayat* which adjudged a [162] separation of the married couple. In these circumstances a Division Bench of this Court, consisting of Stuart, C.J., and Pearson, J., declined to enforce restitution of conjugal rights without deciding whether the verdict of the *panchayat* dissolved the marriage. They observed :—"For the purposes of this suit it is sufficient to observe that 13 years ago they consented to separate, and that looking to the circumstances under which that separation took place, and to the circumstances *still existing*, we are of opinion that the plaintiff is not entitled to have that arrangement set aside without Musammat Poonia's consent, nor are we aware that the opinion expressed by us is contrary to any provision of the Hindu Law." I am not prepared to say how far I can regard that decision as consistent with the Hindu law, but the facts of the case are very peculiar, and I need not further discuss it, as no similar facts are alleged to exist in this case. The ruling is however an authority for holding that the Court may, in exceptional cases, exercise judicial discretion by withholding relief of restitution of conjugal rights.—In *Jogendronundini Dossee* v. *Hurry Dass Ghose*, (1) the husband appeared to have lived a very profligate life, and was in the habit of consorting openly with prostitutes, and on several occasions had insulted his wife by introducing one of them into her private apartments. He was moreover given to intemperance and whilst under the influence of intoxication had ill-treated and threatened his wife with knives and other weapons in such a way as to induce very natural apprehensions on her part for her own personal safety. Under these circumstances she left his house and went to live with her mother under the protection of her own family. He however paid visits to her there, and cohabited with her as man and wife. Garth, C. J., held that the circumstances of the case showed condonation on the part of the wife, of which the effect was not undone by reason of a slap on the face, which was given with the open hand at a time when the husband was under the influence of drink and in a moment of irritation when his wife was worrying him for money.

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The learned Chief Justice, with the concurrence of Pontifex, J., decreed the claim for restitution of conjugal rights, qualifying their [163] decree by saying, "But we think it right, after what has occurred, to secure the defendant a home untainted by the presence of any persons of bad character; and we therefore propose so far to modify the decree of the lower Court, as to make it a condition that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife." Again the case of *Paigi* v. *Sheo Narain* (2) is one in which my brother Straight held that under the Hindu Law the fact that a husband had had adulterous intercourse with another woman which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights so long as the marriage subsisted, but that the Court was bound not to disregard any reasonable objections, such as personal injury or cruelty at the hands of the husband or that he was actually living in adultery with another woman, or that if

(1) 5 C. 500. (2) 8 A. 78.

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she resumed cohabitation with him she might be outcasted, and under the circumstances of the case he held that in decreeing a claim for restitution of conjugal rights, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand, and that, applying this principle to the present case, the defendant might reasonably ask the Court before compelling her to return to her husband to make it a condition that he should first obtain his restoration to caste.

These cases I think are sufficient authorities for holding that a Court in dealing with cases of conjugal rights will not upon right grounds decline to award relief; that it will ordinarily abide by the precepts of the Hindu Law itself in determining such questions, and will decree the claim unless a sufficient reason to justify the wife under the Hindu Law in forsaking her husband is shown; that in exceptional cases it will exercise a sound judicial discretion by imposing conditions upon a decree to secure the welfare of the wife. The mere taking of a wife's jewel or the marrying of a second wife has been held to be no bar to a husband's claim for restitution of [164] conjugal rights (1) and I do not think that *past* cruelty any more than past adultery of the husband would constitute a sufficient defence under the Hindu Law to such a suit, and I hold that in cases between Hindus, whilst past cruelty would furnish good reason for apprehending cruelty in the future, a Court would not be justified in dismissing a suit for conjugal rights where the circumstances would warrant the conclusion that no cruelty in the legal sense is to be apprehended, and the welfare and the safety of the wife can be secured even if the suit is decreed.

For these reasons and since the lower appellate Court has not tried the case upon the merits, I would decree this appeal, and, setting aside the decree of that Court, remand the case under s. 562, Civil Procedure Code, for trial upon the merits and passing such a decree as the circumstances of the case may require after adjudication, with reference to the observations which I have made. Costs will abide the result.

STRAIGHT, J.—I think it right only to add this much that the elaborate and exhaustive examination of the points arising in the case by my brother Mahmood and the conclusions which he has arrived are the same that I had formed at the close of the hearing of the argument of the appeal, and that the only reason that the judgment was reserved for consideration was that my brother Mahmood had some little doubt upon the matter. The doubt has now been dispelled, and I am glad to think that we have what appears to me to be a most complete and unanswerable argument presented to establish the propriety of those conclusions to which I have referred. I concur in the order that has been made.

Cause remanded.

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(1) 17 W.R. 522 ; 1 M.H.C.R. 375 ; 24 W.R. 377.

13 A. 165 (P.C.)=5 Sar. P.C.J. 616.

1890 JULY 8. PRIVY COUNCIL. 13 A. 165 (P.C.).= 5 Sar. P.C.J. 616.

[165] PRIVY COUNCIL.

PRESENT :

Lord Watson, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*]

RAM CHARAN (*Appellant*) v. DEBI DIN AND OTHERS (*Respondents.*)
[8th July, 1890.]

Hindu Law—Evidence of partition of joint family—Presumption.

In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of a share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged, as a ground of appeal, that the Courts below in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family.

APPEAL from a decree (3rd July 1885) of the High Court, affirming a decree (14th July 1881) of the Subordinate Judge of Cawnpur.

The plaintiff claimed a one-half share of joint family property, suing his only and elder brother, the first and principal defendant, with whom two sons, a grandson, and a deceased son's widow, were joined as co-defendants interested in the subject-matter. The plaint (29th July 1880) alleged that both brothers had jointly succeeded to the estate of their father, Jian, who died about the year 1828, consisting of an eight-anna share in mauza Bibrapur, and a smaller share in mauza Bakothi besides household and other property ; that the brothers continued joint, trading with ancestral fund ; and that about thirty-eight years before this suit their father's brother Nayan, who had survived, was separated off. It was stated in the plaint that the joint property comprised shares in ancestral villages in the Cawnpur and Farrukhabad district, which stood in the Collectorate books in the names of the two brothers, Umrao Singh, the plaintiff, and Debi Din, the first defendant, as joint proprietors ; other shares in other villages were entered in their names separately and shares in villages had been purchased out of the joint family funds in the names, respectively, of Beni [166] Madho, son of Debi Din, and of Ramcharan, son of Umrao Singh ; also other shares had been entered in the name of Musammat Pem Kuar, widow of Beni Madho, and in the name of Bhima, son of Debi Din, subsequently to Beni Madho's death. Shares in villages purchased out of the joint family funds, had been recorded in the names of Pem Kuar and Ganga Sahai, after a purchase at a sale upon a decree obtained by Beni Madho in his lifetime. Also were claimed shares in gardens, groves, indigo factories, debts, and decreed debts, jewels, and furniture ; the whole being valued at Rs. 1,68,811.

The plaintiff's case was that the brothers remained joint in estate, and that the parties were in possession of all the villages, and of the profits of the joint trading concerns, including an indigo factory, which profits were applied to the family expenditure, until the death of Beni Madho, the eldest son of Debi Din, on the 19th June 1876, when his father caused the name of Pem Kuar, the widow, and the name of Ganga Sahai, minor son of Bhima, another of Debi Din's sons, to be entered as proprietors of some villages,

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remaining himself in possession: that upon this, followed disputes and separate living, dating from the 16th October 1877, when the cause of action accrued; and that as all the property had been acquired while the family was joint, the plaintiff was entitled to a decree for one-half of the entirety.

The defence of the defendant, Debi Din, mainly was that about ten years after the death of their father, which had occurred as the plaintiff stated, the brothers separated each taking his half share; and that no part of the property in suit had been acquired by means of the ancestral stock or its profits, but by his, Debi Din's, own personal exertions, each brother carrying on business separately.

The Subordinate Judge found that Jian having died at the date alleged, left the property stated, and that plaintiff was in undisputed possession of a moiety thereof; but that after Nayan's separation, admitted by both parties to have occurred about thirty-eight years before this suit, the family no longer remained joint; "and although there was no division of the ancestral property by metes and bounds, the members separately appropriated and enjoyed the pro-[167]fits; they carried on business separately, and all their concerns were separate; each party having exclusive possession of the property personally acquired by him; and the interest of any party in any transaction in which he was admitted as a partner, was limited to the amount of money contributed by him."

The Subordinate Judge also found that the plaintiff was at one time employed as a jamadar in the opium factory at Bibiapur, and subsequently traded in grain; and that he made smaller profits than did his elder brother, who traded in cotton and indigo seed, and who carried on business at Cawnpur with the late Mr. Hugh Maxwell, an indigo-planter, through whom he made a large fortune.

The lower Court observed: "Moreover, it is neither alleged nor proved that the plaintiff shared in the profits of the estates held in mortgage or purchased in the name of the first defendant or his children within twelve years before his cause of action, while it is shown that he received profits of mauza Gauri and Musahibpur held by him exclusively and of a 4-anna share in Asalatganj and Bachitbhartu in which, besides Beni Madho, other parties unconnected with the family were shareholders. As the plaintiffs used to receive no profits from those estates in which the names of the second and fourth defendants were substituted in the place of Beni Madho's it did not affect his position, and if the plaintiff's possession was not affected by these paper proceedings he could have no cause of action."

"Moreover, from the very fact of the plaintiff having in a former suit sued for possession of the property acquired in the name of first defendant and his children, it is shown that he did not hold joint possession of those properties on the date of his cause of action (16th October, 1877), for had he been in possession, he would have sued merely for establishment of his right and maintenance of his possession as an equal sharer, and as he has not in the present or former petition of plaint mentioned the date, on, and circumstances under which he lost such possession, or was excluded from joint family property, his plant does not disclose sufficient cause of action. The lower Court also found that the suit was barred by [168] limitation, observing: "The plaintiff has not proved that the property acquired in the name of the first defendant and his children was joint family property in the profits of which he participated within twelve

years before his cause of action. The suit is therefore barred by lapse of time." The suit was dismissed.

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On the plaintiff's appeal, the High Court, after a remand for further evidence on the point whether Debi Din had been either personally, or by authority given by him to sign khewats, a party thereto, maintained the judgment of the Court of first instance. The Judges (BRODHURST and TYRRELL, JJ.) pointed out that there was no evidence of jointness afforded by the revenue records, or that the plaintiff had ever interfered in villages bought in the names of the defendants, or conversely; and that, had it been otherwise, it would have been easy for the plaintiff to produce accounts, or other similar evidence, to show payments made by him to the defendants, or by them to him, for these estates. Nayan and the separated members of the family occupied the same building after their undeniable separation for some years, and that partition was not more formal, or more certain in its character than this partition alleged by the defendants; and yet it was a fact.

The Judges then concluded in the terms quoted in their Lordships' judgment concurring in the finding of the Court below.

They added the following to the finding of the fact of previous partition, on which their Lordships' judgment proceeded:—

We think that the Subordinate Judge has rightly found that the parties to the suit have realized and appropriated the rents, and have continuously been in adverse proprietary possession of the properties purchased in their respective names, and that the plaintiff has not, within twelve years of the institution of his suit, been in possession of the properties which he sues to obtain.

Umrao Singh having preferred the present appeal, was now represented by Ramcharan, his son.

Mr. *C. W. Arathoon*, for the appellant, argued that the burden of proof had been wrongly laid in this case upon the plaintiff, it having [169] been incumbent on the defendants to establish the separation alleged by them, so as to rebut the presumption of Hindu Law that the family had continued to be joint. The defendants had not proved their case. He referred to the application of presumption in particular cases, citing *Bholanath Mahta* v. *Ajudhia Prasad Sookul*, (1), and *Gobind Chunder Mookerjee* v. *Doorga Prasad* Baboo (2).

The respondents did not appear. Their Lordships' judgment was delivered by Sir R. Couch.

JUDGMENT.

SIR R. COUCH.—THE plaintiff to this suit, the late Umrao Singh, who is now represented by the appellant, and the defendant, Debi Din, are the sons of one Jian, who had a brother named Nayan. The plaintiff asked in his plaint for a partition of the property, which he alleged was joint family property, part of it having come to the brothers from their father Jian, and another part of it having been acquired after the death of the father, and in such a manner as to be joint family property. The defence was that there had been a partition subsequently to the death of Jian. There had been a previous partition between Jian and his brother of the property which came to them from their father, but that is not material. The real question was, whether there had been a partition between the plaintiff and the defendant, Debi Din.

(1) 12 B.L.R. 336.

(2) 14 B.L.R. 337.

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issue was: " Did plaintiff and first defendant separate after the demise of their father, or did they continue to live in joint partnership until 16th October, 1877, and hold joint possession of all ancestral property or was the property acquired with the ancestral stock while they lived as members of a joint family ?" The Subordinate Judge in his judgment says: " From the evidence of the defendants' witnesses, and the tenor of the letters of the parties produced in this case, it is shown that the parties had separate concerns, and each received the profit due to his share in respect to the villages in which his own or his son's name was recorded as proprietor or mortgagee, separately, and for his exclusive use." This is a finding that, as alleged by the defendants, there had been separation, and that each [170] of the parties, although no separation had been made by metes and bounds, had had separate enjoyment of his share of the property. When the case came before the High Court on appeal the finding of the High Court on the question was; " Having very carefully considered the evidence and the arguments of the learned Counsel and pleaders on either side, we have arrived at the conclusion that no sufficient reason for disturbing the judgment of the able and experienced Subordinate Judge has been shown; on the contrary, we agree with the lower Court that it is proved that the ancestral property was but of small value; that the two brothers made a partition of their ancestral property though they continued to live under the same roof; that Debi Din engaged in business on a much larger scale than did Umrao, who was in the service of the Government as a jamadar in the Opium Department; that the two brothers sometimes made purchases separately and sometimes jointly with their children or with strangers, but in all joint transactions the interest of each purchaser was limited to the amount contributed by him." This again is a definite finding that a partition had been made between the two brothers. It has been contended on the part of the appellant that the *onus* of proof had been improperly put upon the plaintiff to show that the family was joint. It does not appear from the judgments that the *onus* was so put upon the plaintiff. The case was fully gone into, the evidence offered by either party was received, and the whole of it was considered by both the lower Courts. It is not shown in any waythat there has been any error in law in putting the *onus* of proof upon the plaintiff. There are two concurrent judgments of the lower Courts upon the question of fact, and there is no ground for the present appeal.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss the appeal. As the respondent does not appear there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson and Co.*

13 A. 171 (F.B.)=11 A.W.N. (1891) 48.

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13 A. 171 (F.B.)= 11 A.W.N. (1891) 48.

[171] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Young.

QUEEN-EMPRESS *v.* POHPI AND OTHERS.*
[6th February, 1891.]

Criminal appeal—Appeal preferred by appellant in jail—Power of appellate Court to dispose of appeal in absence of the appellant—Criminal Procedure Code, ss. 420, 421, 422, 423.

Where an appeal preferred under s. 420 of the Criminal Procedure Code, has been admitted by the appellate Court, and notice has been properly given under s. 422 and record of the case has been sent for and perused under s. 423, the appellate Court is competent, under the last-mentioned section, to dispose of the appeal though the appellant is not present and is not represented by a pleader.

The only limitation placed by s. 423 on the powers of the appellate Court is that the Court, before disposing of the appeal, must peruse the record, and, if the appellant is present or is represented by a pleader, the appellant in person must be heard, or the pleader must be heard.

So *held* by the Full Bench, Mahmood, J. dissenting.

Held, by Mahmood, J., *contra*, that the principles of *audi alteram partem* and *ubi jus ibi remedium* and the provisions of s. 422 of the Code, as to notice of appeal, imply that, where an appeal is admitted and not summarily rejected under s. 421, the appellant must have a real opportunity of being heard; that in the passage in s. 423 "after perusing the record and hearing the appellant or his pleader if he appears," the word "he" refers to the pleader, and must not be read as "either of them;" that, in any case, the words "if he appears" make it a condition precedent to the disposal of an appeal under the section that the appellant is heard, or at least has the choice of appearing; that the word "appears" refers to the *personal* appearance of the appellant; and that an appeal which has been admitted cannot be disposed of unless the appellant is before the appellate Court, or can be heard within the meaning of s. 423.

Semble, per Mahmood, J., but the High Court in appeal is competent to send for a criminal to appear before it to explain a difficulty in his case.

[R., Rat. Unrep. Cr. Cas. 739 (740).]

THESE were five criminal appeals in which a reference to the Full Bench was made by Edge, C. J., on the recommendation of Mahmood, J. The appeals were presented by the appellants, who were in jail, on the 30th June 1890, under s. 420 of the Criminal Procedure Code, and was duly forwarded to the High Court by the officer in charge of the jail. The appeals were admitted by an order of Brodhurst, J., dated the 15th July 1890; the date fixed for [172] their hearing was the 5th August 1890; and notices under s. 422 of the Code were duly served on the prisoners on the 23rd July. On the 18th October 1890, the appeals came on for hearing before Mahmood, J., who, on the 25th October, recorded an order directing that they should be laid before the Chief Justice, with a recommendation that the following question should be referred to the Full Bench:

"Can an appellant who is in jail, and who has presented his appeal through the officer in charge of the jail in which he is confined, be said not to appear, so that he may be heard, within s. 423 of the Criminal Procedure Code, when by reason of his confinement in jail he cannot appear, and is without means to instruct a pleader to appear for him?"

* Criminal Appeal No. 478.

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This question was, by an order of Edge, C. J., passed on the 25th October, 1890, referred to the Full Bench, and on the 28th October, it came on for hearing.

Mr. *W. K. Porter*, at the request of Mahmood, J., appeared for the appellants.

Mr. *C. H. Hill*, as *amicus curiæ contra.*

JUDGMENT.

MAHMOOD, J.— This case represents five appeals, and under the present system of registering them, these five appeals are called as one appeal. There are five appellants and their names are Pohpi, Chidda, Mulua, Dammar and Sipahi.

These names I mentioned in my order of the 18th instant, as persons who at that time seemed to me to be entitled to be heard, that is to say, heard by me sitting here as the vacation Judge in charge of the duties which that office imposed upon me. When the case was called on for hearing, I saw from the record which was before me, that, although this appeal was denominated as one appeal, it in fact comprised five appeals, and further, although the Crown was represented before me, not one of these five appellants was represented. I also had the fact before me that the sentences from which these five persons were appealing were sentences of rigorous [173] imprisonment for ten years each on an offence which according to law is non-bailable, that is to say, in the natural course of things no opening was given them by the law for releasing themselves by furnishing bail. It has always been an important question, and doubts have been raised whether in regard to that class of offences called non-bailable there is any power in any Court—certainly not, as I feel, in the district authorities—to release a person on bail. It was even doubtful as to the powers of this Court, as the highest Court in these provinces, to release a person on bail, though I need entertain no doubt on that point now, but I am quite certain that these prisoners could not have been released by any other authority on bail than this Court.

I have made these observations in order to render it intelligible why the doubt arose in my mind, as described in my order of the 18th instant, and again repeated in the order of reference laid before the learned Chief Justice, as to whether the matter should go to the whole Court; because up to the 18th of this month, I had ample reasons to think that these persons were prisoners confined in jail, and confined in a fashion in which their legs were tied down by iron chains, not metaphorical iron chains, but solid, actual iron fetters, I then felt it was right to ask Mr. *Datti Lal*, who was holding the brief of Mr. *Ram Prasad*, to consider whether or not I could proceed with the appeals. It was by reason of my order of reference of the 25th October 1890, that this case was laid before the learned Chief Justice for orders whether it should be heard by the Full Bench, and his Lordship was pleased to say that it was to be heard by the whole Court, that is to say, all the Judges of the Court who were in Allahabad at that day, *i.e.*, to-day.

The case has thus come up before the whole Court, and I think, speaking entirely for myself, that I am obliged, not only to Mr. *Porter*, who at my request has appeared on behalf of the absentee prisoners, but also to Mr. *Hill*, who has been good enough to act as *amicus curiæ*, he not being at present the Public Prosecutor in charge of the business owing to some arrangement arrived at by the Government in his absence.

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[174] I mention this on purpose, that purpose being that in this case ample opportunity has been given to legal talent to place matters before us, who, after all, are bound by the statute to make it easy for us to understand the difficulty which arose on the one side and the other.

With all that advantage it has been to me a matter of sorrow that it should be my duty to begin judgment in this case: that sorrow arises from the fact of my being the dissentient Judge. The reason why I have expressly mentioned this is that I am afraid I must take longer time than otherwise I would have considered necessary to deliver what I have to say.

I take it to be the unshaken doctrine of human jurisprudence, as distinguished from local jurisprudence, that whenever there are quarrels between two parties and those quarrels have to be decided, those quarrels cannot go before a person who is a party to them or in anyway personally interested therein. The maxim, *Nemo debet esse judex in propria sua causa* (no man can be judge in his own cause), is a firm and sound maxim and it rests, not upon any suspicion as to the honesty of the Judge or his capacity for the purposes of adjudication, but it rests upon a thing higher than the technicalities of law. It rests upon the philosophy that says that human beings are after all human beings, and, with all honour due to the honesty and integrity of Judges, they are not to hear cases in which they are themselves concerned.

Now cognate with this is another doctrine which I again call a maxim of human jurisprudence, as distinguished from local or sectarian jurisprudence, and that doctrine is that adjudication must be made in open Court. Such was not the case at some period of English history, because we all know what the Star Chamber meant, and we also know that that Star Chamber might have done justice in many cases, but nevertheless it was abolished by the English when the nation came to find it necessary to do so for securing justice.

I am not dealing with history and need not refer to that matter further than for the purpose of this very case. I maintain, therefore, [175] that the opinion which I have already mentioned above should be applicable also to a matter entirely legal, entirely technical and entirely within the region of law, as distinguished from philosophy; but it is not so distinguishable at first sight as it may seem. There is another maxim which says *Audi alteram partem*—the meaning of which is that no one shall be condemned unheard. So at least says Mr. Broom in his celebrated work on legal maxims. Also there is equally as great an authority, if indeed not greater in point of jurisprudence than the authority of that maxim, and it is the saying of Seneca. It is this:—"*Quicunque aliquid statuerit parte inaudita altera—æquum licet statuerit, haud æquus fuerit.*" This translated in simple English means, "Whoever may have decided anything, the other side remaining unheard, granted that his decision may have been just, will not have been just to himself."

This is not only poetry but it is sound juristic sense, and I think it is the essence of this doctrine which has passed into a maxim, *viz.*, *Audi alteram partem.*

Be that so or not, I know this, speaking entirely for myself again, that it is to me impossible to conceive that any one, no matter how able and conscientious he may be, can with certainly undertake to say that he has arrived at right results in adjudicating upon a quarrel without giving both parties ample and equal opportunities of being heard.

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That this is my conviction is not entirely the result of what little I have learned of the English law, but it is the result of the study of Muhammadan jurisprudence also, to which I shall have to call attention, because that jurisprudence was the standing law of the land when the British rule came to this part of the country. This case is from the district of Budaun, a territory ceded to the Honorable the East India Company by the Nawab Wazir of Oudh by the Treaty of the 10th November 1801 (*Vide* Aitchison's Treatise, Vol. II, p. 100). That is to say, at the date of the cession the law in criminal cases was the Muhummadan law both substantive, and adjective, and it goes without saying, as a matter of international [176] law, that when this annexation or cession of territory took place, the British rule took it subject to that law. That law requires that the litigants should be heard before their cases are decided.

Under these conditions it is of course obvious that, unless there was express legislative sanction given by the sovereign authority to whom this territory had been ceded changing the old law, such old law would stand unchanged, because such is the notion of all civilized nations dealing with each other, especially in questions of cessions of territory.

I have gone the length of reading out, but I think with full authority, a couplet of Seneca. It has been cited at least half a dozen times by eminent Judges in England, and I am glad to be able to follow them in this method; because I want to show that in India, too, poets, more modern no doubt than Seneca, have spoken out in the same fashion. One is the following couplet—

قریب هی یار روز محشر چهپیگا کشتوں کا خون کیونکر
جو چپ رهیگي زبان خنجر لهو پکاریگا آستین کا

I will render this into English because in principle it represents exactly the same idea as that of Seneca, and it is of greatest practical importance inasmuch as it represents the feelings of a native of India.

The couplet may be thus rendered into English:—

"O friend, the day of judgment is near; how then will it be possible to conceal (by silence) the blood of those killed? Even if the tongue of the dagger will keep silence, the blood on the sleeve will speak out."

This is certainly as good jurisprudence as the lines of Seneca which I have read out. What does it mean? It means that the hearing of the litigant is absolutely necessary, and if he is not heard there is no adjudication and no justice, and the only justice to be got will lie in the day of judgment.

Having so far dwelt upon this aspect of the case, I think it is important for me now to examine in detail the provisions of the [177] enactment regulating criminal appeals. I have intentionally dwelt so long on this part of the case, because I want to show that I take it, unless the contrary is demonstrated, as an undoubted proposition of our law, irrespective of statute and irrespective of any considerations other than the fundamental principles of jurisprudence, that whenever right is given to any party for purposes of putting forth his case, thereby it is necessarily implied that he must be heard. In other words, whenever the doctrine, *ubi jus ibi remedium* applies, I must take it that when a man asserts a right he must be heard, because remedy itself implies the right and the claim to be heard in order to show to the judge that there is a remedy to be awarded to the suitor.

At first sight it would appear that this is a matter entirely concerned with interest which I take in such principles, and that it is on that account that the question has been referred to the whole Court. But it is not so. I have before me seven cases, which I had to consider during the long vacation, in all of which this question was raised. The first case is that of Jarbandhan, which is a revision under s. 439, Criminal Procedure Code, in which the solitary ground inviting the interference of this Court was as follows :—

"That the Deputy Magistrate convicted the petitioner on the basis of fictitious proceedings taken by the police, and the Sessions Judge dismissed his appeal without instituting inquiry and without summoning and examining him, the petitioner, and therefore the petitioner prays that justice be done to his cause." The other six cases also contain similar grounds, and I felt that, if it was true that these persons had never been summoned to argue their appeals before the Sessions Judge, it might be very doubtful whether the disposal of the appeal was or was not legal. In order to decide whether it was legal, I must, after what I have already stated as to the general doctrine of law and the effect of *Audi alteram partem*, proceed to look at the Act itself.

This enactment is called the Code of Criminal Procedure, Act X of 1882. I know that it was preceded by at least two previous enactments, one being the Criminal Procedure Code of 1861, in [178] which s. 419 is interesting for the purposes of the question raised. The other Act was the Criminal Procedure Code of 1872, of which s. 280 is interesting, because it follows out the same line of thought as s. 419 of the Act of 1861. More important than either of these for the purposes of this case is s. 423 of the Code of Criminal Procedure, Act X of 1882.

Now in order to understand s. 423 of the Criminal Procedure Code and only for that purpose, I find it necessary to refer to some other section of this very Code, to enable me to place the interpretation which I shall place upon s. 423, the most important section with reference to this case.

The first among these to which I wish to invite attention is s. 404 of that same Code, which defines what all know to be the well-known rule of law that "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code, or by any other law for the time being in force." This stands there practically as a warning rather than as a necessity.

The next section is 410. It says :—"any person convicted on a trial held by a Sessions Judge or an Additional or a Joint Sessions Judge may appeal to the High Court." There in the section the word "may" occurs, but in the learned argument with which Mr. *Hill* has favoured us, he did fully concede that this word "may," as distinguished from "shall," does not make any practical difference, because the learned Counsel agreed that it did give a right of appeal as distinguished from an indulgence to be heard or not to be heard. Then comes s. 419 of that same enactment which lays down the manner in which a petition is to be written out, because the section says :—"Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under s. 367." Then comes s. 420, which says :—"If the appellant is in jail he may present his petition of appeal and the copies accompanying the same

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to the officer [179] in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate Court.

I must here pause for a second in order to indicate what I do believe to be the right interpretation of s. 419. S. 419 prescribes the form of the petition as distinguished from s. 420, which prescribes the manner in which, in the exceptional case of a prisoner in jail, the petition of appeal is to be presented. These are two different matters altogether, and these sections are not in *pari materia*. I say so, because, having considered it, I look upon s. 420 to be nothing derogatory to the rule laid down in s. 419. S. 419 applies as much to a prisoner a jail as to any other appellant and that section requires that the petition shall be prepared in the form in which that section requires, while s. 420 is concerned only with the question of presentation of appeals from the jail.

Thus far I have simply indicated that rules about the method of presentation are not to be confounded either with the right of appeal or with the right that the appellant has to be heard. There are three things especially important in cases of persons who are never to be heard, whose tongue is silent, whose tongue cannot speak to us, because *ex hypothesi*, by exigencies of this very Code, it is impossible for their tongue to speak to us.

Then we come to s. 421 of the Code of Criminal Procedure, which prescribes, not any rule as to the drawing up of petitions, nor any rule how they are to be presented, but how they are to be disposed of, if the appellate Court saw this fit. This section provides that "on receiving the petition and copy under s. 419, or s. 420, the appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may reject the appeal summarily, provided that no appeal presented under s. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. Before rejecting an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so."

I had some difficulty in undertanding the proviso in this section, but that difficulty has been removed by the learned argu-[180]ment addressed to us by Mr. *Hill*. It must, on the maxim of interpretation *expressio unius est exclusio alterious*, I am afraid, be taken that this proviso is limited to appeals which have not been presented from the jail, and therefore a man in jail, whilst on the one hand he has the privilege of presenting his appeal in the manner which s. 420 prescribes, on the other hand he has not the privilege of insisting that he should be heard, or even his pleader, if he retains one, after sending up an appeal from the jail.

I have no doubt that, for purposes of summary rejection of appeals, this proviso to s. 421 is helpful to the cause which Mr. *Hill* has undertaken to advocate, namely, that the presence of the prisoner appellant is not necessary as a condition precedent to the action of the Court in rejecting such appeals summarily. I do not wish however to dwell upon this aspect of the case, nor upon the somewhat invidious distinction which the Legislature in its wisdom has thus thought fit to draw. I do not do so because these five appeals were not summarily rejected.

They were admitted by my brother Brodhurst; they are standing appeals on the register of this Court, and they cannot be disposed of except according to the method of procedure which this enactment prescribes.

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This brings me directly to the point before us, and I wish first of all to read s. 422 of the Criminal Procedure Code. It says:—"If the appellate Court does not reject the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal; and in cases of appeals under s. 417, the appellate Court shall cause a like notice to be given to the accused."

Now over the word "notice" there may in some cases be difficulties of interpretation, but that difficulty I do not feel in this case because, "notice" is a well understood term of law. What does the word mean? I will interpret it. *Notice* is the warning to a [181] party to a *lis* to enable him to resist a possible result, that is to say, not merely information that that which is threatened will, or may possibly, happen in a matter in which he, the person to whom notice is given, is concerned, but also that he can avoid such result if he takes proper measures to do so. I have put the thing so generally because this explanation of the word "notice" is ample enough to cover cases arising out of Common law or Chancery law or the Criminal law, and indeed all departments of law.

This being so, never has it been possible for me to be other than unwilling to credit the Legislature with surplusage, or with laying down things that it did not mean or using words which had no purpose in them. Here I have got to deal with the word "notice" and the object of its being used with the specification of "time and place at which such appeal will be heard." Did the Legislature intend by using these words that the person to whom such notice was to be given was to be tied by the leg by actual iron chains so as to disable him from avoiding the result, namely, the dismissal of his appeal, and yet given him notice. I cannot hold any such thing. I find it impossible to do so, for then s. 422 would never have existed, for the whole section in most cases would have been a surplusage. The last part of that section also leads to the same conclusion, because there the case contemplated is an appeal presented not by the prisoner but by the Crown, under the special powers given to it by s. 417, against a verdict of acquittal. There also the word "notice" occurs. We hear *not* of the pleader of the accused, but we find him mentioned only as the person to whom notice is to be given. We also have to look at s. 427, which prescribes that when an appeal is presented under s. 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."

I am particularly anxious to call attention to this provision of the law, because, by dint of this power which I have, I may make it impossible for the appellant before me to avail himself of the [182] notice as it is understood by me and as I have described it. For example I may, *ex hypothesi*, first take very good care to imprison the person far away from any Court house, and then to give the notice required by the last part of s. 422. What would be the use of such "notice" if it meant other than what I have said?

However, the matter does not really rest so much on the analogy of this section as it does upon the interpretation to be placed upon s. 423 itself. That section I feel it difficult to interpret in the manner in which Mr. *Hill* desires to interpret it, and that difficulty arises mostly on account

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of the fact that English is not my tongue. I take it to be a rule of law, as distinguished from anything connected with philology, that a sentence is to be read in the grammatical sense, that is to say, such grammar as is known to the authority which has to deal with the interpretation of the statute. I have read the first part of the section, which is important. It runs thus :—"The appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under s. 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal, or may—" and here follow four clauses which are not important for the purposes of this discussion, otherwise than indicating what enormous powers the Court has as a Court of appeal.

The difficulty which I have had so far as the interpretation is concerned consists in the second sentence of the first paragraph of the section which I have read :—"*After perusing such record* ;" every one will agree that that is a condition precedent to a dismissal of an appeal. "*And hearing the appellant or his pleader, if he appears.*" We have been asked by Mr. *Hill* to hold that the pronoun, "*he*" as it occurs there, by dint of nothing other than a comma, should be read to mean, "*either of them.*" In other words, the learned counsel has argued, and I have listened to his argument with much attention, that the phrase "*after perusing such record and hearing the appellant or his pleader, if he appears*" means that the [183] word "*he*" there is alternatively used because the word "*or*" is disjunctively used, and is a disjunctive conjunction. There may be difficulties, purely as a matter of interpretation, over the word "*or*" whether it always means that; but I cannot take it that the word "*he*" there means "*either of them*" The Legislature could have easily made that clear if they meant "*either of them* ;" but "*he*" never means "*either of them.*" According to the general rule of interpretation, the pronoun must refer to the substantive nearest to it, and therefore the word "*he*" must be taken to refer the word nearest to it, *viz.*, "*pleader.*"

This, however, is not the only important matter to me, because I will, for the sake of argument, concede that "*he*" means, *either of them*, and read the statute thus after perusing such record and hearing the appellant or his pleader *if either of them* appears, &c."

Reading the section thus my difficulty becomes greater, because I have got to deal then with the word "*if.*" What is the meaning of the word "*if.*" If I remember rightly "*if*" is only one of the paradigms of the English word to "*give,*" the which word only means "*granted,*" and "granted" means a "*condition precedent,*" a very much bigger phrase. Therefore, reading it in this light, we have this, "*granted that he appears,*" namely, that this must necessarily be a condition precedent for the disposal of the appeal, that either the appellant is heard or at least choice is given to him to appear. If the word "*if*" did not mean choice, it is a valueless word. It is no use tying a person by the leg, making it impossible for him to appear, and then saying to him we are to hear you "*if*" you appear, when all the while we know that we have made his appearance impossible.

The next word to be interpreted is the word "*appears.*" The word "*appears*" implies the possibility of the person's presence in Court, or any such presence which is contemplated by rules of procedure and recognised as equivalent to appearing in person.

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It is to me a matter more or less of surprise, that whilst in the Code of Civil Procedure (Act XIV of 1882), s. 36, there are specific [184] rules laid down prescribing that the appearence of the parties may be either in person or by pleader, no such general rule exists throughout the whole of this Code of Criminal Procedure. Therefore the word "*appears*," as it occurs in s. 423 of the Code of Criminal Procedure must mean that the man accused or the prisoner must appear *himself*, and I can well understand it, because there is internal evidence that the law did so intend. If the word "*appears*," had any other meaning there would have been no necessity of referring to "*his pleader*," for it would have been equally enough to say; "after perusing such record, and hearing the appellant, if he appears, &c."

The powers which the Court of appeal in Criminal cases possesses are depicted in this very section, and I need not read it. The clauses (*a*), (*b*), (*c*) and (*d*) show the enormous powers which the Courts of appeal possess in regard to conviction. Fortunately those powers do not include the power of enhancing sentence, a matter which did at one time form the subject of legislative enactment in Act X of 1872, but still even *minus* that power, the powers of the Appellate Court are very vast, and undoubtedly in a case when the appellate Court happens to be this Court, because this Court is also a Court of revision under s. 439 of the Code of Criminal Procedure.

Before I pass on to the revisional powers of this Court, which I consider wholly relevant by analogy to this point, I must refer to s. 424 only for the purpose of deriving the rule as to my interpretation of the previous section. This section says in the first part, "the rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be particable, to the judgment of any appellate Court other than a High Court", then comes the proviso, "Provided that unless the appellate Court otherwise directs, the accused shall not be brought up or required to attend, to hear judgment delivered."

I mention the proviso, because it shows that this proviso would have been an absolute surplusage wholly unnecessary unless, upon general principles, the contemplation of the law was that the accused should be present to hear the judgment.

[185] In passing on then to s. 439 of the Code of Criminal Procedure, I find that it is important to refer to the second paragraph of it:—

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

In the course of consultation which I have had the honour of having with the learned Chief Justice and my brother Judges, some difficulty arose in my opinion as to the meaning of the word "*prejudice*." However, putting that aside, one thing is certain, that we cannot enhance punishment by dint of s. 439, unlsss we give the accused an opportunity of being heard, either personally or by pleader.

Now the practice of this Court in these cases, called "*Nemo* cases," has been, I know, different from the view of the law which I have now taken; but the reason of that, I believe, is that "*Mr. Nemo*" never appeared in person and never raised the question which has given rise to the present difficulty. There must be some kind of appearance, either in person or by pleader, before any powers under s. 439 can be exercised to the prejudice of the prisoner. I am anxious, in order to fortify what I have just said as to s. 439, to read the exception contained in s. 440;

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"No party has any right to be heard, either personally or by pleader, before any Court when exercising its powers of revision; provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect s. 439, paragraph 2."

Two points are to be deduced from this section. First the object of enacting this section would have been wholly unnecessary unless this statute proceeded upon the well recognised doctrine of law, that wherever there is a right to have a *lis* there is an implied right to be heard, and that this section makes an exception to the general rule. This is a case of *expressio unius est exclusio alterius*.

Then comes the proviso, which is equally important, because it shows that even though an application for revision may be disposed [186] of in the absence of the applicant without hearing him, we are not so to dispose of them as to "*prejudice*" the accused within the meaning of the second paragraph of s 439.

Having so far dealt with these aspects of the case, as they have appeared to me both in point of law and upon points which I think have even higher basis than that doubtful phrase, I think it is necessary for me to say that if it is true that the law of British India makes it possible for me sitting here as a Judge, in the first place, by dint of my writ to order a person to be imprisoned and tied by a chain, then in the next place to require the mockery of giving him notice, the mockery of asking him to attend, when I, by dint of the exercise of my own power have made it impossible for him to attend, and then have the solemn mockery of having his name called out; if this is the law of British India, I hope the sooner it is abrogated the better.

I am of opinion that we cannot proceed to hear this case, unless the prisoners are before us, or can be heard within the meaning of s. 423 of the Criminal Procedure Code.

I wish just to add one observation and that is this. There has been a doubt as to whether or not this Court can send for a criminal to appear before it to explain a difficulty in his case. I have no doubt that this Court has that power.

EDGE, C.J.—The only question which I propose to consider is whether these appeals can be disposed of in the absence of the appellants, who are not represented by a pleader. That question, it appears to me, depends on the construction of s. 423 of the present Code of Criminal Procedure (Act X of 1882). That section applies to cases in which appeals have been presented and admitted. As I understand, the contention is that in the case of an appeal which has been admitted, the appellate Court, notwithstanding that notice has been properly given under s. 422 of the Code, notwithstanding that the record of the case has been sent for and perused by the Court, is incompetent to dispose of the appeal, if the appellant, who is not represented by a pleader, is not present. I cannot construe s. 423 as providing any such limitation on the power [187] of the appellate Court. The limitation which it does provide, as I read the section, is the appellate Court, before disposing of the appeal, must peruse the record, and if the appellant is present, or is represented by a pleader, the appellant in person or his pleader must be heard. The Legislature contemplated clearly that in certain cases a criminal appeal might be disposed of without hearing the appellant, or any on his behalf. For I find under s. 421, the Court is empowered in the case of an appeal

presented under s. 420 through the officer in charge of the jail, to summarily reject it, if on perusing the petition of appeal and the copy of the judgment or order, and, in a case tried by a jury, the copy of the heads of charge, it considers that there is no sufficient ground for interfering, and that without perusing the record of the case. Again in cases coming up in revision the Court is not bound to hear any party in person or by pleader, unless the Court proposes to make an order to the prejudice of the accused person. That I understand to be an order enhancing the sentence or altering a conviction against him to one involving a more serious sentence. I cannot conceive the meaning of ss. 439 and 440 is that a Court in revision has not power to reject the accused person's application for revision, unless that accused person or his pleader has actually been heard. My brother Mahmood apparently thinks that persons who have been convicted and have appealed were hardly treated, if their appeals are disposed of in their absence. He has suggested that the Code of Criminal Procedure cannot contemplate the disposal of an appeal without the hearing of the convicted person in person or by a pleader, when the convicted person is, by reason of the sentence which was passed upon him, prevented from personally attending. It must be observed that it is in the power of any convict, if he has means, to be represented before the appellate Court by a pleader. If he has not the means to instruct a pleader to represent him, he is not in any wise in a worse condition than a convict who has been released on bail, pending his appeal, and through want of means is unable to attend at the hearing of his appeal, or to instruct a pleader to represent him. It has been the practice of this Court since its foundation to dispose of these criminal appeals under s. 423 [188] and the corresponding sections of the previous Acts, although the appellant did not appear and was not represented by a pleader; the Court in all such cases having taken care that proper notices had been served under s. 422 of the present Code, or the corresponding sections of previous Codes, before disposing of such appeals.

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I do not propose to express any opinion on the historical aspect of my brother Mahmood's judgment, or further than I have done on the other sections to which he has alluded. In my opinion the hearing of those appeals can proceed and they can be disposed of by the Court under s. 423 of the Code, although the appellants are not present and are not represented by pleaders.

STRAIGHT, J.—I am entirely of the same mind as the learned Chief Justice.

YOUNG, J.—I concur in the judgment of the learned Chief Justice, and in addition to the argument which he has set forth, I will remark that s. 426 of the Criminal Procedure Code provides a procedure by which the appellate Court may, for special reason, order that the execution of the sentence or order appealed against be suspended; and if the appellant is in confinement, that he be released on bail or on his own bond. Such special provision is provided for special circumstances only, and therefore is not generally applicable to all cases, seeing that in many cases (as in the case now under consideration) the appellant is in jail under a legal warrant, and cannot appear in any Court until such warrant is set aside, and such warrant can be set aside only under some special provision such as that referred to in the special cases to which s. 426, Criminal Procedure Code, alludes. Similarly in s. 428, the law enacts that the accused or his pleader shall be present in the event of additional evidence being taken, unless the appellate Court otherwise directs. This special

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provision would not be necessary if, as a matter of course, the appellant were always to be present in Court during the hearing of his appeal.

[On the 6th February 1891, the appeals came on for hearing on the merits before Tyrrell, J., by whom they were dismissed.]

Appeal dismissed.

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13 A. 189 (F.B.).

[189] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

KODAI SINGH (*Plaintiff*) v. JAISRI SINGH AND OTHERS (*Defendants*). [10th December, 1889.]

Appeal—Decree conditional upon payment of a certain sum within a specified time—Appeal presented after the expiration of the time so fixed.

The plaintiff in a pre-emption suit obtained a decree in his favour, conditional on payment into Court of a certain sum within a specified time; otherwise his suit was to stand dismissed. He did not comply with the terms of the decree, but, after the expiration of the term mentioned therein, appealed against it.

Held that the appeal would lie both in respect of the sum fixed by the decree to be paid by the plaintiff-appellant, and the discretion of the Court as regards the period allowed for payment.

[R., 14 A. 350 (354); 15 A. 529 (531); 16 A. 126 (128) = 14 A.W.N. 3 (4); 18 A. 223 (226) = 16 A.W.N. 43 (44); 11 O.C. 144 (147); 48 P.R. 1906 = 104 P.L.R. 1906.]

[N.B.—This case and 13 A. 376, *infra*, are one and the same case and so they may be read together.]

THIS was a reference to the Full Bench made, on the recommendation of Mahmood, J., under the following circumstances:—

The appellant was plaintiff in a pre-emption suit and had obtained a decree (dated the 28th April 1887) in his favour in the Court of the Munsif of Gorakhpur, which decree provided that the plaintiff should be entitled to recover the property in suit on payment of the sum of Rs. 799 within 15 days from the date of decree. The defendants did not appeal, but the plaintiff appealed in respect of the amount fixed by the Court of first instance as the pre-emptive price, and he also complained that the time allowed for payment was too short. This appeal was presented on the 27th May 1887, and was on the 2nd February 1888 dismissed by the lower appellate Court without inquiry into the merits, that Court holding that, the term within which the money was to be paid under the decree of the first Court having expired, the plaintiff had no right of appeal. The plaintiff then appealed to the High Court.

JUDGMENTS.

STRAIGHT, J.—The learned Judge appears to have refused to enter into the question of price, because, the Rs. 799 not having been paid within the time directed by the decree of the first Court, he was of opinion that there was no subsisting decree from which an appeal could be preferred. Strictly speaking, the exact decree which stood at the date of the plaintiff's filing this appeal was that of dismissal of his suit by reason of his having failed to deposit the Rs. 799 within 15 days, and, had he appealed against it on that footing, [190] he might have raised questions as to the propriety of the first

Court's finding on the matter of price and the time allowed him within which to pay the amount into Court. I think, therefore, in this case it must be taken that there was a decree from which an appeal could be entertained and the plaintiff was entitled to get a determination of the question of price, which, when decided, might properly guide the Judge's conclusions upon the further point as to whether the time allowed by the first Court was reasonable.

We in no way wish to depart from what was thrown out in the case of *Sheo Pershad Lal* v. *Thakoor Rai* (1) and followed by Pearson and Spankie, JJ., in *Parshadi Lal* v. *Ram Dial* (2) that an appellate Court in its discretion may vary the decree of a first Court in the matter of time for payment, even though such time expired before the appeal was filed.

The effect of this view upon the present appeal is that it will be decreed and the appeal be remanded to the Court of the Judge of Gorakhpur for restoration to his file of pending appeals and disposal in ordinary course as an appeal upon the pleas, including that of time, taken by the plaintiff-appellant. Costs hitherto incurred will follow the result.

MAHMOOD, J.—This case has arisen out of a reference made by me, and the circumstances which gave rise to the reference are stated in my order of reference, dated the 28th May, 1889, and I do not wish to repeat the circumstances of the case further than saying that my judgment in this case depends on, and refers to, that order and the facts stated therein for the consideration of the question of law which arises here. This being so, it is, I think important for me specially, as the referring Judge in the case, to explain that my ruling in *Chhidda* v. *Imdad Hussain* (3), is not inconsistent with the view expressed in the judgment which has just been delivered. That was not a case of a regular pre-emption decree, which was the subject of appeal, but the appeal related, to the execution of such a **[191]** decree which fixed one month as the time for payment of price. That decree had become final by being affirmed by the appellate Court on the 15th January 1885, without any alteration as to the term of one month, but the deposit of the purchase-money was not made till the 16th February 1885, that is, after the fixed period of one month, even as calculated from the appellate decree of the 15th January 1885. The appellate Court in that case, in passing its decree of the 15th January 1885, had, no doubt, power to decline to extend the period, as was held by the Full Bench in *Sheo Pershad Lal* v. *Thakoor Rai* (1), to which I referred, and, as a Court executing a decree, declined either to hold that the decree, in fixing a period for payment of price, was illegal, or that the period of one month which it prescribed could be extended by the Court executing the decree. The argument that the period of one month should be calculated from the final appellate decree of the 15th January 1885, could not very well be pressed in that case (as indeed it was not pressed) in favour of the pre-emptor decree-holder, because, as I have already said, even, upon that calculation his deposit of the price on the 16th February 1885 was beyond time. The case is therefore distinguishable from the present case.

The real difficulty in connection with pre-emption decrees, and specially with reference to the point which has given rise to this reference, arises in considering whether such decrees, which are usually passed, or which purport to be passed, under s. 214 of the Code of Civil Procedure are decrees in the nature of decrees *nisi* or decrees absolute in the same

(1) N.W.P.H.C.R. (1868) 254. (2) 2 A. 744. (3) 8 A.W.N. (1888) 4.

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manner as in any other class of cases where the decrees may, by force of equity, be subjected to considerations and limitations of amount or time as to payment of money as a condition precedent to the recovery of possession, or subjected to other restrictions which the Court may deem fit to impose. This is a matter which I had to bear in mind in *Rup Chand* v. *Shamsh-ul-Jehan* (1), and I dealt with the matter in a suit for pre-emption itself, dealing with it much upon the same principles as those governing other conditional decrees passed in suits where the possession of [192] immoveable property is subjected to conditions. I think it is enough to say, in order not to delay or prolong my judgment, as I have already explained my ruling in *Chhilda* v. *Imdad Husain* (2) and the ruling in *Rup Chand* v. *Shamsh-ul-Jehan* (1) that no distinction of principle really exists, and it is only because the learned Judge of the lower appellate Court misapplied the former ruling that he considered the ruling relieved him of the duty of trying the suit upon the merits. I think the rule, which was laid down in *Rup Chand* v. *Shamsh-ul-Jehan* (1), is a rule which should govern this case, consistent as it is with the principle of the Calcutta Court ruling in *Noor Ali Chowdhuri* v. *Koni Meah* (3), and the Bombay Court ruling in *Daulat and Jag Jivan* v. *Bhukandas Manek Chand* (4), to both of which I referred in the case. I am also glad that the conclusions arrived at in this case by me are wholly consistent with those arrived at in the judgment which has just been delivered. I therefore agree in the order which has been made in the case by my brother Straight.

EDGE, C.J.—In concurring with the judgment which has been delivered by my brother Straight, I should say that I understand that judgment to be in no way based upon any cases referred to in the judgment just delivered by my brother Mahmood. As to these cases and the inferences to be drawn from them I decline to express any opinion. I am of same opinion as my brother Straight.

BRODHURST, J.—I concur with my brother Straight.

TYRRELL, J.—I also concur with my brother Straight, without expressing any opinion on the cases just referred to in his judgment by my brother Mahmood.

Appeal decreed.

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13 A. 193=11 A.W.N. (1891) 83.

[193] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Young.

RADHA PRASAD SINGH (*Plaintiff*) v. PERGASH RAI (*Defendant*).* [24th April, 1890.]

Act XII of 1881 (*North-Western Provinces Rent Act*), s. 189—*Act XIV of* 1886 (*amending Act XII of* 1881), s. 5—"*Rent payable by the tenant*"—*Appeal.*

The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent.

[F., 14 A. 50 (51)=11 A.W.N. 219; R., 21 A. 247 (250)=19 A.W.N. 47.]

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* Second Appeal, No. 756 of 1888, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 17th February, 1888, modifying a decree of Maulvi Muhammad Wasi, Deputy Collector of Ghazipur, dated the 26th August 1887.

(1) 11 A. 346. (2) 8 A.W.N. (1888) 4. (3) 13 C. 13. (4) 11 B. 172

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APPELLATE CIVIL.

13 A. 193 = 11 A.W.N. (1891) 83.

THE facts of this case sufficiently appear from the judgment of Straight, J.

Hon. *G. T. Spankie* and Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad* and Munshi *Jwala Prasad*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This second appeal relates to a suit brought by the plaintiff-appellant against the defendant-respondent for arrears of rent amounting to Rs. 88-1-0; in respect of 1292, 1293 and 1294 Fasli. The case was heard by an Assistant Collector of the first class, and he decreed the claim in part upon the 26th August 1887. The only question before us is with regard to the language of s. 189 of the Rent Act, as it now stands, whether any appeal lay to the Court of the District Judge. The answer to this objection, if any can be found, is contained in s. 189. Now it is material to remember, in considering this question that until 1886 the words "or in which the rent payable by the tenant has been a matter in issue and has been determined," were not in the rent law then in force, and that they were introduced in that year by s. 5 of Act XIV of 1886. It is contended by Pandit *Sundar Lal* that the words "rent payable by the tenant," mean the "*rate*" of rent payable by the tenant, and that the appeal which is here in express terms given by this section is an appeal limited to cases in which the Court of first instance has determined the rate at which a [194] tenant is to pay rent. On the other side Mr. *Jwala Prasad* argues that these words give a general power of appeal and that in every case in which the "*amount*" of rent payable by a tenant comes into question, that tenant, if unsuccessful, has a right of appeal to the Judge. I cannot accept this view. It seems to me that if the Legislature had intended to throw open the door. indiscriminately to appeals of that description it would have been not merely inartistic drafting but surplusage to add these amending words, when the section might have been framed in such a way as to give a right of appeal, irrespective of any question of amount or value. I think significance is to be attached to the words "has been a matter in issue and has been determined," because that would cover a case in which, though the amount claimed by a landholder was below the sum of Rs. 100, yet, if the rate of rent was in issue in that suit between himself and his tenant, and the rate of rent had been determined in that suit by a Court of first instance, there would be an appeal. It seems to me clear that according to the language of s. 189 the only instances in which an appeal lies to the District Judge are the following: (1) Where the amount or value of the subject-matter exceeds Rs. 100. (2) Where the rent payable by a tenant has been a matter in issue and has been determined, and, lastly, where the proprietary title to land has been determined between parties making conflicting claims thereto. All these matters may well be made the subject of an appeal to the District Judge as involving important considerations; the question as to the rate of rent being one which would, as between the landlord and the tenant, as a matter of *res judicata*, bind them as to the rate of rent payable by the one to the other for all subsequent time. By this, of course, I mean until an alteration made by agreement between the parties or by the act of a Court properly empowered under the statute has taken place. I do not think, as at present advised, that the amendment was intended to flood the Courts of District Judges with appeals on

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pure questions of the amount of money in the shape of rent due from a tenant to his landlord. This being the view that I take of the matter, I am of opinion that no appeal lay from the Assistant Collector's decision to the District Judge, and that this [195] appeal must be decreed, and, the decree of the District Judge being set aside, that of the Assistant Collector must be restored, with costs to the successful party in proportion to his success in all Courts.

YOUNG, J.—I concur.

Appeal decreed.

[A similar interpretation was placed upon the above-mentioned section of the N.-W.P. Rent Act by Edge, C. J., and Brodhurst, J., in the case of *Bhagwan Din* v. *Mosai*, Second Appeal, No. 431 of 1888, decided on the 4th February 1890—W.K.P.]

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13 A. 195=10 A.W.N. (1890) 228.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

ANANDI RAM AND OTHERS (*Plaintiffs*) *v.* DUR NAJAF ALI BEGUM (*Defendant*).* [27th June, 1890.]

Mortgage—Payment of Government revenue by mortgagees in possession to save the property—Payment of mortgage-money into Court by mortgagors and relinquishment of possession by mortgagees—Subsequent suit by mortgagees to recover the Government revenue paid by them by sale of the mortgaged property—Act IV of 1882 (*Transfer of Property Act*), s. 83.

The plaintiffs were mortgagees in possession of certain shares in a village under a mortgage which, as to the principal amount advanced, was a simple mortgage, as to the interest a usufructuary mortgage. The mortgagees, to save the property from sale, paid up certain arrears of Government revenue. Subsequently, the defendant, who was the representative of the mortgagors, under s. 83 of the Transfer of Property Act (IV of 1882), paid the original sum due under the mortgage into Court. The mortgagees withdrew the money so paid in and deposited the mortgage-deed in Court. The mortgagees then, after relinquishing possession of the mortgaged property, sued to recover the money which they had paid as Government revenue by sale of the mortgaged property.

Held that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit, which was for realization of the Government revenue paid by them, by sale of the mortgaged property, must fail.

[196] *Semble*, a mortgagee, who had given up his lien under circumstances similar to those above described, might bring a simple money suit to recover money paid by him to save the property from sale in execution for arrears of Government revenue.

Kinu Ram Das v. *Mozaffer Hosain Shaha* (1); *Lachman Singh* v. *Salig Ram* (2); *Achut Ramchandra Pai* v. *Hari Kamti* (3); *Girdhar Lal* v. *Bhola Nath* (4); *Parsotam Das* v. *Jaijit Singh* (5); *Nikka Mal* v. *Sulaiman Shaikh Gardner* (6); *Kristo Mohinee Dossee* v. *Kaliprosono Ghose* (7); and *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (8) referred to.

[R., 22 M. 332 (336).]

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* Second Appeal, No. 1266, from a decree of T. R. Redfern, Esq., District Judge of Bareilly, dated the 1st May 1888, reversing the decree of Maulvi Abdul Kayyum, Subordinate Judge of Bareilly, dated the 15th November 1887.

(1) 14 C. 809. (2) 8 A. 384. (3) 11 B. 313. (4) 10 A. 611. (5) 10 A.W.N. (1890) 90. (6) 2 A. 193. (7) 8 C. 402. (8) 11 M.I.A. 241.

THE facts of this case are fully stated in the judgment of the Court. 1890 JUNE 27.
Mr. *Roshan Lal* and Babu *Durga Charan Banerji*, for the appellants.
Munshi *Madho Prasad* and Mir *Zahur Husain*, for the respondent.

APPEL-LATE CIVIL.

13 A. 195 = 10 A. W.N. (1890) 228.

JUDGMENT.

EDGE, C. J., and BRODHURST, J.—The suit out of which this appeal has arisen was one in which the plaintiffs sought a decree for sale against certain shares in a village under the following circumstances. The plaintiffs were mortgagees of the shares in question. The mortgage was a simple mortgage, so far as the principal was concerned, and a usufructuary mortgage so far as the interest on the principal moneys lent was concerned. The plaintiffs, whilst they were in possession as usufructuary mortgagees, paid certain arrears of the Government revenue due in respect of those shares. It may be taken that those payments were made to protect the mortgaged property from sale under s. 166, of Act XIX of 1873. If those arrears had not been discharged and the property had been sold under s. 166, s. 167 would have applied, for the purchaser would have taken the property free from any incumbrance, except those, if any specified in clauses A and B of that section. After those payments were made, the defendant, who is the representative of the mortgagors, paid into Court, under s. 83 of the Transfer of Property Act, Rs. 25,000 which was the amount which had been advanced under the mortgage. Upon that the plaintiffs presented a petition saying that they would take out the Rs. 25,000 in satis- [197] faction of the mortgage, and they would in future claim the money paid in respect of arrears of the revenue. They also deposited in Court the mortgage-deed and obtained the payment out to them of the Rs. 25,000.

The first Court decreed the claim to some extent. The District Judge of Bareilly dismissed the claim altogether. We should mention that it was provided in the mortgage-deed as follows :—"At the time of the settlement whatever reduction or enhancement may happen in the Government revenue we mortgagors take upon us." The arrears of the revenue which were paid by the plaintiffs represent an enhancement within the meaning of that clause in the mortgage-deed. Mr. *Durga Charan*, who has argued this case very fully and with much ability, has contended that his clients, the plaintiffs-appellants here, upon payment of those arrears of the revenue, obtained a charge in equity upon the property and a charge which was quite independent of the mortgage which they had held : further, a charge in enforcement of which they are entitled to a decree for a sale of the property, nothwithstanding their having abandoned their lien under the mortgage. He has cited to us a great number of authorities, most of which are referred to in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1). Those authorities which he has cited to us which do not appear to be referred to specifically in that case are the cases of *Luchman Singh* v. *Salig Ram* (2) ; *Achut Ramchandra Pai* v. *Hari Kamti* (3) ; *Girdhar Lal* v. *Bhola Nath* (4) ; *Parsotam Das* v. *Jaijit Singh* (5) ; *Nikka Mal* v. *Sulaman Sheik Gardner* (6). There is no doubt that, with the exception of the case of *Kristo Mahinee Dassee* v. *Kaliprosono Ghose* (7), and the case of *Kinu Ram Das* v. *Mazaffer Hosain Shaha* (1), there seems to have been a consensus of opinion in the High Courts in India that a payment of money under such circumstances as the payment in this case of the arrears of the revenue created a

(1) 14 C. 809. (2) 8 A. 384. (3) 11 B. 313. (4) 10 A. 611.
(5) 10 A.W.N. (1890) 90. (6) 2 A. 193. (7) 8 C. 402.

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charge in equity in favour of the person paying the money. In the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) [198] a majority of three Judges in a Court of five held that such a payment did not create a charge. The majority held that where a mortgagee paid money under such circumstances the mortgagee might add it to the amount of his mortgage and thereby extend his lien. We have no doubt that when money is paid by a mortgagee to protect the mortgaged property from sale for arrears of the Government revenue the mortgagee is entitled to add the amount so paid to the principal money due under his mortgage, and that in such a case the mortgage cannot be redeemed without paying those moneys; and further, that if the mortgagee proceeds to enforce his mortgage by sale of the mortgaged property, he can do so for the amount then due, which would include the amount so paid for arrears of revenue as well as any principal or interest outstanding. We do not think that the cases relied on by Mr. *Durga Charan*, even if they are good in law, and we do not intend to question them, put the case any higher than this, that a person who made a payment to save the property from sale on execution under circumstances which would make s. 69 of the Indian Contract Act applicable, obtained by such payment a charge in equity on such property. Although we think that it is not necessary to decide in this case whether a mortgagee making such payment would be entitled to bring a simple money suit or the money paid, still we may point out that the case of *Lachman Singh* v. *Salig Ram* (2) and the case of *Parsotam Das* v. *Jaijit Singh* (3) are authorities to show that he might maintain such a suit. Those authorities are fortified by the decision of their Lordships of the Privy Council in *Nugenderchunder Ghose* v. *Sreemutty Kamine Dossee* (4). It is true that the latter case turned on the effect of s. 9 of Act I of 1845, but that Act was repealed so far as the Lower Provinces of Bengal were concerned by Act II of 1859, and so far as these provinces are concerned by Act XIX of 1873. Still, the principle of the judgment in that case applies, whether the section to be considered is s. 9 of Act I of 1845, or s. 69 of the Contract Act. It is not necessary to go further into that matter, because any right which the plaintiffs [199] might have had as a personal remedy against the defendant has been long since barred by limitation. We do not think it necessary to express any opinion as to whether the majority of the Calcutta High Court in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* reported in (1) or the minority which represents in that judgment the previous consensus of opinion of the Indian Courts (excepting the case reported in I. L. R., 8 Calc.) and which minority has been followed since in Bombay and Madras was right. In our opinion, whatever may be the position or right of a person paying money under such circumstances, who is not a mortgagee, the position of a mortgagee making such payments is this: if he makes such payment and wishes to seek a direct remedy against the mortgaged property in respect of them by a suit for sale of that mortgaged property, he must do so in his character and position as mortgagee, for it was in that character and position, and that only, he paid the money. He must, if he desires to bring the property to sale in respect of such payments, add on those payments to the principal money due under the mortgage. In other words, in our opinion, a mortgagee making such payments as mortgagee, does not, by reason of making those payments,

(1) 14 C. 809. (2) 8 A. 384. (3) 11 B. 313. (4) 10 A. 611.

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obtain a lien independently of that under his mortgage. In this case the plaintiffs have lost their lien under the mortgage by having abandoned it, by having deposited the mortgage in Court to be handed over to the defendant, by having taken out of the Court the money which the defendant said was due on the mortgage, and by having quitted possession in favour of the mortgagor, the defendant. Having abandoned their lien and rights as mortgagees, it appears to us that the plaintiffs cannot revive them in order to sustain a suit for money which they could have added to the original mortgage-debt, and in respect of which they were entitled to continue in their character as mortgagees and to hold on to the deed of mortgage. S. 83 of the Transfer of Property Act is a section that was passed not only in the interest of mortgagors but in the interest of mortgagees. It was a section by which it was intended that a mortgage might be discharged by the mortgagor without any litigation, and it contemplated a mortgagee taking out of Court in satisfaction of the money due to him the [200] money which had been paid in by the mortgagor, although the mortgage-debt at the time might exceed the money paid in. It provides that the mortgagee "on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage and his willingness to accept the moneys deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed," &c. It appears to us immaterial that the plaintiffs here added a paragraph to their petition stating that they reserved their rights in respect of the money paid for arrears of revenue. The result is, we are of opinion that this suit cannot be maintained and we dismiss the appeal with costs.

Appeal dismissed

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13 A. 200 = 11 A.W.N. (1891) 5.

APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Young.

NAUBAT SINGH AND OTHERS (*Defendants*) v. INDAR SINGH AND ANOTHER (*Plaintiffs*).* [3rd July, 1890.]

Limitation—Suit by mortgagor to recover money due on a registered mortgage-deed—Act XV of 1877 (*Limitation Act*, *sch. ii, Nos.* 113 *and* 116.

A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877), sch. ii, No. 113 (for specific performance of a contract) is applicable. The period of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii, of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed. *Gauri Shankar Surju* (1); *Husain Ali Khan* v. *Hafiz Ali Khan* (2), *Nobocomor Mookhopadhya* v. *Siru Mullick* (3); *Vythilinga Pillai* v. *Thetchanamurti Pillai* (4); and *Ganesh Krishn* v. *Madhavrav Ravji* (5) referred to.

[Diss., 8 O.C. 5 (8).]

THE facts of this case are fully stated in the judgment of Mahmood, J.

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* First Appeal, No. 161 of 1888, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 26th June 1888.

(1) 3 A. 276. (2) 3 A. 600. (3) 6 C. 94. (4) 3 M. 76. (5) 6 B. 75.

1890 JULY 3.

APPELLATE CIVIL.

13 A. 200= 11 A.W.N. (1891) 5.

Hon. *T. Conlan* and Munshi *Sukh Nandan Lall* for the appellants.
[201] Mr. *Amiruddin* for the respondent.

JUDGMENT.

MAHMOOD, J.—The facts of this case are very simple, as also the evidence upon which the determination of them depends.

The plaintiffs, Indar Singh and Basant Rai, executed an usufructuary mortgage-deed on the 3rd April 1882, in favour of Naubat Singh and others, the defendants-appellants before us. Under the terms of that deed the amount of the mortgage-money advanced was Rs. 9,000, and in regard to that sum the mortgage-deed mentioned that the money had already been received from the mortgagees by the mortgagors. At the time when the deed was presented to the Registrar for registration, Indar Singh and Basant Rai, both of whom appeared before the Registrar, made a statement to the effect that they had executed the deed, and that the deed was to be given to them, as they would get the money on delivering the document to the mortgagee. This statement was made to the Registrar and is incorporated by him in the endorsement which he made on the document.

It appears then that, in consequence of certain disputes which arose between the parties, the present defendants, mortgagees, filed a suit against the present plaintiffs for recovery of possession of the mortgaged property upon the allegation that they had been wrongfully kept out of possession by the mortgagors. The suit was filed on the 11th October 1882, and it was met principally by the plea that, as a matter of fact, the mortgagees, plaintiffs, had never paid the sum of Rs. 9,000 for which the mortgage had been executed, and that they were therefore not entitled to sue for possession, and there were other pleas also which need not be noticed here.

Upon the trial of that case by the Subordinate Judge of Moradabad, that officer, in his judgment dated the 11th May 1883, decreed the suit for possession, and in the course of his judgment he gave expression to the view that the plea of the mortgagors as to the total non-payment of the mortgage-money was unfounded, and that the mortgagees, plaintiffs before him, had paid at least a sum of Rs. 5,801-6-9, which was the amount of the debts due to [202] them by the mortgagors on former accounts. The Subordinate Judge, as to the balance, went on to say:—"As regards the remainder of the mortgage amount there is no sufficient proof about it, nor is it necessary to settle this point at present."

As I have already stated, the general effect of the Subordinate Judge's decree was to decree the plaintiffs' suit for possession in favour of the mortgagees. But, although the decree was in their favour, they seem to have been dissatisfied with so much of the finding of the Subordinate Judge as gave colour to the view that only a sum of Rs. 5,801-6-9 had been paid by them, and that the payment of the remainder was not proved, and in respect of this finding they seem to have preferred an appeal to this Court on the 3rd of December 1883. The appeal came on for hearing before Petheram, C.J., and Duthoit, J., on the 12th December 1884, and the learned Judges then passed a judgment in the case which may be quoted *verbatim*, as it is short:—"All that is decided is that the plaintiff is entitled to a decree, as he was entitled to have possession of the security; whether the entire consideration of the bond had or had not passed was not a point directly in issue between the parties, and nothing has, therefore, been decided regarding it in this suit."

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Upon this ground this Court dismissed the appeal before it. Matters seemed to have stood thus till the lapse of three years from the judgment of the High Court, when, on the 12th December 1887, this suit was instituted by the mortgagors, plaintiffs. The object of the suit was to obtain payment of the balance of the mortgage-money on the mortgage-deed of the 3rd April 1882, but the plaintiffs' case was not exactly the same as their defence in the former action. In this suit they have acknowledged the receipt of Rs. 5,801 out of the Rs. 9,000, the mortgage-money, thus accepting the finding of the Subordinate Judge in his judgment of the 11th May 1883, and they claim a sum of Rs. 3,199, the balance of the principal mortgage-money, and Rs. 3,300, interest thereon as damages, thus making a total claim of Rs. 6,499.

The suit was resisted mainly upon two grounds, *first*, that it was barred by limitation, and *secondly*, that, as a matter of fact, the [203] money payable by the defendants, mortgagees, to the plaintiffs-appellants as consideration of the mortgage-deed of the 3rd April 1882 had been duly paid by them, the defendants, mortgagees, and that therefore the suit should be dismissed. Now, upon the first of these points, *viz.*, that of limitation, the learned Subordinate Judge seems to have been of opinion that the cause of action which accrued to the plaintiffs for maintaining this suit, was the date of the High Court's judgment and decree of the 12th December 1884, and not any other date, and that the suit being just within time by one day, was not barred by limitation. This view is not clearly expressed in the judgment of the lower Court, and Mr. *Conlan* for the appellants has endeavoured to place an intelligible construction upon it by suggesting that probably the Subordinate Judge imported considerations such as those contemplated by s. 14 of the Indian Limitation Act (XV of 1877) when he allowed the whole of the litigation in the former suit to be excluded from the computation of the period of limitation. Mr. *Conlan* addressed a long argument to show that s. 14 of the Limitation Act did not cover the circumstances of this case, and was therefore inapplicable. But this contention was regarded by us as one not requiring any determination in this case, because the suit is within limitation, even if the contention were to be allowed.

Mr. *Conlan's* argument was that the article which governed this case was No. 113 of the Limitation Act (XV of 1877), which provides period of only three years for suits for specific performance of a contract, and that period is to run from the date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that performance is refused. The learned counsel argued that in this case the mortgage-deed having been executed on the 3rd April 1882, and containing in itself a necessary covenant that the mortgage was executed in lieu of the money to be advanced by the mortgagees to the mortgagors, the present suit for the recovery of the balance of such mortgage-money was a suit for specific performance of the contract, and that therefore the date of the mortgage itself was the date upon which the whole mortgage-money should have [204] been paid, and default in such payment amounted to such a cause of action as would make limitation run against the plaintiffs.

Mr. *Amiruddin* on behalf of the plaintiff-respondents, resisted this contention by arguments which, again we do not think we need notice at length, because, in our opinion, No. 113 of the Limitation Act does not govern the suit, because it is not a suit for specific performance of contract.

In my opinion the nature of the suit falls under the purview of

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No. 65 of the Limitation Act, because it is a suit for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, and for such a suit the limitation of time is a period of three years, calculated from the time when the time specified arrives or the contingency happens. This would have been the limitation applicable to this case if the mortgage-deed of the 3rd April 1882 had been a single unregistered document, but the document on which the plaintiffs sue is a registered instrument, and for that reason, in my opinion, No. 116 of the Limitation Act applies, which article provides generally for suits for compensation for the breach of a contract in writing registered the period of six years to be calculated from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.

The covenant in the contract of the mortgage-deed of the 3rd April 1882, was that the mortgagees would pay the money to the mortgagors as a loan advanced on security of landed property, and, in the absence of any words or indications to the contrary, that covenant must be taken to mean that the money would be paid down at the time of the execution of the document. This being so, the mere withholding of the payment of the mortgage-money by the mortgagee to the mortgagor would amount to a breach of contract in writing registered, as in this case, and a suit to recover the balance would be nothing other than a suit for compensation or damages caused by the breach of contract. There is really no distinction between a suit for compensation under these circumstances and a suit such as this, in which the mortgagor sues the mortgagees for **[205]** obtaining payment of the mortgage-money. The breach of contract having caused damages, the assessment and the measure of those damages would naturally be the amount of money contemplated by the covenant, that is to say, the sum which that covenant mentioned as the amount to be advanced, together with such other loss as the plaintiff may prove to have sustained in consequence of the breach of such covenant. This view is in principle in accord with the rulings of the various High Courts, *Vide —Nobocomar Mookhopadhaya* v. *Siru Mullick* (1); *Vythilinga Pillai* v. *Thetchanamurti Pillai* (2); *Ganesh Krishn* v. *Madavrav Ravji* (3); *Gauri Shankar* v. *Surju* (4); and *Husain Ali Khan* v. *Hafiz Ali Khan* (5).

There remains the second question which relates to the merits, namely, whether the amount mentioned as the mortgage-money in the deed of the 3rd April 1882, was actually paid by the defendants, mortgagees, to the plaintiffs, mortgagors. Upon this point the learned Subordinate Judge has expressed his finding in the following terms:—

"In short, the plaintiffs themselves admit the receipt of Rs. 5,801, out of the said mortgage-money Rs. 9,000, and, after deducting that, they claim in this suit Rs. 3,199 as balance of the principal mortgage-money. Now it is proved from the evidence on the record in this case that the following items have also been paid by the defendants, that is Rs. 150, before the execution of the mortgage-deed for purchasing the stamp paper of the mortgage-deed and for purposes of registration, &c., Rs. 630, which the plaintiffs received from the defendants on the 4th April 1882, and deposited in the Collectorate and Rs. 200 paid to Shib Lal on account of the debt due from the plaintiffs. The total of these three items is Rs. 980. Therefore the items admitted to have been received and the items proved amount to Rs. 6,781."

(1) 6 C. 94. (2) 3 M. 76. (3) 6 B. 75. (4) 3 A. 276. (5) 3 A. 600.

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This finding is not contested by the plaintiffs-respondents in this Court, and it shows that, even in this suit, their allegation as to the non-receipt of the mortgage-money was found by the lower [206] Court to be untrue to the extend of Rs. 980, the payment of which by the defendants was proved to the satisfaction of that Court. As to the balance of Rs. 2,219 (or rather, to be more accurate, Rs. 2,218-9-3) the lower Court has found that its payment by the defendants, mortgagees, to the plaintiffs, mortgagors, was not satisfactorily established. The main reasons, why the lower Court arrived at this conclusion, are stated to be the non-production of a separate receipt by the defendants, and the fact that certain debts due by the plaintiffs-mortgagors to other creditors were not paid off. The Subordinate Judge sums up his conclusions in the following words :—

"The Court is of opinion that when the plaintiffs received the mortgage-deed after it had been registered, the defendants held out a temptation to the plaintiffs that if the latter made over the mortgage-deed to the defendants and got the mutation of names effected regarding the mortgaged property by admitting that the whole mortgage-money had been paid, they would get a good sum in cash from the defendants out of the mortgage-money. Being tempted by this, the plaintiffs did what the defendants told them. But at last there arose a dispute between the parties regarding the possession and enjoyment of the *sir* lands, and the defendants did not pay any money in cash to the plaintiffs, and suits, &c., had to be instituted in the Court for possession of the mortgaged property. The present suit is the last of the series of cases which have resulted from all those disputes. I hold without any hesitation that the defendants have paid only Rs. 6,781 6-9 out of Rs. 9,000, the mortgage-money. It is by no means proved that the remaining Rs. 2,218-9-3 have been paid by the defendants."

Mr. *Conlan* for the defendants-appellants argues that these conclusions are purely conjectural and proceed upon a misapprehension of the rule of *onus probandi* as applicable to such cases. The learned counsel has invited our attention to a passage in Macpherson's work on mortgages (7th ed., p. 174) where the rule is stated to be that "when a person admits having executed a written instrument which contains a recital that the consideration has been [207] received, but seeks to avoid liability by pleading that full consideration according to the terms of contract has not been received by him, the proof of such non-receipt rests upon him, and in the absence of such proof he must be held to the terms of the document to which he has affixed his signature. The written instrument is *prima facie* evidence that the consideration has been received as recited, but it is not conclusive, and this *prima facie* evidence may be rebutted."

This view is supported by many rulings cited in a foot-note to the passage, and I have no doubt that the passage lays down a sound doctrine of law, namely, the broad principle that where a person makes admissions against his own interest, whether orally or in recitals in written instruments, the burden of explaining away those admissions in order to get rid of their affect in evidence rests upon him. This, indeed, is a well-established rule of our law and has received the sanction of the Lords of the Privy Council in many cases. The rule so far as it relates to admissions contained in deeds, is much less stringent in India than in England; for here such admissions are rebuttable, estoppels by deeds being unknown to our law in the Mofussil. Now what happened in the present case is best stated by the plaintiff, Indar Singh himself, who was examind as a witness in this case. The witness said :—"The mortgage-deed, dated the 3rd April 1882, for Rs. 9,000, executed by me and my brother Basant Rai,

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was presented in the registration office on the same day, *i.e.*, the 3rd April 1882, and was, on my and Basant Rai's declaration, registered in the *tahsil* of Chandpur. After the completion of the registration, the registered mortgage-deed was given to me. I had caused it to be written in the registration office that the deed might be given to me in order to enable me to realize the money on delivering the deed. Both I and Basant Rai made the said statement. I and my brother Basant Rai got the registered mortgage-deed from the registration office." The witness, after some prevarication admitted that a portion of the mortgage-money was to be received in cash from the mortgagees at the time of the delivery of the mortgage-deed to them. He then [208] went on to say :—" When I and Basant Rai got the mortgage-deed from the registration office, I and Basant Rai handed it to Naubat Singh after about ten or twenty days. I made statement in the mutation department also, namely, I stated that I had received the *whole* amount of the mortgage-money. I did all that trusting in him," that is, the mortgagee.

It appears to me that this statement is destructive to the plaintiffs' case as to the non-payment of the mortgage-money. The mortgage-deed itself contains an admission as to the full receipt of the mortgage-money, and that admission is only partially explained by the circumstance that the plaintiffs asked the registration officer to return the deed to them after registration, as they would themselves deliver the deed to the mortgagees on receiving the mortgage-money from them. The force of this precaution proves that the plaintiffs were far from being trustful of the mortgagees as Indar Singh, plaintiff, would have it in his deposition. This being so, we find, according to Indar Singh's own evidence, that the mortgage-deed was delivered to the mortgagees shortly after the registration. That was a contingency which, according to the plaintiffs own statement, was to take place upon receipt of the mortgage-money from the mortgagees. Beyond the vague theory of trustfulness there is no explanation why the plaintiffs, mortgagors, after having expressly stated in the registration office that they would deliver the deed to the mortgagees on receipt of the mortgage-money, actually delivered the deed to them without receiving full payment. Nor does the case against the plaintiffs stop here, for we find that on the 27th April 1882, the plaintiffs, mortgagors, appeared before the revenue authorities and prayed for mutation of names in favour of the mortgagees, alleging that they had received full payment of the mortgage-money. There is no satisfactory explanation why the plaintiffs did so, if they had not received the mortgage money in full.

The learned Subordinate Judge has not given due weight to the evidential effect of the plaintiffs' conduct in delivering the mortgage-deed to the mortgagees, and in solemnly admitting before the [209] revenue officer that they had receivd full payment of the mortgage-money. The Subordinate Judge has accepted the vague and feeble theory of trustullness, and has rejected the defence as to payment, upon the ground that the defendants did not obtain a separate receipt for the balance of the mortgage-money (namely Rs. 2,218-9-3), but it seems to me that if the theory is to be accepted it would equally apply even if such a receipt were produced.

I am of opinion that, under the circumstances of this case, it rested entirely upon the plaintiffs to prove by cogent evidence that their conduct in delivering the mortgage-deed to the mortgagees and in solemnly admitting the receipt of the full mortgage-money before the revenue authorities in the mutation department was explainable on the ground of undue

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influence, fraud, or other circumstances which would explain away such conduct. They have not even attempted to produce any such evidence.

On the other hand, the defendants' case as to payment is supported, not only by the admissions and conduct of the plaintiffs themselves, but by direct evidence. They have produced their *karinda* or managing agent, Misri Lal, and also Ganga Ram, the patwari, who both state on oath that Rs. 2,029-8-0 were paid by the mortgagees, defendants, after settling the account with the plaintiffs, mortgagors, and that after receiving such payment the latter delivered the mortgage-deed to Naubat Singh, one of the mortgagees. The Subordinate Judge has also assigned no reason for disbelieving such evidence, and his judgment seems to have been too much influenced by the absence of a separate receipt. In my opinion the delivery of the mortgage-deed to the mortgagee and the plaintiff's admission in the mutation department are quite sufficient to amount to evidence as good as, if not more cogent than, a separate receipt would have been, and the oral evidence in the case, taken with the plaintiff's own conduct and admissions, proves the full payment of the mortgage-money.

It seems to me that the plaintiffs' conduct throughout the disputes relating to this mortgage has been blameable and prevaricating. In the former suit they denied the receipt of the mortgage-money [210] altogether, but it was found that they had received at least Rs. 5,801. In the present case they admitted the receipt of that sum of money, but denied that they had received anything more. Even the Subordinate Judge, notwithstanding his misapprehension of the burden of proof in this case, found that Rs. 980 had been received by the plaintiffs over and above the sum of Rs. 5,801 which they admitted. This finding the plaintiffs do not dispute in this appeal, and their case as to the balance of the mortgage-money rests entirely upon the theory of trustfulness in the mortgagees, which theory, as I have already said, is feeble, vague and worthless under the circumstances of this case. There is only one more point which requires disposal. In the course of his argument Mr. *Amirud-din*, on behalf of the plaintiffs-respondents, contended that, inasmuch as in the former litigation the Subordinate Judge in his judgment of the 11th May 1883, held that only Rs. 5,801 had been proved to have been paid by the mortgagee, and inasmuch as that judgment was upheld in appeal by this Court in its judgment of the 12th December 1884, the finding in the former case operated as *res judicata* barring the defendants from pleading that any sum of money beyond that amount was ever paid by them to the plaintiffs as consideration of the mortgage. We intimated in the course of the hearing of this case that this plea has no force. I have already quoted from the judgment of this Court, dated the 12th December 1884, and it leaves no doubt that all that was intended to be decided in the former litigation was whether a portion of the mortgage-money had been paid by the mortgagees entitling them to possession, and that no definite finding was intended to be arrived at as to the exact amount which had been advanced by the mortgagees.

For these reasons I would decree the appeal, and, setting aside the decree of the lower Court, dismiss the suit with costs in both Courts.

YOUNG, J.—The facts of the case have been so fully set forth by my brother Mahmood, that it is unnecessary for me to say more than that I fully concur with him in the conclusions at which he has arrived. The issue of limitation discussed in the former part [211] of his judgment was one which occupied us for some time. I have no doubt that the suit is not barred by limitation. But the fact of the plaintiffs' having delivered

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the mortgage-deed to the mortgagees, notwithstanding their clear perception that after having done so further payments from the mortgagees were not likely to be made, and the fact that only a few days previously the plaintiffs had stated before the registering officer that they would retain the mortgage-deed till they had received the balance of the consideration-money, and further, the fact that the plaintiffs themselves in the mutation department clearly acknowledged the receipt of the balance of the consideration-money, leave in my mind no doubt whatever that the plaintiffs cannot now come into Court and set up an allegation of the non-receipt of the consideration-money. It would be impossible for Courts of Justice to come to any definite conclusions if conduct so unequivocal and admissions so distinct are to be treated as wholly meaningless. For these reasons I concur with my brother Mahmood, and would dismiss the plaintiffs' suit and decree the appeal with costs.

Appeal decreed.

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13 A. 211 = 10 A.W.N. (1890) 230.

APPELLATE CIVIL.

Before Mr. Justice Young.

BANSI (*Judgment-debtor*) *v.* SIKREE MAL (*Decree-holder*).*
[4th November, 1890.]

Execution of decree—Step-in-aid of execution—Application by decree-holder for leave to bid at sale—Act XV of 1887 (*Limitation Act*), *sch. ii, No.* 179, *cl.* (4).

The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is "a step-in-aid of execution" within the meaning of cl. (4), No. 179, sch. ii of the Limitation Act (Act XV of 1877).

[Diss., 23 C. 690 (692); F., 22 A. 399 (400) = 20 A.W.N. 129; 21 B. 331 (333); R., 30 C. 761 (769) = 8 C.W.N. 251; 10 C.W.N. 209 (214) = 3 C.L.J. 240; 12 C.W.N. 621; 8 O.C. 161 (163).]

THE facts of this case sufficiently appear from the judgment of Young, J.

Munshi *Madho Prasad* for the appellant.

The respondent was not represented.

JUDGMENT.

[212] YOUNG, J.—This is a second appeal against the order of the District Judge of Meerut, dated the 14th December 1889, dismissing the appeal of Bansi, judgment-debtor, appellant, from the decree of the Munsif of Meerut, dated the 22nd March 1889. The judgment-debtor had objected to his creditor's taking out execution of the decree, dated the 20th July 1880, and the ground taken was that more than the legal period had expired between the date of the present application for execution and the last legal occasion of such execution. It appears that the first application for execution was made on the 13th April, 1881, while the second application was dated the 17th February 1885, a period therefore at nearly four years from the first application for execution. It is alleged that the second application, that is, the one in 1885, was time-barred and therefore such proceedings could in no wise form a

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* Second Appeal, No. 362, from an order of A. Sells, Esq., District Judge of Meerut, dated the 14th December 1889, confirming the order of Munshi Jafar Hussain, Munsi of Meerut, dated the 22nd of March 1889.

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legal starting point for the computation of a new period of limitation. It is alleged that the third application for execution which took place on the 12th May 1886, was therfore time-barred and invalid, and could not suffice to keep alive a decree already dead; and that consequently the application of the 3rd June 1889 was time-barred. These objections were disallowed by the Munsif and the learned District Judge concurs with him in that opinion. The learned Judge says:—

"In this case execution of decree was first applied for in April 1881, and proceedings continued till towards the end of 1882. On the 17th February 1885, another application was made, notice issued, and attachment followed, but no objection was raised on the plea of limitation, and this being so I do not consider that it can now be raised at the time of this *third* period of execution proceedings." [I may observe parenthetically that the learned Judge should have said, at the time of this *fourth* period of execution proceedings.] The learned Judge continues:—"Apart from this, it is shown that on the 18th March 1882, the time of sale drawing near, the decree-holder applied for permission to bid and this was allowed, and this must, it seems to me, be considered to be a step taken in aid of execution, and in my opinion, therefore, the plea of limitation even would not avail."

[213] Against this contention Mr. *Madho Prasad* quoted *Toree Mahomed* v. *Mahomed Mabood Bux* (1) where it was held that "the mere payment of a Court-fee in connection with execution proceedings with a view to obtain leave to bid for the property then up for sale in execution of a decree does not constitute 'the taking of some step-in-aid of execution' with in the meaning of No. 179, sch. ii, of the Limitation Act (XV of 1877)."

I observe that in that case the act alleged to be in furtherance of the execution was the mere payment of a fee of Rs. 2. In the present instance it seems that the decree-holder did more. He applied to the Court for permission to bid, and, with all respect to the Calcutta Court, I am unable to see how such proceeding is other than taking a step-in-aid of execution of decree.

Mr. *Madho Prasad* further urged upon my notice that the proceedings taken by the decree-holder in the year 1885 were very faulty, in fact, the learned counsel stigmatized them as fraudulent. He urged that no proper notice was given to the judgment-debtor, who was in jail at the time, and was not served with notice (as he alleges) until after the expiry of the time for making objections. Be that as it may, it does not appear to me that a Court can rip up the past proceedings of other Courts and determine, for the purposes of deciding of limitation in subsequent execution proceedings, whether those past proceedings were properly conducted or not. No doubt the words of the law, No. 179, clause (4), do show that the application, the date of which is to be the starting point for a new period of limitation, must be an application in accordance with law to the proper Court, but I take it that it does not empower Courts in subsequent applications for execution to discuss the propriety and legality of the action of previous Courts in previous execution proceedings, but merely denotes that the application which is to form the starting point for a new period of limitation is to be an application not made out of Court, but made in Court, according to the general law for execution of decrees, and provided such application falls generally

(1) 9 C. 730.

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under the provisions [214] of the law, the regularity of the procedure of former Courts is a matter beyond the cognizance of a subsequent Court of execution. As to the chief objection taken by Mr. *Madho Prasad*, namely, that nearly four years had elapsed between the date of the first and the second applications for execution, I am of opinion that the Judge assigns good reasons for believing that the second application was not time-barred, and, this being so, I have merely expressed my opinion that the lower appellate Court has come to a right conclusion in affirming the decree of the Court of first instance. The appeal is dismissed. Respondent not appearing, no order as to costs.

Appeal dismissed.

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13 A. 214=11 A.W.N. (1891) 45.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Straight.

BHAGWANI AND ANOTHER (*Petitioners*) *v.* MANNI LAL AND ANOTHER (*Opposite Parties*).* [31st January, 1891.]

Act VII of 1889 (*Succession Certificate Act*), *ss.* 9 *and* 19—*Order granting certificate conditioned on the filing of security—Appeal.*

Where on an application for a certificate of succession under the Succession Certificate Act (Act VII of 1889) an order was made granting the certificate conditionally on the applicant's furnishing security.

Held that this was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that therefore no appeal would lie therefrom.

[Diss., 25 C. 320=2 C.W.N. 59; 20 M. 442 (443); 5 M.L.J. 28 (29); F, 26 A. 173 (174)=23 A.W.N. 225; 11 B. 790 (796); 2 A L.J. 606 (607) R., 4 Ind. Cas. 639 (640)=4 P.L.R. 1909=139 P.R. 1908; 5 O.C. 213 (214); Expl. & D., 36 B. 272 (274)=12 Ind. Cas. 921=13 Bom. L.R. 1208.]

THE question decided in this appeal originally came in first appeal before Mahmood, J., † and was by him decided on grounds similar to those on which the judgment of the Court in the present appeal is based. The facts of the case sufficiently appear from the judgment of Mahmood, J. which is as follows:—

MAHMOOD, J.—Upon this appeal being called on for hearing, Pandit *Sundar Lal*, holding Mr. *Ram Prasad's* brief for the respondent, has taken a preliminary objection to the effect that the appeal is premature, as no such order as that contemplated by s. 19 of the Succession Certificate Act (VII of 1889) has yet been made in [215] the case. In support of this objection the learned pleader relies on the principle of a Division Bench ruling of this Court in the case of *Ali Ahmed Khan*, appellant (1), which, however, related to ss. 22 and 28 of Act XL of 1858. In that case the principle was laid down that no appeal lay from interlocutory orders under that enactment. Mr. *Amir-ud-din* in resisting this contention on the preliminary point has invited my attention to the provisions of cl. (3), of s. 7, cl. (*f*) of s. 6, and ss. 10, 11 and 12 of the Act (VII of 1889) and with reference to these provisions he has argued that the learned

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* Appeal No. 47 of 1890, under s. 10 of the Letters Patent.

† First Appeal, No. 46 of 1890, from an order of H.T.D. Pennington, Esq., District Judge of Ghazipur, dated the 21st March 1890. [10 A.W.N. (1890) 198.]

(1) 4 A.W.N. (1884) 318.

District Judge's order of the 21st March 1890, from which this appeal has been preferred, is erroneous in law.

I do not, however, think that it is necessary for me at this stage to adjudicate upon the question whether the opinions expressed by the District Judge and the action which he has taken are in accordance with law. What I have to consider is whether the order of the learned District Judge, dated the 21st March 1890, from which this appeal has been preferred, was a final adjudication, that is, such an order as s. 19 of the Succession Certificate Act (VII of 1889) contemplates. That section is the solitary authority under which any appeal from orders under the enactment can lie. The right of appeal is a creation of the statute, and if the order complained of in this appeal does not fall under the section, the appeal is premature and unsustainable at this stage.

Now it seems to me that the order appealed from was only an interlocutory order, and not the final order in the case. The learned District Judge expressed his intention to give the certificate to the appellants on their furnishing security to the amount of Rs. 20,000, and he gave them a month for compliance. He disallowed their plea that security for Rs. 3,000 was sufficient under the circumstances of the case, but whether such rejection of the plea was right or wrong, the order of the 21st March 1890, from which this appeal has been preferred, is not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Succession Certificate Act (VII of 1889) which is the only authority for the right of [216] appeal. The final order remains yet to be made by the District Judge.

The preliminary objection prevails, and I hold that this appeal has been prematurely preferred and does not lie. I dismiss it with costs.

Against this judgment the present appeal under s. 10 of the Letters Patent was preferred by the petitioners.

Mr. *Amir-ud-din*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and STRAIGHT, J.—We entirely concur with the order passed by our brother Mahmood, and with his reasons for it. The appellants applied for a certificate under Act VII of 1889. The Judge, acting under s. 9 of that Act, required security as a condition precedent to his granting the certificate. He was proposing to proceed under s. 7, cl. (3). S. 19 provides for appeals. There was no order granting or refusing a certificate. Our brother Mahmood was right in holding that no appeal lay. We dismiss this appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BHAWANI BAKHSH AND ANOTHER (*Plaintiffs*) *v.* RAM DAI AND OTHERS (*Defendants*).* [4th February, 1891.]

Hindu law—Joint Hindu family—Mortgage executed by father on the whole joint family property in respect of his own debts—Liability of sons—Burden of proof.

The father of a joint and undivided Hindu family executed a mortgage over the whole immoveable property of the joint family. The mortgagees having obtained a decree on their mortgage and having put an attachment on the joint family property, the minor sons of the mortgagor sued for a declaration that their interest in the attached property was not liable under the mortgagees' decree, inasmuch as the debts in respect of which the mortgage had been executed had been contracted for immoral purposes and were not such as they, by the Hindu law, were under a pious obligation to discharge. *Held* that the burden of proving that the debts in question were contracted for the purposes alleged lay on the plaintiffs.

[217] *Beni Madho* v. *Basdeo Patak* (1) followed; *Lal Singh* v. *Deo Narain Singh* (2); *Bosa Mal* v. *Maharaj Singh* (3); *Subramanya* v. *Sadasiva* (4); *Hanooman Persaud Panday* v. *Munraj Koonweree* (5); and *Bhagbut Pershad Singh* v. *Girja Koer* (6) referred to.

[F., 1 O.C. 53 (59); Appr., 14 A. 179 (183); R., 28 A. 508 (528)=3 A.L.J. 274=A.W.N. (1906) 117; 31 A. 176=6 A.L.J. 263=1 Ind. Cas. 479 (498); 4 Bom. L.R. 587 (600); 6 C.P.L.R. 140 (141); 16 C.P.L.R. 169 (170).]

THE facts of this case are fully stated in the judgment of Straight, J.

Mr. *C. Dillon*, Munshi *Jwala Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *T. Conlan* and Hon. *G.T. Spankie*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit that belongs to a well-known class of cases in which the minor sons of a Hindu father, along with whom they were members of a joint and undivided Hindu family, seek to exempt their interests in the joint estate from the operation of a mortgage executed by the father of the entire family share in immoveable property and a decree obtained thereon by the mortgagee, followed by attachment of the whole joint family interest. The two minors in the present suit, with their mother as their guardian "*ad litem*," who also sues on her own account, are the plaintiffs, and the first defendant, when the suit was instituted, was their father, Sada Nand, who has died *pendente lite*, while the sons of Lala Ram Charan Lal, the mortgagee and creditor of Sada Nand, were the two other defendants. It is not necessary to detail at length the terms of the plaint. It is enough to say that the plaintiffs allege that the mortgage transaction, out of which the decree passed against their father upon the mortgage arose, represented a debt incurred by their father, which, under the Hindu law, it was not their pious duty or obligation to discharge. This particular mortgage transaction was dated the 5th August 1882, and to total consideration for it was the sum of Rs. 2,959-10-0. The

* First Appeal, No. 144 of 1888, from a decree of Babu Nilmadhub Roy, Subordinate Judge of Gorakhpur, dated the 21st June 1888.

(1) 12 A. 99. (2) 8 A. 279. (3) 8 A. 205.
(4) 8 M. 75. (5) 6 M.I.A. 393. (6) 15 C. 717.

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decree was obtained by the mortgagee for the sale of the mortgaged property upon the 31st July 1886. An attachment of the whole zemindari interest was then put on, to which attachment the plaintiffs offered objections. Their objections were disallowed on the [218] 9th April 1887; hence the present suit to have it declared that the rights of the several plaintiffs should be exempted from the attachment and threatened sale; in other words, the plaintiffs say that the defendants are not entitled to sell more than the individual interest of their father. It is admitted on all hands that the mortgage of the 5th August 1882 was a mortgage of the whole of the family interest in two mauzas. It is also admitted that the decree was passed against the father upon the mortgage for the sale of the whole property without limitation or exception of any kind, and it is further admitted that the attachment, which still holds upon the property, is an attachment that *prima facie* affects the entire interest. The defence of the creditors to the suit was generally to the effect that the father of the minor plaintiffs was not the immoral person he was represented to be; that the money was advanced to meet the valid necessities of the family; and that the father in his character of father of minor sons of a joint Hindu family was the managing member, and, as such, entitled to sell or mortgage for the necessary purposes of the family the joint family property. The learned Subordinate Judge, a Hindu Judicial Officer of long experience, who tried the case, though he does not in terms say that he did so, cast the *onus* of proving the allegations contained in the plaint upon the plaintiffs, and, in my opinion, rightly. Upon the evidence which they produced, consisting of the oral testimony of several witnesses and documentary evidence in the shape of prior bonds of Sada Nand's, he came to the conclusion that the money had been borrowed by the father for immoral expenses, and that the defendants were affected with notice of the purpose for which the money was required, and that they knew at the time they made the advances the purposes to which they were to be devoted. He therefore gave the two minor plaintiffs a decree, by which their interests in the property mortgaged by their father were exempted from the operation of the mortgage-decree and attachment, but as regards the claim of the plaintiff mother, he held that she, not being an heiress under the Hindu law, could not claim any share, though, had a partition taken place, she would then have been entitled to [219] share. With regard to her, therefore, the suit was dismissed. The appeal to this Court by the defendants has been fought upon two grounds only. The first of them is that the *onus* of proof was wrongly thrown upon them. The second is that the proof presented by the plaintiffs and the findings of the learned Subordinate Judge thereon are not sufficient to sustain the decree, and in this connection it was incidentally urged that the defendants had proved that the loan made to the father was for legal purposes. There is no appeal on behalf of Musammat Ram Dai for herself to the effect that the learned Subordinate Judge's dismissal of her claim was erroneous. As to the first point raised, namely, as to with whom rested the *onus*, I do not observe, as I have remarked already, anything in the learned Subordinate Judge's judgment to indicate specific expression of his view as to with whom it lay; but I have no doubt, and in expressing this opinion I am only following the authority of *Beni Madho* v. *Basdeo Patak* (1), that the burden of proof rested upon the plaintiffs, who could only escape from their obligation under the Hindu law to pay the debt

(1) 12 A. 99.

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incurred by their father by showing that the debt was one incurred for immoral purposes. Reference has been made on the other side in the course of the hearing of the appeal to numerous authorities of their Lordships of the Privy Council and to a ruling of this Bench in *Lal Singh* v. *Deo Narain Singh* (1), which is in consonance with the ruling of the Madras High Court in *Subramaniya* v. *Sadasiva* (2). Whatever may have been the view expressed in these two last-mentioned rulings upon the authorities as they stood at the time they were given, it seems to me that, for the reasons which were stated by me, with the approval of Sir Comer Petheram, in the case of *Basa Mal* v. *Maharaj Singh* (3), and in the case of *Beni Madho* v. *Basdeo Patak* (4), already referred to, it does not now represent the correct rule of law as declared by the later decisions of their Lordships of the Privy Council which are set out in detail in those two last-mentioned rulings. With regard to the case of *Lal Singh* v. *Deo Narain Singh* (1), it was a judgment [220] of my own in which my brother Tyrrell concurred, and it is to be noted that it proceeded largely, if not entirely, upon the principles laid down in the well-known case of *Hunooman Persaud Panday* (5). But it seems to me that in the case of *Lal Singh* v. *Deo Narain Singh* (1). I omitted to bear in mind the distinction that the case of *Hunooman Persaud Panday* was the case of a guardian and manager of an infant in the person of a mother with whom certain transactions were had, and that it was not the case of a Hindu father living jointly with his minor sons whose position is a very different one. As regards the powers of an ordinary guardian these are limited, while the powers of a father as manager for his minor sons can only be questioned by those sons when he has effected a charge on the whole property, upon the ground that the charge so created was for immoral purposes, that is to say, for purposes which it was not their pious obligation to discharge. At least this is what I take to be the outcome of all the authorities upon the subject, and that, while it may well be that in a family of joint brothers, or in the case of a guardian of the kind I have mentioned, the rule of *Hunooman Persaud Panday's* case may be properly applied ; in the case of a father, who is admittedly the managing member of the joint family, it being the pious obligation of his sons to pay his debts, except under certain circumstances, the presumption is that his debts have been legally incurred until the sons have shown to the contrary. Upon further consideration, therefore, I have come to the conclusion that the case of *Lal Singh* v. *Deo Narain Singh* (1), so far as it laid down that the *onus* rested upon the creditor in reference to a transaction with the father in his capacity of a managing member of a joint family, was wrong, and I am borne out in this by the case of *Bhagbut Pershad Singh* v. *Girja Koer* (6). In the last passage of the judgment in the case of *Beni Madho* v. *Basdeo Patak* (4), I stated what seemed to me to be the outcome of the latter rulings that succeeded the ruling in *Basa Mal* v. *Maharaj Singh* (3), and for the purpose of guarding against any misunderstanding I may here repeat that in [221] my opinion in all cases like the present, where a son or sons is or are coming into Court to assail a mortgage of the whole joint estate made by the father, upon which a decree has been passed against him and sale has been ordered of the whole estate and an attachment has been made of the whole estate, the son or sons can only escape from the effect of the decree and attachment by showing that the debt in respect of which the transaction of mortgage originated was a debt which they, as the sons of

(1) 8 A. 279. (2) 8 M. 75. (3) 8 A. 205. (4) 12 A. 99.
(5) 6 M.I.A. 393. (6) 15 C. 717.

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a Hindu and members of a joint Hindu family, were not under a pious obligation to discharge. Whether or not it was necessary for the decree-holder with a decree for sale to resort to an attachment I do not stop to enquire. In the present case he has done so, and in that way an opportunity presented itself to the minor plaintiffs to make the objection which brought about the present suit. In saying this it must not be understood to mean that, if the mortgagee had sold the property, without first putting an attachment on it and had purchased it himself or had sold it to others, the sons could not have brought a suit on the same grounds upon which they now come forward. Mr. *Spankie* for the plaintiffs admits that the *onus* may ordinarily rest upon them to establish the immorality of the debt, and the only distinction that he seeks to have drawn is that if the decree-holder himself was the purchaser, then the *onus* would rest upon him but I fail, for the purpose of dealing with the question with whom the proof lies in cases of this kind, to see why any distinction should be drawn between a stranger-purchaser at an execution-sale and the decree-holder who himself becomes the purchaser. If my view in this respect is right, then arises the question—have the plaintiffs satisfactorily established the case upon which alone they can succeed? I have remarked above that the learned Subordinate Judge who tried the case was a Hindu gentleman of long judicial experience, and I think that this is not a wholly unimportant circumstance in judging as to the value of his opinion on the merits of a case like the present. He has found in terms that the father of the minor plaintiffs was a dissolute, disreputable person, given to gambling, to keeping prostitutes, to drinking strong liquor and to smoking opium ; in other words, he has come to the conclu-[222]sion that the life of the father was an evil one. To use the learned Subordinate Judge's own words :—

"Sada Nand was a known gambler and spendthrift. He used to smoke *Chandu* and keep prostitutes. He was a confirmed drunkard. He had been borrowing these moneys for these immoral expenses. Defendants live near plaintiff's house. They were fully aware of his bad habits, and yet these greedy and grasping *banias* advanced large sums of money for their own selfish ends and for the ultimate ruin of this wretched family. The character of Sada Nand has been proved by the evidence of the *kotwal* and other respectable witnesses. It is a notorious fact in this city (as proved by the evidence in the record) that Sada Nand was a man of bad character, and that he was borrowing large sums of money to meet his selfish and immoral demands. These creditors, who are almost his next-door neighbours, advanced large sums of money fully knowing how those sums were spent. No legal necessity has been proved. I fail to understand how plaintiffs were benefited by this loan. No house was built at Soomli. No money was paid in any *taksim* case, and the private expenses were nothing but money spent in *ganja*, opium, wine, gambling and bazar women. A Court of justice can never tolerate the advancement of money for such immoral purposes, and the ancestral property to the extent of the shares of the minors cannot be held responsible for the discharge of such illegal debts."

The evidence also shows that the estate when it came to Sada Nand produced an income of about Rs. 70 a month which, it is clear, could have in no way sufficed to meet his expenses. It is not unimportant to examine the precise character of the several transactions which took place between the plaintiff's father and the defendants. The first of them was on the 4th April, 1880, and it was for the sum of Rs. 699, and a portion of it represented, we do not know how much of it, an antecedent debt

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due to some bankers of the name of Anant Lal and others, but the residue is spoken of as "for my own private expenses" and the rate of interest was Rs. 1-8-0 per cent *per mensem*. Within a little more than four months from this date a second transaction is entered into in which the first bond [223] and interest due thereupon is consolidated, and a further cash advance for " personal expenses " is taken amounting to Rs. 1,099. Then in April of the following year a sum of Rs. 700 is taken " for my own private expenses," and again on the 11th August 1881, a sum of Rs. 499 is taken " for my own private expenses," and then at last on the 5th August, 1882, all these antecedent loans are lumped together, amounting in all to Rs. 2,959-10-0. They are recited in the moatgage-deed, as also a sum of Rs. 950. " to pay the money of a banker and for meeting the partition and private expenses."

The learned Subordinate Judge, having all the facts before him and the evidence of the witnesses on behalf of the plaintiffs, came to the conclusion that the moneys and former advances covered by the bond of the 5th August 1882, were borrowed for and devoted to immoral purposes. Then comes the question, had the defendants notice that they were borrowed for those immoral purposes. The learned Subordinate Judge has found that they had, and I agree with him that the creditor, not only in this case, but in ninety-nine cases out of a hundred, knows to a nicety the status and character of the father and of the family, the number of his children, his mode and way of life and the purposes for which he wants the money. The money-lenders in the towns and villages of these provinces never lend their money without the most thorough and searching inquiry into the character and antecedent of the borrower, and, if a person was leading such a life as it is found that the father was leading in this particular case, the presumption is overwhelming that the money-lender who lived within two doors of his knew well what his character was, why it was he wanted money, and what purposes he required it for. I cannot say that, upon such facts as those found by the learned Subordinate Judge in this particluar case, the proof required from the son in a suit of this nature, namely, that the debts were incurred for immoral purposes and that these purposes were well known to the party who lent the money, was not supplied. At any rate, the learned Counsel on behalf of the creditor has not satisfied me that the learned Subordinate Judge had no materials before him to warrant [224] his conclusions, and this being so, the appeal is dismissed with costs.

I have to add that our decree will not be issued to or on behalf of the plaintiffs-respondents until they have made good the deficiency of Rs. 415 which they should have paid as Court-fee for the suit in the Court of first instance, as reported to us by our Registrar on the 13th August 1888.

TYRRELL, J.—I concur.

Appeal dismissed.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Mahmood and Mr. Justice Young.

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BAIJ NATH (*Defendant*) *v.* SITAL SINGH (*Plaintiff*).*
[21st June, 1890.]

Act XIX of 1873 *(North-Western Provinces Land Revenue Act)*, ss. 166, 168 *and* 188—*Act XII of* 1881 *(North-Western Provinces Rent Act)*, s. 177—*Interpretation of statutes—Meaning of the terms "Patti" and "Patti of a mahal"—Pre emption.*

The expression "patti of a mahal" as used in s. 188 of the North-Western Provinces Land Revenue Act (Act XIX of 1873) means a division of a mahal distinct from the share of an individual co-sharer.

The right of pre-emption, therefore, which is given by the above-named section is not exerciseable on the sale merely of the share of an individual co-sharer not amounting to such a division of a mahal.

Moreover, the provisions of s. 188 of Act XIX of 1873 do not apply to a sale under s. 168 of the same Act of land other than that in respect of which the arrears which it is sold to satisfy accrued.

Hence where the share of a co-sharer in an imperfect pattidari village, not being the land in respect of which the arrears of rent, for the satisfaction of which the said share is sold, are due, is sold under the provisions of s. 177 of the North-Western Provinces Rent Act (Act XII of 1881), no right of pre-emption can be claimed in respect of such sale.

So held by EDGE, C. J., and YOUNG, J.

MAHMOOD, J., *contra*. There being no statutory definition of the word "patti" that word must be taken in its ordinary acceptation, and in that acceptation it means the share of a pattidar, whether such share amounts to a definite division of a mahal or not. The exigencies of the law of [225] pre-emption require that in s. 188 of Act XIX of 1873 the word "patti" should be construed in its broader signification as equivalent to any share of a pattidar.

The words of s. 168 which provide that land sold under that section is to be proceeded against "as if it were the land on account of which the revenue is due under the provisions of this Act" render the incidents of sales under s. 166, including pre-emption, applicable to sales under s. 168, with the exception that in such case only the defaulter's interest in the land sold passes by the sale.

Hence a right of pre-emption would accrue under s. 188 in respect of the compulsory sale of any share of a co-sharer though such share did not amount to a "patti" in the sense of a definite division of a mahal.

[R., 1 Ind. Cas. 474 (475) ; 4 N.L.R. 78 (79)=8 Cr. L. J. 18 (19) ; 46 P.R. (1909)= 72 P.L.R. (1909) ; D., 27 A. 670 (677)=A.W.N. (1905) 149=2 A.L.J. 390.]

THE facts of this case are fully stated in the judgment of Mahmood, J.
Pandit *Ajudhia Nath* for the appellant.
Pandit *Sundar Lal* for the respondent.

JUDGMENTS.

MAHMOOD, J.—The village Musafirpur consists of three *pattis* :—

I	comprising	6	bis.	$13\frac{1}{2}$	biswansis
II	,,	6	,,	$13\frac{1}{4}$	,,
III	,,	6	,,	$13\frac{1}{4}$	,,

thus making up the aggregate of 20 biswas of the whole village which constitutes one and the same *mahal*.

* Second Appeal, No. 967 of 1888, from a decree of Rai Isri Prasad, Subordinate Judge of Farakhabad dated the 31st March 1888, reversing a decree of Maulvi Muhammad Mazhar Husain, Munsif of Kanauj, dated the 22nd December 1887.

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The *mahal* appears to have been divided only by imperfect partition, and the estate therefore is an imperfect *pattidari zemindari* tenure, and one and the same *wajib-ul-arz* governs the *mahal*, and there is only one *lambardar* of the whole *mahal*. One Lala Singh owned a 1 biswa 12 biswansis share in *patti* III, and in the same *patti* one Bhoja Singh owns a share, whilst the plaintiff Sital Singh is a sharer in *patti* I.

In execution of a Revenue Court's decree for arrears of rent, held by one Tulshi Ram against Lala Singh, the latter's whole share of 1 biswa 2 biswansis 5 kachwansis in *patti* III was sold by auction on the 20th August, 1886, under s. 177 of the Rent Act (XII of 1881), and the highest bidder was the defendant, Baijnath, whose bid of Rs. 100 concluded the sale. The plaintiff-respondent, Sital Singh, joined Bhoja Singh in asserting their pre-emptive right as [226] co-sharers in the *mahal* under s. 188 of the Revenue Act (XIX of 1873), and deposited the sale-consideration. The Revenue Court, however, rejected the plaintiff's pre-emptive claim and confirmed the sale in favour of the defendant, Baijnath, by its order of the 17th September 1886.

The present suit was instituted on the 16th August 1887 by Sital Singh and Bhoja Singh jointly in the Civil Court with the object of setting aside the Revenue Court's order of the 17th September 1886, and obtaining a declaration that the plaintiffs, by virtue of their right of pre-emption, were entitled to the benefits of the auction-sale of the 20th August 1886, in preference to the defendant, Baijnath, purchaser at that auction, and they also prayed for recovery of possession of the property sold on payment to the defendant of Rs. 100 purchase-money already deposited by them.

The suit was resisted by the defendant-purchaser mainly upon the ground that, the property in suit not being an entire *patti* of a *mahal*, but only a portion of a *patti*, no right of pre-emption accrued in favour of the plaintiffs by the auction-sale of the 20th August 1886, and that the plaintiffs could not maintain the suit as they had no pecuniary means to purchase, their own property being under mortgage.

The Court of first instance held that s.177 of the Rent Act read with s. 188 of the Revenue Act restricted the right of pre-emption in respect of auction- sales to entire *pattis* and did not extend to cases such as the present in which only a portion of the *patti* was sold. For this view that Court relied upon a Division Bench ruling of this Court in *Narain Singh* v. *Muhammad Faruk* (1) and dismissed the suit. Upon appeal, the lower appellate Court, distinguishing the case from that ruling, held that the pre-emptive right provided by s. 188 of the Revenue Act (XIX of 1873) applied also to auction-sales of portions of *pattis*, and that the suit was maintainable by Sital Singh as co-sharer of *patti* I, but that the other plaintiff, Bhoja Singh, being a co-sharer in *patti* III, of which a portion was sold, was not entitled to pre-emption, [227] as he might have saved the property from sale by paying up the money due under Tulsi Ram's decree for arrears of rent. The lower appellate Court, therefore, dismissed the suit so far as Bhoja Singh was concerned, but decreed it fully in favour of Sital Singh alone.

From the lower appellate Court's decree two appeals have arisen, one by the plaintiff, Bhoja Singh (S. A. No. 998 of 1888), and the other preferred by Baijnath, defendant, upon the contention, *first*, that co-sharers have no right of pre-emption in respect of sales under the Rent Act; *secondly*, that s. 188 of the Revenue Act applies only to sales of entire

(1) 1 A. 277.

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pattis; and, that since the lower appellate Court has found that one of the plaintiffs, Bhoja Singh, was not entitled to pre-emption, it should also have held that the plaintiff-respondent, Sital Singh, had also forfeited his right of pre-emption by joining the aforesaid Bhoja Singh as plaintiff in the suit.

In dealing with this contention it is necessary to consider, in the first place, whether under the general law, as distinguished from specific legislative enactments, any right of pre-emption arises in respect of *compulsory* sales, such as those which take place by public auction in execution of decrees or for arrears of Government revenues. I am of opinion that this question must be answered in the negative, whether the right of pre-emption in respect of such sales is claimed under the Muhammadan law, the compact of the *wajib-ul-arz*, or local usage and custom. Such sales are not the result of any private contract to which the person whose property is sold is a party. They are the result of an authority conferred by the Legislature upon the Courts for the purposes of awarding remedies against those who have failed to perform their pecuniary obligations. But for the specific interference of the Legislature such a power to sell the property of the debtor against his will could not be exercised by the Courts or the revenue authorities, and it would appear from general principles that when, in so interfering, the Legislature has framed specific rules, statute-law takes the place of general law, if any, *in pari materia* and excludes the application of the ordinary law of sale on account of the exigencies [228] of procedure. The object of such sales is to secure satisfaction of debts by well-defined means and methods calculated to achieve the object with certainty and expedition, and it seems clear that the object would be frustrated if such sales were hampered by the rules which govern private sales. The Legislature, however, in so interfering has not been heedless of the right of pre-emption. Under the rules of procedure, compulsory sales take place after a public proclamation, which being an act of the Court or revenue authority, is taken to be sufficient notice to the pre-emptors, along with the public at large, to come forward and purchase the property; and it seems reasonable to suppose that those who do not appear to bid at the auction-sale have no wish to purchase the property. These considerations seem sufficient to render the ordinary law of pre-emption inapplicable to sales by public auction in execution of decrees, and this view has received judicial sanction.

So long ago as 1854, three learned Judges of the late *Sudder Dewanny Adawlut* of Agra, in *Chikhoree Singh* v. *Hukeem Nujuf Ali* (1), concurred in observing that "the right of pre-emption supposes an act of volition on the part of the vendor, a principle inapplicable to a transaction of compulsory sale made by any authoritative order or injunction, and that the incident of a public sale creates a new element beyond the ordinary scope of such right." Soon after, in 1855, the same Court, in *Mudar Buksh* v. *Muhummud Hussun* (2), took occasion to point out that their ruling was not to be understood to have repudiated the right of pre-emption in respect of compulsory sales when such right had been specifically created by statute. Referring to the earlier case the learned Judges said:—"the obvious intent of the whole judgment is that *ordinarily* the right of pre-emption is dependent on the *voluntary* character of the transfer made by the owner, but that Act I of 1841 has extended the principle to sales in execution of decrees made under the provisions of that Act, which are of

(1) N.W.P.S.D.A.R. (1854), p. 40. (2) N.W.P.S.D.R. (1855), p. 597.

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a *special* nature, applying only to a particular class of tenures, and that they cannot be held to include sales of portions of *zumeendaree* tenures, and that [229] sales of the latter description were not, either according to law or the custom of the country, subject to the law of pre-emption." The same view was adopted in *Sah. Koondun Lall* v. *Ram Buksh* (1); and in *Baboo Ram Narain Singh* v. *Syud Sadik Ally* (2), a Full Bench of the same Court with a majority of three out of five Judges held that where the sale was a compulsory one no claim of pre-emption could be founded either on the *wajib-ul-arz* or the Muhammadan law, and in the case before them, the mauza and holding having been declared to be separate *mahals*, the plaintiff's claim of pre-emption was untenable on either of the grounds on which it was laid. The same rule was adopted in *Seth Luchmee Chund* v. *Mussumat Kesur Buhoo* (3) where it was again pointed out that the rule was not to be understood as negativing the right of pre-emption in respect of compulsory sales where such right has been created by special enactments such as Act I of 1841. A similar view was adopted by the Calcutta High Court in *Abdool Juleel* v. *Khellat Chunder Ghose* (4) where the learned Judges, with reference to the ground taken by the special appellant that he was entitled as a co-sharer under the general law of pre-emption to have the property sold to him, observed that where property is sold by public auction at a sale in execution of a decree and the neighbour and partner has an opportunity to bid for the property as other parties present in Court, the ordinary law of pre-emption cannot apply to such sales. This ruling was followed by the same Court in the later case of *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh* (5), also in *Sheikh Nuzmoodeen* v. *Kanye Jha* (6), where the rule was carried further by holding that even where the right of pre-emption between two co-sharers was based upon an express *ikrar* or agreement between them, sale in execution of a decree could not render the right enforcible, as it was the act of the Court, though such right might have been enforced if the transfer had been by private sale.

[230] It may therefore be taken as a rule of law settled by a long and uniform course of decision that a compulsory sale, such as a sale in execution of a decree of a sale under an authoritative order of the revenue authorities for arrears of Government revenue, does not render pre-emption enforcible, whether such right is claimed under Muhammadan law, the terms of the *wajib-ul-arz*, or on the ground of local custom or private contract; but that such compulsory sales being the creation of statute-law do furnish occasion for the exercise of the pre-emptive right where such right is provided, subject to the rules and restrictions prescribed by those legislative enactments themselves. Thus, for sales in execution of Civil Courts' decrees, we have the provisions of s. 310 of the Code of Civil Procedure (Act XIV of 1882) which lays down that "when the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons, of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer," this provision being a reproduction, in a very amplified form, of the provisions of s. 14 of Act XXIII of 1861, which was limited to sale of shares of a *pattidari* estate as defined in s. 2 of Act I of 1841. Again, in respect

(1) N.W.P.S.D.A.R. (1860), p. 194.
(2) N.W.P.S.D.A.R. (1863), Vol. 1, p. 325.
(3) N W.P.S.D.A.R. (1865), p. 139.
(4) 10 W.R.C R. 465 = 1 B.L.R.A.C. 105.
(5) 15 W.R.C.R. 455.
(6) 1 Marshall 555 = 2 Hay 651.

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of sales in execution of the revenue Courts' decrees we have special provision made by s. 177 of the N.W.P. Rent Act (XII of 1881) which runs as follows:—

"If it appear to the Board that the debt cannot be recovered under s. 174, or if the sale of the property appear to it advisable on other grounds, it shall order the property to be sold, in which case the sale shall be made under the rules in force for the sale of land for arrears of land revenue, but without prejudice to the incumbrances (if any) to which such property may be subject."

In this case we are directly concerned with this section, because the auction-sale of the 20th August 1886, in respect of which pre-emption is claimed took place in execution of a revenue Court's decree, and, if this section does not confer a right of pre-emption upon the plaintiffs, the suit, as I have already explained, could not [231] be maintained upon the ground of the general law of pre-emption going beyond the scope of the legislative enactments. Now it is clear that the terms of the section do not in themselves contain any words referring to the right of pre-emption, and if any such right is to be imported it can only be by a liberal interpretation of the words "the sale shall be made under the rules in force for the sale of land for arrears of land revenue," as they occur in the section. The first thing then is to determine whether the phrase "*the rules in force*" includes legislative provisions such as those found in the Land Revenue Act (XIX of 1873) as to sales of land for arrears of land revenue. This point was considered by a Bench of this Court in *Narain Singh* v. *Muhammad Faruk* (1) where the learned Judges observed:—"The only reference to pre-emption in Act XIX of 1873 is to be found in s. 188. It is contended that, as the sale is concluded before the claim to pre-emption can be made, the claim itself is not made under any rules for the conduct of sales. We should, however, be disposed to disallow this contention. It is not, however, necessary on the present occasion to determine the point." In the case now before us the question does require determination and I have no hesitation in holding that the word "*rules*" as it occurs in the section includes legislative enactments such as those contained in Act XIX of 1873, and that they refer to and include such provision as that enactment makes in respect of the manner in which sales in arrears of Government revenue are to be held and conducted, including the exercise of the right of pre-emption, which forms part and parcel of the matters entrusted to the officer conducting the sale. In *Syud Abdool Jaleel* v. *Kalee Koomar Dutt* (2) the High Court of Calcutta held that the Court executing a decree had no authority to substitute the claimant of pre-emption, under s. 14, Act XXIII of 1861, for the actual purchaser without the consent of the latter, and that a party claiming a share under the section cited is simply in the position of a party who having a right of pre-emption has observed the requisite formalities to enable him to assert the right and must resort to a civil suit to obtain the benefit thereof. This view of the law was expressly dissented from by a [232] Division Bench of this Court in *Tasaduk Ali* v. *Muksud Ali* (3), where the duties of the officer conducting an execution-sale in which claims for pre-emption under s. 14 of Act XXIII of 1861 are made, were considered, and it was laid down that it is incumbent on an officer conducting a sale in execution of a decree of land which is share of a pattidari estate paying revenue to Government, as defined in s. 2 of Act

(1) 1 A. 277. (2) 6 W.R. Mis. Rul. 3.
(3) N.W.P.H.C.R. (1874), p. 272.

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I of 1841, to take notice of a claim made by a person under the provisions of s. 14 of Act XXIII of 1861, and to receive the purchase-money as a fulfilment of the conditions of the sale, subject to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim. The learned Judge said :—" If the person at whose bid the property has been knocked down pays in the balance of the purchase-money as well as the claimant under s. 14, Act XXIII of 1861, the Court must pass orders for the acceptance of the money paid by the one, and for the return of the money deposited by the other. If, then, the conditions of sale are fulfilled by the claimant only, we see no reason why the sale should not be confirmed in his favour, if the Court be satisfied that he has established his right to advance the claim ; and, on the like hypothesis, if there be a contention between a bidder and the claimant as to the right of the latter to advance the claim, we see no reason why the Court should refuse to adjudicate the question and to pass orders accordingly. There is nothing in the provisions of s. 14, Act XXIII of 1861, which discharges the Court executing the decree from the obligation of recognizing the right thereby given. If, after inquiring into the claim, the Court executing the decree considers the claimant's right doubtful, it would confirm the sale in favour of the bidder, leaving the claimant to his remedy by suit, but, if the right of the claimant be clear, the Court executing the decree is as much bound to give effect to that right as it would be if the question came before it in a regular suit."

In this view of the law I fully concur, and, applying it to the present case, I hold that the plaintiffs were entitled to ask the Court executing the decree to recognize them as pre-emptors in respect of [233] the auction sale of the 20th August 1886, that, they having abided by the conditions to which the law subjected it as to the pre-emptive right, the sale should have been confirmed in their favour, and that, the order of the 17th September 1886, having been passed against them by the Revenue Court executing the decree, their proper remedy lay in a civil suit, such as this, in which they seek to set aside that order and to obtain possession of the property by enforcement of their statutory right of pre-emption. Nor should the ruling of this Court in *Shib Sahai* v. *Thika Ram* (1) be regarded as opposed to this view, for in that case, as far as it is intelligible from the report of the judgment, it can scarcely be said that the learned Judges intended to rule, as the head-note would represent, that after a Court executing a decree has disallowed a pre-emptive claim under s. 14, Act XXIII of 1861, though the pre-emptor duly observed the conditions of the sale, he is to be relegated to two separate suits : one for a declaration that he was entitled to the pre-emption of the property by substitution for the auction-purchaser, and another for recovery of possession of such property by enforcement of the right of pre-emption. The plaintiffs in the present case sued for declaration of their pre-emptive right in respect of the auction sale of the 20th August 1886 ; they also prayed for setting aside the Revenue Court's order of the 17th September 1886, whereby their claim was disallowed, and they further prayed for recovery of possession of the property by enforcement of their pre-emptive right. Such a suit seeks all that it could pray for and is in my opinion properly framed, and in no sense either premature or unmaintainable. Whether it succeeds or fails is a matter of the merits which must be considered with reference to the requirements of the law as to the right

(1) N.W.P.H.C.R. (1875), p. 97.

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of pre-emption in respect of auction sales in execution of the Revenue Court's decrees in these Provinces.

I have already stated my reasons for holding that the provisions of s. 177 of the Rent Act (XII of 1881) refer to and must be read with the provisions of the Land Revenue Act (XIX of 1873) [234] relating to sales for arrears of Government revenue. S. 150 of that Act provides the various processes for recovery of arrears of revenue, and clause (*g*) lays down that one of these is " by sale of such *patti* or of the whole *mahal* " and clause (*h*), going further in the same direction, prescribes another method to be " by sale of other immoveable property of the defaulter." Thus there are two kinds of sale contemplated by these two separate clauses. The former is provided for by s. 166 which authorizes the Collector, under certain conditions, to "sell by auction the *patti* or *mahal* in respect of which such arrear is due," and s. 167 provides that "land sold under the last preceding section shall be sold free of all incumbrances, and all grants and contracts previously made by any person other than the purchaser in respect of such land shall become void as against the purchaser at the auction sale." The second class of sales to which clause (*h*) of s. 150 relates is provided for by s. 168 which runs as follows :—

"If the arrears cannot be recovered by any of the above processes, and the defaulter owns any other *mahal* or any share in any other *mahal* or any other immoveable property, the Collector of the District may proceed against such *mahal* or other immoveable property as if it were the land on account of which the revenue is due, under the provisions of this Act :—

Provided that no other interests save those of the defaulter alone shall be so proceeded against, and no incumbrances created, or contracts entered into by him in good faith, shall be rendered invalid by such proceeding."

We are directly concerned with this section in this case, as it was admitted in the course of the argument that the auction sale of the 20th August 1886, was not such as s. 166 of the Act contemplates, and it must therefore have been held under s. 168. This being so, it is important to notice : *first*, that the section contemplates sale of "*any share* in any other *mahal*, that is, any fractional share, and, *secondly*, that "no other interests save those of the defaulter alone " can pass by such sale.

[235] Sections 169 to 187 lay down various rules as to the manner in which sales by auction are to be held and the purchase-money is to be deposited and other similar matters, and then comes s. 188 under which pre-emption is claimed in this case. The section requires close consideration, as its provisions are the solitary ground of the plaintiff's right of pre-emption, and, as I have shown at the outset, if the case falls beyond the exact scope and purview of that section the claim for pre-emption must necessarily fail, as no other statutory authority is relied upon, and the general law of pre-emption will not apply to compulsory sales. The section runs as follows :—

" Where any land sold under s. 166 is a *patti* of a *mahal*, any recorded co-sharer, not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger claim to take the said land at the sum last bid ; provided that the said demand of pre-emption be made on the day of sale and before the officer conducting the sale has left the office for the day, and provided that the claimant fulfil all the other conditions of the sale."

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In regard to the interpretation of this section the argument on behalf of the defendant-appellant, Baijnath, may be analyzed under three heads, namely.

(1) that the pre-emption provided by the section applies only to sales under s. 166 and not to sales under s. 168 such as the sale in this case.

(2) that it applies only to sale of a whole *patti* of a *mahal* and not to a fractional share of a *patti*, as the share of a Lala Singh which was sold on the 20th August 1886, in respect of which pre-emption is claimed.

(3) that the plaintiffs-respondent, Sital Singh, being a share of another *patti* cannot be recorded as a "recorded co-sharer" within the meaning of the section so as to entitle him to pre-emption.

Now in regard to the first of these points, it is true that the s. 188 mentions only sales under s. 166 and the right of pre-emption would at first sight appear to be limited to such [236] sales only, but s. 168, whilst authorizing the sale of " any share in any other *mahal*," distinctly provides that such share is to be sold "as if it were the land on account of which the revenue is due, under the provisions of this Act." I am of opinion that, inasmuch as s. 166 is the only provision in this behalf, these words render all the incidents of sales under s. 166, including pre-emption, applicable also to sales under s. 168, with the exception of what is provided in the proviso, namely, that only the defaulter's interest passes "and no incumbrances created or contracts entered into by him in good faith shall be rendered invalid by such proceedings," as would have been the case under s. 166, if the body of the section had been allowed to stand without the proviso. The proviso cannot be regarded as a surplusage, and it could be required only if the body of the section imported all the incidents and rules relating to sales under s. 166, which, according to my opinion, it does. I therefore hold that the pre-emption provided by s. 188 applies also to sales under s. 168. The case of *Narain Singh* v. *Muhammad Faruk* (1) is not opposed to this view, because all that that ruling specifically laid down was that the provisions of s. 14 of Act XXIII of 1861 as to the right of pre-emption were limited to sales in execution of Civil Courts' decrees and could not be extended to sales in execution of decree passed by the Revenue Courts; and the learned Judges, before expressing any view as to the point now under consideration, began by saying that if the present Rent Act admits of the assertion of a pre-emptive title in cases of a sale in execution of decrees, the suit should have been founded on some section in that Act," and they then, without deciding the question, expressed their inclination to be that the effect of s. 177 of the Rent Act, read with s. 188 of the Revenue Act, was to give a right of pre-emption in respect of sales in execution of decrees of the Revenue Courts. So far therefore the dictum of the learned Judges is entirely in favour of my view, and the judgment shows that they refrained from actually ruling it, because they were of opinion that the phrase "a *patti* of a *mahal* " as it occurs in s. 188 means only an entire *patti* and not a part only of a *patti* of a *mahal*.

[237] This leads me to the second point as to the interpretation of s. 188, for upon the strength of the ruling which I have first cited, it has been argued that since the share of Lala Singh sold by auction on the 20th August 1886 was only 1 biswa 2 biswansis 5 kachwansis in *patti* III, and did not constitute the whole *patti*, no right of pre-emption under the section could accrue either in favour of the co-sharers of the same

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patti, such as Bhoja Singh the other plaintiff (appellant in the connected S. A. No. 998 of 1888) or in favour of the co-sharers of the other *pattis*, such as Sital Singh, plaintiff-respondent in this appeal. In order to deal with this contention it is necessary, before deciding whether I am prepared to accept the ruling cited, to determine the exact meaning of the word *patti* as it occurs in s. 188 of the Revenue Act (XIX of 1873).

Now it is no doubt a somewhat regrettable circumstance that that enactment, whilst defining the word "*mahal*" in s. 3, omits to define the word "*patti*," which, as will presently appear, is most important for the purposes of this case. Nor does the Rent Act (XII of 1881) define the term, and the omission is all the more regrettable because the word does not belong to the language in which these two enactments have been framed. It must therefore be taken that the Legislature intended to leave the word to its natural signification in Hindustani, to which language it belongs and to be understood in the sense in which it was understood before these two enactments were passed.

This being so, it is necessary to consider the history of the word as a term of the land revenue system. Mr. Justice Field in his learned Introduction to the Bengal Regulations (p. 48) gives an account of the meaning and use of the word. He says :—"The village system as previously described was in existence in the Upper Provinces when they came under our dominion. Under that system the proprietors or *village zamindars* were in general so numerous a body that a settlement with them all would have been highly inconvenient. We therefore continued a practice which existed before our time of selecting one amongst the sharers whose name was entered in the public accounts as the person responsible for the [238] collection and payment of the revenue. The proprietor who is thus a party in his own name to the contract with Government for the payment of the revenue is called the *sadar malguzar* or *lambardar*, while the co-sharers or proprietors who are not parties in their own names are called *puttidars*. " The learned author then in a foot-note explains the meaning of the term. " *Putti* is a share, one of the many shares into which the village has been split by the operation of the laws of inheritance, &c. *Pattidar* means any holder of a share, but has in practice been limited as above. In a *mukammal*, or perfect *pattidari* tenure the lands are held in severalty by the proprietors who are all jointly responsible for the revenue. In a *namukammal* or imperfect *pattidari* tenure, part of the land is held in common, and the profits of this go first to meet the revenue and the remaining part is held in severalty. When one of the co-sharers fails to pay his quota the others have to make it good."

This explanation is inconsistent with the definition of the phrase "*pattidari estate*" in s. 2 of Act I of 1841, which runs as follows :—"A *pattidari* estate in this Act is held to be an estate which consist of two or more separate portions or *pattis*, or of which there may be proprietors possessed of separate properties and holding direct of the Government but not parties in their own names to the contract with the Government for payment of the public revenue. The proprietor who is a party in his own name is called a *lambardar*, and the proprietor who is not a party in the own name is called a *Pattidar*."

This section as relating to the tenures in these provinces is best explained in the authorized Directions for Settlement Officers (p. 50) published by the authority of the Local Government in 1858. The work says :—"*Pattidari* tenures are those in which the lands are divided and held in severalty by the different proprietors each of such persons

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managing his own lands, and paying his fixed share of the Government revenue, the whole being jointly responsible in the event of any one sharer being unable to fulfil his engagements. Imperfect *pattidari* tenures are those in which part of the land is [239] held in common and part severalty; the profits from the land in common being first appropriated to payment of the Government Revenue and the village expenses, and the overplus being distributed or the deficiency made up, according to a (rate or *baehh*) on the several holdings."

In the present case it is admitted that the tenure of the village in which the share of Lala Singh sold is situate is an imperfect *pattidari* and that he was therefore a *pattidar*. The word occurs in s. 10 of Regulation XXVII of 1795, and it is used there in its natural sense as a convertible term with the English word "sharer" employed with reference to a sharer in a *pattidari mahal*. There being nothing to the contrary in the Act itself, or elsewhere, I hold that a broad and general meaning consistent and co-extensive with its meaning in the Hindustani language should be assigned to the word "*patti*" as it occurs in s. 188 of the Revenue Act, and that "*patti*" must be taken to mean the share of *pattidar*. This interpretation is not inconsistent with the definition of *pattidar* in s. 2 of Act I of 1841, of which enactment s. 4 provided the right of pre-emption in respect of auction-sale or any *patti*) in favour of any *pattidar* or other member of the co-parcenary, not being himself in arrear." The manner in which this provision is understood by the revenue authorities in connection with pre-emption is described in the authoritative "Directions for Revenue Officers" (at p. 249) where it says :—In co-parcenary estates a right of pre-emption generally exists on the part of such co-parcener in the event of the sale of a share. Provision is made for the enforcement of this right by s. 4, Act I of 1841, on the occasion of the sale of any *patti* by public auction for arrears of revenue, and by the 8th rule promulgated by the Court of *Sudder Dewanny Adawlut*, under s. 11, Act IV of 1846, on the occasion of the sale of the right and interests of a co-parcener in satisfaction of a decree of Court."

But it is contended that the word "*patti*" can never mean the share of a *pattidar*, because in clauses (*d*) and (*e*) of s. 150 of the Land Revenue Act (XIX of 1873), as also in ss. 154 and 157, [240] the words "*patti*" and "share" are used as indicating a marked distinction between them, and that that distinction is all the more apparent when it is observed that in clauses (*f*) and (*g*) of s. 150 and the corresponding ss. 158 and 166 the word "*patti*" only occurs to the exclusion of the word "share," in respect of the power of annulment of the settlement and sale of the *patti* in respect of which the arrear is due. The distinction is no doubt noticeable, but the context of the clauses above-mentioned shows that the distinction may have been intended only to differentiate between the share of a *zamindari* estate and a *patti* which is a portion of a *pattidari* estate. The distinction might refer to the nature of the tenure, that is to the difference between *zamindari* estates and *pattidari* estates, and I do not think it need necessarily be understood to mean that the holding of a *pattidar*, who by reason of the very nature of the tenure holds his land separately, is not a *patti*, though speaking literally the holding is a *share* of the *mahal* in which it is situate. But it is further contended that a sale of a share of a *patti* never takes place for arrears of Government revenue. This contention is based upon drawing a hard and fast distinction between the meaning of the word "*patti*" and "share" which, as I have explained, are literally and virtually convertible terms for all practical purposes where *pattidari*

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estates are concerned, and there is no reason shown why, for purposes of pre-emption, the rules which apply to the sale of the one should not apply to the sale of the other. Moreover, whilst it is true that as a matter of practice and convenience revenue authorities do not ordinarily sell the share of a *pattidar* by itself by the summary executive process for recovery of revenue, it is an ordinary occurrence that such share is, as a matter of fact, brought to sale in execution of a revenue Court's decree, and Messrs. Crosthwaite and Smeaton, in their note on s. 166 of the Revenue Act, says that this takes place in nine cases out of ten. We know that this responsibility for payment of revenue by co-parcenary *pattidars* is of a joint character, and arrears due by any one of them can be recovered by sale of the shares of all. In view of this circumstance when a *pattidar* makes default in payment of his *quota* of the revenue his *co-pattidars* pay up his *quota* of [241] revenue, and then sue him in the Revenue Court under clause (*k*) of s. 93 of the Rent Act which provides for "suits by recorded co-sharers to recover from a recorded co-sharer who defaults arrears of Government revenue paid by them on his account." Decrees passed in such suits by the Revenue Court are executed by bringing to sale only the share of the defaulting *pattidar*, for it is clear that the shares of the other *pattidars* would not be liable to sale under such decrees. Such sales take place under s. 177 of the Rent Act, and there seems no reason in principle why a right of pre-emption should not accrue to the non-defaulting *pattidars*. The right of pre-emption is in its very essence a reciprocal right, available to such co-parcenary *pattidars* in respect of the *share* or *patti* of the other, and its object is to exclude strangers from the co-parcenary body. Now, applying this principle to the present case, it must be admitted that the *pattidar* Lala Singh whose share was sold could have exercised pre-emption by reason of his *pattidari* right, if the other *pattis* were sold; and it would be infringing the essential principle of pre-emption reciprocity if it were to be held that when his share is sold, as it was on the 20th August, 1886, the other *pattidars* would have no right of pre-emption in their turn. I think we are not driven to any such interpretation of s. 188 of the Revenue Act, and indeed, in my opinion, we should be defeating the policy of the statute as to the right of pre-emption if we adopt any interpretation which would have such an effect. The whole policy and object of the right of pre-emption is to prevent the intrusion of strangers in co-parcenary villages such as *pattidari* estates, and since it is conceded on all hands that the sale of an entire *patti* would give the right of pre-emption to the owners of other *pattis*, it seems to me to follow *a fortiori* that the sale of the lands of a *co-pattidar* should entitle his *co-pattidars* in the same *patti* to exercise pre-emption for the purpose of including strangers from that *patti*.

When I say that any interpretation other than that which I have adopted of the word "*patti*" as it occurs in s. 188 of the Revenue Act, would defeat the policy of the right of pre-emption itself [242] as indicated by that section, I must not be understood to mean that such a result might not have followed if the word had been clearly defined in the statute itself, or indeed if any clear definition of it were capable of being gathered from the statute. Nor should I be taken to hold that, even if a precise definition of the word were to be found in the statute, it should not be interpreted in other parts of the statute in the same sense as it should be interpreted in s. 188. I have said enough to show that whilst the word *patti* did bear an intelligible and definite meaning under

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Act I of 1845, s. 2 and therefore also in s. 4 of that enactment, the Legislature has chosen to leave it undefined in passing the present Revenue Act. I confess, speaking for myself, that I have exceptional difficulty in understanding this word of my own language in a sense different from what it would have free of doubt, had it not been appropriated by the Legislature in passing a law such as the Revenue Act. In so appropriating the word it might have been expected that the mere fact of its being a word alien to the English tongue, in which the enactment was framed, rendered it necessary that it should be specifically defined, so as to make it impossible for those whose duty it is to interpret the statute to have any doubt as to the meaning it bears in any one point of the enactment or another.

But, whilst saying this, I cannot help feeling that the interpretation which I have placed on the word *patti* as meaning the share of a *pattidar*, whether he owns a whole *patti* or not, is an interpretation which cannot be adopted in exactly the same broad sense in some parts of s. 150 of the Revenue Act as in s. 188 of the same enactment. It seems to me clear, for the reasons stated by Messrs. Crosthwaite and Smeaton in their edition of the Revenue Act at page 167 that the word *patti* as it occurs in clause (*f*) of s. 150 with reference to annulment of the settlement, and as it occurs in clause (*g*) with reference to sale of such *patti* under conditions such as s. 166 requires must necessarily mean the whole *patti*, that is to say, a proportionate share of the *mahal* with reference to the assessment of of revenue. This, I think, may be conceded, because the word has not been used sufficiently carefully in the enactment to make [243] it bear only one and the same rigid, definite and precise meaning throughout the Act. The exigencies of the rules as to annulment of the settlement or sale in arrears of revenue require the limited interpretation of the word *patti* as meaning the whole *patti*; the exigencies of the right of pre-emption require that the same word in s. 188 should be broadly interpreated as meaning the share of a *pattidar*. There is no inconsistency in thus interpreting the word *patti* in a limited sense in one part of the statute and in a broad sense in another part of the same enactment, as I will presently explain.

It is undoubtedly a sound rule of interpreting statutes that words must be understood in their ordinary and natural meaning unless there is clear reason to the contrary. *Patti* is a Hindustani word, and in that language it means a share in a *pattidari* estate. For example, where there are five shares the share of each is a *patti* and each sharer is a *pattidar*. If the Government dealing with the settlement of revenue, chooses to deal with all the five in one, engagement, that engagement will not, in the absence of express words to that effect alter the meaning of the word *patti* or *pattidar*. The fact of the joint engagement of revenue may regulate the incidents of the engagements, for example that the engagement cannot be annulled with one *pattidar* unless the whole engagement is annulled. But this would not alter the fact that *patti* means the share of each of the five *pattidars* who joined in the engagement. This is the natural meaning of the word, and I so understand it in the absence of any express definition to the contrary.

As to this broad meaning being incapable of precise application to the powers of annulment of the settlement under clause (*f*), s. 150 read with s. 158, and the powers of sale under clause (*a*) of s. 150 read with s. 166 of the Revenue Act as to the sale of a *patti* in arrears of revenue, I have little doubt. But the fact that a revenue officer desirous of collecting revenue by either of those processes is bound by the rules to put a restricted interpre-

tation on the word *patti* by interpreting it to mean the whole *patti* does not necessitate my interpreting the word *patti* to mean that the share of a man who is admittedly a *pattidar* is not a *patti* in the sense in which I under- [244]stand it in s. 188 of the Revenue Act for purposes of pre-emption. If a revenue officer cannot annul a settlement unless it is a *patti* including the whole area covered by the engagement to pay the revenue, it is not because the word *patti* necessarily and exclusively means that, but because the nature of the engagement with the Government for the payment of revenue, like a mortgage, necessitates that the breaking up of such an engagement must relate to the whole area. Similarly clause (*g*) of s. 150 read with s. 166 relates to cases where a revenue officer desirous of realizing the arrears of revenue cannot sell the share of any individual *pattidar* if that share falls short of what the revenue officer is bound to recognize as the area subject to the engagement for payment of revenue. This is so, not because the word *patti* means anything other than what is really does *i.e.*, the share of a *pattidar*, but because, by reason of the provisions of s. 166 taken with the provisions of s. 167, which clear away prior incumbrances, no such sale can take place by the summary process without disturbing the whole engagement with all the *pattidars* who joined in the responsibility for payment of Government revenue. It is therefore in consequence of the exigencies of the engagement for payment of Government revenue that in clauses (*f*) and (*g*) of s. 150 and in the corresponding ss. 158 and 166 the word *patti* must be taken to mean the whole *patti*. No such reasons apply to sales under s. 168 which must be read with clause (*h*) of s. 150 of the Act.

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Whilst I fully recognize the rule of interpretation that words, when they occur in one and the same statute, must, so far as possible be interpreted in exactly the same meaning, I regret I am differing with the majority of the Bench in holding that that rule of interpretation, which undoubtedly is a sound rule in ordinary cases, is not applicable to this case. I am driven to the conclusion that the interpretation of the word *patti* in s. 188 so as to exclude the share of a *pattidar* for the purpose of pre-emption would defeat the whole policy with which we must credit the Legislature in having framed that section with the special object of preventing the intrusion of strangers in *pattidari* estates.

[245] As to the rule of interpretation that words in a statute should bear the same meaning throughout, unless something to the contrary is shown, I wish to say that it is far from being an inflexible rule, and that it amounts only to a presumption for purposes of understanding the meaning of the Legislature. Mr. Maxwell in his work on the interpretation of statutes (at p. 385, 2nd ed.), referring to decided cases, states the rule in the following terms :—

"It has been justly remarked that when precision is required no safer rule can be followed than always to call the same thing by the same name. It is at all events reasonable to presume that the same meaning is intended for the same expression in every part of the Act. But the presumption is not of much weight."

The learned author supports this statement of the rule by illustrations furnished by decided cases, and his conclusions are similar to those arrived at by Mr. Wilberforce in his work on statute law from which I quote a passage (at pp. 135—6) :—

"As the literal meaning of words, and even their usual meaning can thus be forsaken, it follows, as a necessary consequence, that the same word may have various meanings not only in different Acts of Parliament,

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but sometimes in the same Act or in the same section. As a general rule the Courts 'endeavour to give the same meaning to the same words occurring in different parts of an Act of Parliament,' and it is said that 'if the Legislature have used an ambiguous word in a definite sense in one passage of a clause in an Act of Parliament, it is in accordance with the rules of sound construction and legitimate inference to hold the same word is used in the same sense when found in another passage of the same clause.' This, however, is not always possible. In one case the Court, in construing the 9th section of 3 and 4 Will. IV., Cap. 27, found that the word 'rent' occurred seven times in that section, and that in three of those instances it must be read in the sense of '*rent-charges*' in the other four instances in the sense of '*rent reserved*.'"

This passage is also supported by the authority of decided cases, which show that the rule that a word used in a statute is to be [246] understood in the same sense throughout, is only a rule of presumption, by no means inflexible, and certainly not of such a character as to be irrebuttable by other rules of interpretation founded upon the especial context of statutory words of reasons and objects wherfore any special section is enacted.

I have dealt upon the exact scope of this rule of interpretation because the point upon which my judgment in this case virtually turns is to show that, unless the word *patti* as it occurs in s. 188 of the Revenue Act is to be interpreted literally as including the share of any *pattidar* and in a sense different to, or rather, less restricted than the sense in which it is used in s. 150, clauses (*f*) and (*g*) and in the corresponding ss. 158 and 166, s. 188 need never have been enacted. In other words I have come to the conclusion that in interpreting the word *patti* in s. 188, there exist enough reasons for interpreting the word in a sense other than that in which, speaking strictly, it occurs in some other parts of the Act.

Now s. 188 provides what? It provides no rule calculated to facilitate the recovery of arrears of revenue. There is not one word in that section which is intended to provide any special process for expediting the collection of revenue. It is also clear from the preamble of the Act that the scope of the enactment was "to consolidate and amend the law relating to land revenue and the jurisdiction of Revenue officers in the North-Western Provinces of the Presidency of Fort William in Bengal." There is not one word in that preamble which would suggest that the enactment was intended to create a right of pre-emption in connection with sales that may take place in collecting arrears of revenue.

This being so it is of considerable importance for understanding the section to notice that the Legislature, going beyond the exact purview of the enactment as specifically represented by the preamble, chose to frame a rule such as s. 188 contemplates. That rule, if it is to be understood in any sense of having an object in view, must be understood to mean that its aim and end is that in *pattidari* estates when sales take place in arrears of Government revenue, such sales should be made under conditions which give a chance to [247] other *pattidars* of precluding the intrusion of strangers by paying up the amount of money represented by the last bid in a public auction sale. The protection of the integrity of *pattidari* estates from intrusion by strangers is not a part and parcel of the rules as to collection of revenue, and I say this with emphasis, because I attach to s. 188 an especial importance as representing an especial and definite policy of the Legislature, namely, that in *pattidari* estates the intrusion of strangers should be obviated.

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I will now show by analogical illustration that if the word *patti* in s. 188 is to be understood in any inflexible or rigid sense so as to mean only the whole *patti*, and not a share of a *patti*, then it will be a necessary consequence that s. 188 will be suicidal in itself, because the right of pre-emption which it provides will be easily defeated by the simple fact that the property brought to sale is not the whole *patti*, but only the share of a *pattidar*. The purchaser of such a share, however disliked he may be, by the *co-pattidars* of the *pattidars* whose rights are sold, may intrude upon the co-parcenary with impunity, and not only in the *patti* of which he has bought a share, but also thus acquire a pre-emptive right in other portions of the *mahal*. The case may be thus illustrated :—

Suppose that the words of s. 188 were to begin by saying " where any property sold under s. 166 is a *house* " the question would arise whether the sale of a portion of the house would imply that a right of pre-emption is enforcible in respect of such sale. The argument by which the word *patti* is interpreted in that section as meaning only the whole *patti*, when applied to the house would be this :—" When the whole house is sold then undoubtedly there is a right of pre-emption, but if a portion of the house is sold then there is no right of pre-emption for the co-sharers. A neighbour is entitled to sue when the whole house is sold to enforce his pre-emption but the sale of a portion of the house, where by a stranger is introduced into the house, cannot be questioned by any pre-emptive claim by the co- sharers in the house itself."

That such would be the consequence of holding that the word *patti* as it occurs in s. 188 of the Revenue Act does not include the [248] share of a *pattidar* is obvious. I cannot credit the Legislature with any such intention, as I believe, in framing s. 188 of the Revenue Act, they were only recognizing and showing consideration to the well-established custom of pre-emption in this part of the country. In short, I think that, whatever meaning is to be assigned to the word *patti* for purposes of considering the annulment of settlement or considering the question whether a *patti* cannot be executively brought to sale under s. 166, so as to defeat prior incumbrances; for purposes of interpreting s. 188 the word *patti* must include the share of a *pattidar*. I must repeat that I am driven to this conclusion, because otherwise the policy of the Legislature in framing s. 188 would be frustrated, as it would be repugnant to the very notion of pre-emption. So far as these views are in discord with the ruling of a Division Bench of this Court in *Narain Singh* v. *Muhammad Faruk* (1) I respectfully dissent from it.

I now proceed to consider the case-law upon the subject, and in doing so I must premise what I have already pointed out that the provisions of s. 188 of the Revenue Act (XIX of 1873) are a reproduction of the rule as to pre-emption contained in s. 4 of Act I of 1841, and that by section 14 of Act XXIII of 1861 the rule was extended to auction-sales in execution of Civil Courts' decrees. Whilst the law stood thus it was held by Morgan, C. J., and Spankie, J., in *Sheikh Kadir Bux* v. *Ram Tahul Bhagat* (2) following some earlier rulings of the Sadar Court, that a claim for pre-emption under s. 4 of Act I of 1841 applied equally to perfect and imperfect *pattidari* tenures, as they both fall under the purview of the definition of *pattidari* estate in s. 2 of that Act. Even a stronger case is the ruling of Pearson and Brodhurst, JJ., in *Ram Autar* v. *Sheo Dutt* (3)

(1) 1 A. 277.
(2) N.W.P.H.C.R. (1871), p. 125.
(3) N.W.P.H.C.R. (1874), p 243.

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where there had been no public partition, but it appeared from the settlement *wajib-ul-arz* that the lands in the *mauza* were held in the following manner, that is to say, the co-sharers had divided them into *pattis*, and each *pattidar* realized the rents or proceeds of his own separate holding, and his share of the rent of the common lands, and paid his own *quota* of revenue [249] separately, it was held that the tenure came within the definition of a *pattidari* estate contained in s. 2 of Act I of 1841, and a share in the *mauza* having been put up for sale in the execution of a decree and knocked down to the defendant, a stranger, the plaintiff, a co-sharer of the share, was held to be entitled, under the provisions of s. 14 of Act XXIII of 1861, to take the share.

These cases are clear authorities for the proposition that the mere fact of a *pattidar's* share being situate in an imperfect *pattidari* estate did not preclude pre-emption in respect of the sale of such share under s. 4 of Act I of 1841, and I see nothing in the corresponding s. 188 of the present Revenue Act (XIX of 1873) to require any other interpretation.

As to the third point I am of opinion that the phrase "any recorded co-sharer" as it occurs in s. 188 of the Revenue Act means any *pattidar*, that is, the holder of a share in a *pattidari* estate or *mahal*, and that therefore the plaintiff-respondent, Sital Singh, was entitled to the right of pre-emption along with the other *pattidars*, there being no such restrictive words in the section as would exclude a person in his position.

The third ground of appeal in this case, namely, that since the lower appellate Court has found that one of the plaintiffs, Bhoja Singh was not entitled to pre-emption, it should also have held that the plaintiff-respondent, Sital Singh, had also forfeited his right of pre-emption by joining the aforesaid Bhoja Singh as plaintiff in the suit is also the turning point of the ground taken by Bhoja Singh in his connected second appeal, No. 998 of 1888, in which he contests the validity of the lower appellate Court's finding in this respect; so far, therefore, both these appeals may be considered together.

It has been argued on behalf of the defendant Baijnath, who is respondent in Bhoja Singh's appeal (No. 998 of 1888), that since Bhoja Singh was a co-sharer of the same *patti* as Lala Singh whose share was sold on the 20th August 1888, his proper course was to have prevented that sale by paying up the money due by Lala Singh in respect of which the Revenue Court's decree was passed against the latter, and that he, having omitted to do so, must be taken to be [250] himself a defaulter so as to disentitle him from the benefits of s. 188 of the Revenue Act. This indeed is the view adopted by the lower appellate Court as the ground for dismissing his claim, but it is thoroughly unsound. In the first place it was not pleaded and it does not appear, that Bhoja Singh, was himself in arrear of revenue with regard to the land sold, and in the next place, as I have shown, the sale must be understood to have taken place under s. 177 of the Rent Act read with section 168 of the Revenue Act, sales under which must necessarily be limited to the interest of the defaulter Lala Singh, and could in no sense have imperilled the rights and interests of Bhoja Singh, thus rendering it unnecessary for him to make any payment to obviate the sale. As a *pattidar*, Bhoja Singh was entitled, like Sital Singh, to the right of pre-emption in respect of the sale of the 20th August 1886, and there was nothing irregular or improper in their having joined in bringing the suit to enforce the pre-emptive right which was common to them both. This view renders it unnecessary for me to consider how far the rule laid

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down in *Bhawani Prasad* v. *Damru* (1) and *Karar Singh* v. *Muhammad Ismail Khan* (2) that the joinder of a stranger by a pre-emptor in suing for pre-emption defeats the entire pre-emptive rights can be applicable to a case such as this where the claim for pre-emption is based upon the statutory provisions of s. 188 of the Revenue Act.

As the result of this judgment I would dismiss this appeal, and, setting aside the decrees of the lower Courts, so far as they dismiss the claim of Bhoja Singh, decree his appeal (S. A. 998 of 1888) with the effect that the whole suit as brought would stand decreed with costs in all the Courts.

EDGE, C.J.—In the view which I take of sections 166, 168 and 188 of Act XIX of 1873, it is not necessary for me to express in this case any opinion as to the effect of s. 177 of Act XII of 1881, or on the various other points discussed by my brother Mahmood.

In my opinion we must apply here the rule of construction which is applicable generally to Statutes and Acts of the Legisla-**[251]** ture that is, we must construe a word which occurs more than once in the same Act, so as to give it the same meaning throughout the Act, unless some definition in the Act or the context shows that the Legislature used the word in different senses.

If the Legislature by "*patti* " as used in ss. 166 and 188 of Act XIX of 1873 meant the share of a *pattidar* in a *patti* and not a division of a *mahal*, it appears to me that the Legislature used the word " *patti* " in two different senses in the Act. In s. 150 clause (*d*) a distinction is made between a " share " and a " *patti* " and a " *mahal*." In clause (*e*) of that section a distinction is made between a " share " and a " *patti*." Clause (*f*) of s. 150 relates to " the annulment of the settlement of such *patti* or of the whole *mahal*," clause (*g*) to a "sale of such a *patti* or of the whole *mahal* " and clause (*h*) to a " sale of other immoveable property of the defaulter." The " other immoveable property of the defaulter " in clause (*h*) must be immoveable property other than " the share, or *patti*, or *mahal* in respect of which the arrear is due " mentioned in clause (*d*), and consequently other than " such share or *patti* " mentioned in clause (*e*) and other than, " such *patti* " or the " whole *mahal* " mentioned in clauses (*f*) and (*g*).

The " processes " respectively prescribed in clauses (*a*) to (*h*) inclusive of s. 150, by which an arrear of revenue may be recovered are separately developed and provided for in the subsequent sections of the Act, and are not in those sections confused one with the other. As, for example, the process " by attachment of the share, or *patti*, or *mahal*, in respect of which the arrear is due " mentioned in clause (*d*) of s. 150 is dealt with in ss. 154, 155 and 156. Again the process " by transfer of such share, or *patti*, to a solvent co-sharer in the *mahal* " mentioned in clause (*e*) of s. 150 is dealt with in s. 157. Again the process " by annulment of the settlement of such *patti* or of the whole *mahal* " mentioned in clause (*f*) of s. 150 is dealt with in ss. 158 and 169. Ss. 160 to 165 inclusive further relate to some of the above-mentioned processes. The process " by sale of such *patti* or of the whole *mahal* " mentioned in clause (*g*) of s. 150 is dealt with in s. 166 ; s. 167 enacting what shall be the effect of sale under s. 166. The process " by sale of other immoveable **[252]** property of the defaulter " mentioned in clause (*h*) of s. 150 is

(1) 5 A. 197. (2) 7 A. 360.

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separately dealt with in s. 168. Ss. 169 to 187 inclusive relate to procedure, re-sales, the application of proceeds of sales the liability of a purchaser and other matters not necessary to refer to here. There is nothing to suggest that the word " *patti* " in s. 166 has been used in any other sense than that in which it has been used in clauses (*d*), (*e*), (*f*) and (*g*) of s. 150, when it is used as meaning something other than a share of a defaulting share-holder or *pattidar* in the *patti*. It appears to me that in whatever sense the word "patti" is used in s. 166, the same meaning, and that only, must be applied to it as it is used in s. 188 which enacts that " when any land sold under s. 166 is a *patti* of a *mahal* any recorded co-sharer may, &c." It will be remembered that what may be sold under s. 166 is the *patti* or *mahal* in respect of which such arrear is due and not the share of a defaulting share-holder or *pattidar* in the *patti*.

A sale under s. 168 of Act XIX of 1873 can only be restored to " if the arrear cannot be recovered by any of the above processes," amongst which is the process of a sale of the *patti* or *mahal* in respect of which such arrear is due " authorized by s. 166. I cannot read s. 188 of the Act as applying to a sale under s. 168.

For the above reasons, whatever may be the construction of s. 177 of Act XII of 1881, I am of opinion that s. 188 of Act XIX of 1873 cannot apply in this case in which the property sold was not a *patti* of a *mahal* within the meaning of that section.

It was not suggested by the learned vakil who represented the respondent before me that there was any right of pre-emption if s. 188 of Act XIX of 1873 did not apply.

I would allow the appeal of Baij Nath, defendant, with costs and dismiss the suit with costs.

YOUNG, J.—This was a suit for pre-emption of the share of the *pattidar* in an imperfect *pattidari* estate, such share having been sold at auction in execution of a decree of a Rent Court.

The points for decision in this case appear to be the following. Where a decree under the Rent Act (XII of 1881) has been passed [253] against the owner of a share in an imperfect *pattidari* estate and execution of such decree has been had by sale of the defaulter's share in the *mahal* (not being the property on which the arrear accrued) does the right of pre-emption accrue—

(1) to a co-sharer in the same *patti* ?

(2) to a co-sharer in another *patti* of the same *mahal*?

The law as to execution of decrees of Rent Courts provides (Act XII of 1881, s. 177) that the " Board " may order the property to be sold, " in which case the sale shall be made under the rules in force for the sale of land for arrears of revenue but without prejudice to the incumbrances (if any) to which such property may be subject."

I think the expression " the rules in force for the sale of land for arrears of revenue " must be taken in its most comprehensive sense and is probably wide enough to include within its scope the rule allowing the exercise of the right of pre-emption at such sales under certain circumstances.

What then are the circumstances under which a right of pre-emption arises in a sale for arrears of revenue?

Under s. 166 of the Land Revenue Act (XIX of 1873) the Collector may, with the sanction of the Board, sell by auction " the *patti* or *mahal* in respect of which such arrear is due." The next section (s. 167) enacts

that land so sold is sold "free of all incumbrances." S. 168 enacts that if the arrear cannot be recovered by any of the processes previously mentioned "and the defaulter owns any other *mahal* or any share in any other *mahal* or any other immoveable property" the Collector "may proceed against such *mahal* or other immoveable property as if it were the land on account of which the revenue is due under the provisions of this Act."

The rule allowing the pre-emption is contained in s. 188 of the same Act which runs as follows :—

"When any land sold under s. 166 is a *patti* of a *mahal*, any recorded co-sharer, not being himself in arrear with regard to such land may, if the lot has been knocked down to a stranger, claim to [254] take the said land at the sum last bid." S. 168 extends these provisions to any *mahal*, share, or immoveable property other than that on which the arrear accrued ; but only authorizes sale of the defaulter's right and title therein saving incumbrances.

It is admitted that the village of Musafirpur consists of three "*pattis*"—

Patti	(I)	containing	6	bis.	13½	biswansis.
,,	(II)	,,	6	,,	13¼	,,
,,	(III)	,,	6	,,	13¼	,,
			20 biswas.			

It is further admitted that the tenure of the village is "Imperfect *pattidari*." In *patti* (III) Lala Singh held a share of 1 biswa 2 biswansis, 5 kachwansis. We are not informed whether this share was held by him in distinct severalty or conjointly with other co-sharers in *patti* No. III, but in any case this share was sold at auction on the 20th August 1886, in execution of a decree of a Rent Court, under s. 177 of Act XII of 1881, and s. 168 of Act XIX of 1873 (apparently).

It will be remembered that such sale being in execution of a Rent Court's decree, does not prejudice the rights (if any) of previous incumbrancers, and in this respect differs from a sale under s. 166 of the Land Revenue Act (XIX of 1873), and agrees with a sale under s. 168 of that Act.

The question now before us is—does Lala Singh's *share* (assuming it to be a separate share) of 1 biswa 2 biswansis 5 kachwansis in the third *patti* of mauza Musafirpur come within the meaning of the expression "*patti* of a *mahal*" in s. 188 of Act XIX of 1873. Bearing in mind that Musafirpur is an imperfect *pattidari* village, I think the answer must be in the negative. For even if 1 biswa 2 biswansis 5 kachwansis could perfectly be called a *patti*, or the *patti* of Lala Singh, it would be the *patti* of a *patti* and the language of s. 188 ought to run—" When any land, &c., &c., is a *patti* of a *mahal* or the *patti* of a *patti* of a *mahal*." Does the language [255] of the Land Revenue Act really justify such an interpretation ? If the property to be sold had been either of the three great *pattis* into which this village is divided, then the language of s. 188 would clearly be accurate, such a sale would be "the sale of a *patti* of a *mahal*." In the present case however we are asked to interpret the words *patti* "of a *mahal*" to mean "*patti* or part of a *patti* of a *mahal*."

But it was contended that in a *pattidari* village (perfect or imperfect *pattidari*) the word *patti* also meant the holding of any of the *pattidars* and therefore Lala Singh's share of 1 biswa 2 biswansis 4 kachwansis might be called his *patti*, he being a *pattidar*. To this it was replied

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firstly, that in that case the Urdu word *patti* was used ambiguously in the Act to mean two things, and secondly, that in its second sense the word is simply equivalent to share, and that if the Legislature had meant to include a *pattidar's* share in the words "*patti* of a *mahal*" in s. 188, Act XIX of 1873, it could and would have said so, just as it does speak of "any share in any other *mahal*" in s. 168 of Act XIX of 1873.

Again s. 150 of Act XIX of 1873 specifies the various remedies to be had against revenue defaulters. It provides eight processes for enforcement of the Government demand. Some of these deal with the share of a defaulter, some with the *patti* or *mahal* in respect of which the arrear accrued.

The section draws a sharp distinction between the words *mahal*, *patti*, share, and this corroborates me in the opinion that the words "*patti* of a *mahal*" in s. 188 are not intended to include the share of a co-sharer in a *patti* of an imperfect *pattidari mahal*.

If the village had been a perfect *pattidari* one, so that Lala Singh's share might have been held entirely in severalty without any share of the joint lands; then "*patti*" might have included Lala Singh's share, though, even then, the language of the Act could not be regarded as free from ambiguity. But where the village is one of *zamindari* tenure or of imperfect *pattidari* (as here) the word *patti* cannot be treated as synonymous with share. In conclusion I may briefly point out that a sale under s. 168 is merely [256] a sale of the defaulter's right, title and interest, and does not pass a title clear from prior incumbrances. It may well be that this consideration influenced the Legislature in omitting to allow a right of pre-emption in sales under s. 168.

In my opinion s. 188 of Act XIX of 1873 has no applicability to sales under s. 168 of that Act.

On these grounds I would disallow the claim of Sital to pre-emption and would decree the appeal of the purchaser Baijnath with costs.

Appeal decreed.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

BASDEO (*Plaintiff*) *v.* GHARIB DAS (*Defendant*).*
[7th November, 1890.]

Hindu Law—Succession to the "gaddi" of temple—Nature of evidence required to prove title to succeed—Explanation of terms "nihang" and "grihast."

Per EDGE, C.J., and MAHMOOD, J.—The question who is entitled to succeed to the office of a deceased *Mahant* must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased *Mahant* belonged. It is necessary for the person claiming a right to succeed as *Mahant* to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponent's title.

Per MAHMOOD, J.—It was necessary for the plaintiff in this case to prove that he was "*Nihang*," as distinguished from "*Grihast*," which he failed to do. Meaning of the terms "*Nihang*" and *Grihast*" explained.

Genda Puri v. *Chhatar Puri* referred to (1).

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* First Appeal No. 28 of 1890 from a decree of Babu Piari Lal, Subordinate Judge of Meerut, dated the 3rd December 1888.

(1) 13 I.A. 105.

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

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Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan* and Babu *Sirish Chandar Bose*, for the respondent.

JUDGMENT.

EDGE, C. J.—This appeal arises out of a suit that has been heard and determined by the Subordinate Judge of Meerut, in which he dismissed the suit with costs. The plaintiff brought his suit to re-[257]cover possession of a certain property attached to the *gaddi* of Baksar. He alleged that, according to the custom which governed the succession, he was the person lawfully entitled to the *gaddi* and to the title of *Mahant*, and, as such, to the property in suit. The custom which he alleged was that the *Mahant* for the time being had the power, without consultation with or interference by any one, to appoint his successor. His case was that he was so appointed by the deceased *Mahant* Ganga Prasad who died on the 26th February 1887. The plaintiff also alleged that the defendant had taken possession of the property attached to the *gaddi* and kept him, the plaintiff, out of possession of it.

On the other hand, the defendant, by his written statement, denied that the plaintiff had been nominated by Ganga Prasad as his successor; he alleged that the plaintiff was a married man and as such incompetent as a candidate for nomination; and he went on to allege that he himself had been appointed to succeed Ganga Prasad, and that such appointment was made with the consent of the *Mandoldhari Mahants* and that he had been invested by Ganga Prasad with the cap and necklace, and that he had performed the obsequies of Ganga Prasad, and in paragraph 5 he in fact traversed the custom alleged by the plaintiff. He therein says:—"Succession to the *gaddi* depends upon the consent of the *Panchayati Mahants* and very exalted *Mandaldhari Mahants* so that the plaintiff has no right to get the property, nor is there any cause of action for the present suit." There were other questions raised in the written statement which it is not necessary, in the view that I take of the case, further to refer to.

Now the position is this:—The plaintiff claims a decree to eject the defendant from the property in suit. Admittedly the plaintiff never was in possession; and, admittedly, immediately after the death of Ganga Prasad, the defendant took possession and has continued in possession down to the present time. Under those circumstances it is for the plaintiff to prove a title which entitles him to have the defendant ejected from the property and to get possession of the property himself.

[258] We have been referred to no case which is precisely in point. I mean by that, no case in which the question as to how the succession to the *gaddi* of a monastery of this particular persuasion of *Nanakshahis* has been decided. So far as we know, that is a question which has never been legally decided. We are bound, therefore, to see whether any custom has been proved, which would, on the facts as to nomination alleged by the plaintiff, if we were satisfied with his evidence as to the nomination, entitle him to a decree. The law as laid down by their Lordships of the Privy Council in the case of *Genda Puri* v. *Chhatar Puri* (1) applies in our opinion generally to this case.

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(1) 13 I.A. 105.

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I propose to refer to the evidence of the witnesses called on behalf of the plaintiff, to whose evidence our attention has been called by his Counsel and vakil. There may have been other witnesses called on his behalf in the Court below whose evidence the plaintiff did not consider it necessary to translate or print, and whose evidence certainly has not been relied upon in the course of the argument of this case.

[The remaining portion of the judgment of Edge, C. J., has not been reported here as it deals exclusively with the effect of the evidence in the case. The conclusion arrived at was that the plaintiff-appellant, on the evidence adduced by him, had failed to prove his title and the appeal should be dismissed—W.K.P.]

MAHMOOD, J.—I agree so entirely in the estimate of the evidence which the learned Chief Justice has expressed in his judgment, that it is not necessary for me to say anything more than this, that on all points connected with the question of *onus probandi*, the proof of title rested with the plaintiff. I concur with him also in holding that the plaintiff has failed to prove his own case. The learned Chief Justice has already referred to the case of *Genda Puri* v. *Chhatar Puri* (1) and out of the judgment of their Lordships of the Privy Council I wish only to read two short passages at pages 105 and 106. The passage says:—"In determining who is entitled to succeed as *Mahant* in such case as the present, the only law to [259] be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled according to custom to recover the office and the land and property belonging to it. This has been laid down by this committee in several cases. The infirmity of the title of the defendant, who is in possession, will not help the plaintiff, as the Subordinate Judge seems to have thought."

In this case when I was listening to the learned argument addressed to us by Mr. *Hill*, the learned Counsel for the plaintiff-appellant, I confess I did feel that there may have been as great a difficulty as the learned Counsel imagined in the title of the defendant. However, I felt exactly as the learned Chief Justice has now represented in his judgment, that it is for the plaintiff to prove his title, be the title of the defendant as feeble as possible. This is all I wish to say as to the reason of my concurrence in the judgment of the learned Chief Justice.

There is, however, one matter upon which I wish to express a few words, and this is that I take it that both Mr. *Hill* on behalf of the plaintiff-appellant, and Mr. *Conlan* on behalf of the defendant-respondent concede, as common ground between them, that in order to qualify a *Chela* to succeed to the deceased *Ganga Prasad*, it was necessary that the successor should be *Nihang*, as distinguished from *Grihast*. His Lordship the Chief Justice has rightly observed that the exact distinction between these two terms is not a necessary matter for decision for the purposes of this case. I do feel that myself; but I may say that, whilst fully concurring with that, I have no doubt [even after having heard the learned philological argument addressed to us by Pandit *Sundar Lal* in his reply on behalf of the plaintiff appellant] that *Grihast* means a householder, that celibacy for purpose of the definition of *Nihang* is only a part of the qualification, a part of the signification, of the term. The word *Nihang* according to Shakespear's Dictionary at p. 2099 means:—"Naked, free from care." I must then remember also what Fallon in his well-known Dictionary says as to the meaning of the word *Grihast*, from which the

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word *Grihasti* is derived by the [260] addition of the appendix "i." It means domestic or wordly affairs; and, as is usal with this learned author, he cites a well-known Hindi proverb showing what in common parlance the word meant in the language of the country. This proverb is:—*Joga asan Grihast kathin*; Easy a holy friar to be, hard house-affairs and husbandry.

I have absolutely no doubt that the translation of the word *Grihast* as given above is in accordance with the manner in which the word is used in the language of the country, and it does not necessarily mean a married man, nor is it limited to the fact of the taking place of any marriage ceremony legitimate or illegitimate. It means a householder at large; it means a householder as distinguished from a wanderer; an *Arya* from a *nomad*. It is important to know that a person who is a *Grihast* can never be a *Nihang* according to the proper signification of these terms.

The proverb quoted above has especial application here, because on the evidence in this case it clearly follows that the plaintiff was not a wanderer on the face of the world in order to be a *Nihang*, but he was a householder. It has been attempted to be shown that he was a married man; that he was keeping a woman. That evidence I do not attach any importance to; still there is enough to show that he was not a *Nihang*.

One word more as to the word *Grihast*, and I refer to the Dictionary of Shakespear again at page 1700 where he says:—"*Grihast* means a householder, a man of the second order, or he who, after having finished his studies and been invested with the sacred thread, performs the duties of the master of a house and father of family; a peasant; a husbandman."

It must be clearly understood that the meaning of the word is somewhat similar to the Roman expression *paterfamilias*. In order to be *paterfamilias*, it is enough to be the head of a family, to be the manager of affairs in the household, and by analogy this is all that the Hindu law means by the word *Grihasti*, notwithstanding the contention of Pandit *Sundar Lal* who drew my attention to [261] Chapter 3 of *Manu Smriti*. It is needless for me to dwell upon that chapter, but I have no doubt that there is nothing there either as to the meaning of the word *Nihang* or as to the signification of the term *Grihasti*.

Holding these views then as I do, *viz.*, that the plaintiff has failed to prove that he is a *Nihang*, but that he is a *Grihast*, I have nothing more to say than that I entirely agree in all that the learned Chief Justice has said upon the evidence, and the decree which his Lordship has made in the case. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr Justice Tyrrell.

MURTAZAI BIBI AND ANOHER (*Defendants*) v. JUMNA BIBI AND OTHERS (*Plaintiffs*).* [8th December, 1890.]

Muhammadan law—Wakf—Construction of document.

Where a Muhammadan of the Shia sect executed a document purporting to come into operation after his death, which document provided in a most complete manner of the devolution of his property, with the intention apparently

* First Appeal, No. 143 of 1888, from a decree of Babu Nilmadhab Rai, Subordinate Judge of Gorakhpur, dated the 29th June 1888.

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of preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowance for the other members, and of maintaining the dignity of the *riasat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties.

Held that such a document could not be construed as creating a *wakf*. Though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settler, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses, but the object of the executant was evidently merely the maintenance of the family estates and of the dignity of the *riasat*.

Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* (1) followed. *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan* (2) and *Nizamuddin Gulam* v. *Abdul Gafar* (3), referred to.

[R., 8 O.C. 379 (383).]

[262] THE parties to this appeal were Muhammadans of the Shia sect whose relationship to one another will be apparent from the accompanying genealogical tree:—

Bhasharat Ali, *ob.* March 1849.

- Mehdi Husain, *ob.* 1848
  - Muhammad Sajjad.
- Imam Ali, *ob.* 1855 = Musammat Bandi, widow.
  - Husaini, = Imdad Husain.
    - Ghulam Husain.
  - Rahiman.
  - Muhammad Hadi, *ob.* June 2nd 1875 = Musammat Jumna widow (plaintiff).
    - Akbari.
- Kurban Ali, *ob.* October 1867.
  - Muhammad Kasim, *ob.* December 1886 = Murtazai Bibi, widow- (defendant).
  - Sakina = Muhammad Sajjad (defendant.)
- Musammat Zainab.
  - Rabat Husain, *ob.* 1876.

The plaintiff, Musammat Jumna, brought her suit in the Court of the Subordinate Judge of Gorakhpur for her share by inheritance of the property of her deceased husband, Muhammad Hadi, who died in 1875, alleging that she had on various pretexts been put off and kept out of her rights by her brother-in-law, Muhammad Kasim. The other two plaintiffs were pleaders to whom the principal plaintiff had sold a portion of her share of the property in suit to provide herself with funds for carrying on the litigation. The suit was resisted by the defendants, the widow and sister of Muhammad Kasim, mainly on the following grounds, *viz.*, that Musammat Jumna, the plaintiff, was not the widow of Muhammad Hadi, and that by reason of a deed executed by one Basharat Ali, the common ancestor of both the parties, in 1848, the plaintiff could have no claim to the inheritance so long as there were male descendants of Basharat Ali, living. The defendants also alleged that the plaintiff, Musammat Jumna, had acquiesced in the transfer of the property in suit to Muhammad Kasim on the death of Muhammad Hadi, that both Muhammad Hadi and Muhammad Kasim had dealt with the property as their own, and that Musammat Jumna had never lived in the house of Muhammad Hadi. The Subordinate Judge found on these pleadings that the plaintiff, Musammat Jumna, was [263] lawfully married to Muhammad Hadi, and that the document relied upon by the defendants

(1) 17 I.A. 28. (2) 3 I.A. 291. (3) 13 B. 264.

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was a will, under which, as the conditions of it had come to an end, nobody could take anything, and that therefore the position of Muhammad Hadi's heirs was exactly what it would have been according to Muhammadan law at the date of his decease in June 1875. The Subordinate Judge accordingly passed a decision in favour of the plaintiffs. The defendants then appealed to the High Court.

Mr. *D. Banerji*, Mr. *Abdul Majid* and Maulvi *Mehdi Hasan* for the appellants.

Mr. *W. M. Colvin* and Mr. *C. H. Hill*, for the respondents.

JUDGMENT.

STRAIGHT, J.—Then comes the third question, which is a question of law, and this entirely turns upon the construction to be given to the document of the 16th March 1848. As to the genuineness of this document no controversy is raised, and we must take it that it was executed by Basharat Ali, the ancestor of the parties. At the outset of this judgment I took occasion to advert to the statement of defence, and the case therein set up, and it is to be remarked in this connection that in that written statement this instrument of the 16th March 1848 is spoken of as a deed of settlement, and as such it was put forward and relied upon before the learned Subordinate Judge. In the 7th plea in both the memoranda of appeal it is said:—"Because the document of 16th March 1848, executed by Mr. Basharat Ali, is in the nature of a settlement, and *not a will*, and binding upon the parties. Moreover it had been carried out." Despite this having been the position taken up in the Court below, and in the plea in appeal, an entirely new ground was adopted before us, the contention being that this instrument constituted a *wakf* created by bequest. Mr. *Hill*, when this point was raised by Mr. *Banerji* for the appellants, not unnaturally urged that the whole position for the appellants had been changed and that the contention now put forward on their behalf was inconsistent and at variance with the position they had asserted below and in their memorandum of appeal. I am not at [264] all sure that I should not be more strictly performing my duty if I were to limit the appellants to the contention upon which the trial before the first Court proceeded; but as I think under all the circumstances it might be inconvenient to adopt that course, I am prepared to decide the questions of law in the case not upon that narrow view, but in its broader aspect. Now what then is this instrument of the 16th March 1848? By paragraph 1, the party executing it recites that, being "in the last stage of his life, and in old age, he executes this deed as a valid document as regards *heir and inheritance*." And he then goes on to set out his various properties, which he states to be of "his own obtaining or creation, and that he has the full power over them by way of gift or transfer either to his kindred or to a stranger." In paragraph II, he recites that his son, Mehdi Hasan, who was at that time alive, had acted in a way that he did not approve, and that he therefore, excludes him from inheritance. As regards his two remaining sons Imam Ali and Kurban Ali, he goes on to say that Kurban Ali has made himself extremely useful in the management of his propetry, in looking afterr his affairs, and in protecting it from attacks and litigation; and he uses the following expression:—"There is no one among my heirs, excepting Kurban Ali, who has ability to protect the livelihood. All these rights, personal earnings and the whole income, after deduction of expenses relating to door (*darwaza*), Court, occasions of ceremonies and *taziadari* in Muharram, &c., appertaining to me will also be in the power

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of Kurban Ali in a proper manner." Then, in the next paragraph, he proceeds to make division, and he says :— " Supposing that the whole of my *madsh* [livelihood] is Re. 1, out of it 4 annas for Kurban Ali as remuneration for the labour, management of the livelihood, and opposition of claimants and adversaries which appertain to him. The remainder is 12 annas, which has been equally allotted to Kurban Ali and Imam Ali, *i.e.*, in equal shares of 6 annas each. But as regards *patta*, and *kabuliat* of tenants and lessees, purchase, sale, gift and *tamlik*, &c., *i.e.*, in the matters relating to the management and transfer, Imam Ali, illiterate, neither has, nor shall have, any power without the consent and advice of Kurban Ali. But [265] sometimes, in case of Kurban Ali being engaged in other work, Imam Ali also, with the consent and advice of Kurban Ali, shall have power in matters of demand, settlement on account, receipt and acquittance in respect of the revenue fixed." Then further a provision is made for Zainab Bibi; and then comes the concluding paragraph, which, it seems to me, it is necessary should be read at length :—

" Let it be known that this property, together with its income, has been assigned to my heirs, *for maintenance and for protection and perpetuation of riasat and not for any sort of transfer*; but the way for the management is that one person be the owner and manager of the whole and the rest be his dependents and sharers in the profits in cash to the extent of their fixed shares without division of any land, for by division *power will be diminished and the riasat will be reduced to small parts. Then there will be neither the perpetuation of riasat nor the perpetuation of honour, and then the distinction of my family will be lost.* Therefore the powers of management of villages and domestic affairs, payment of revenue, and defending the claim of adversaries to the *riasat* &c., *i.e.*, of all matters in connection with the protection, authority, and proprietorship, have been conferred upon Kurban Ali just as I have. He shall not be interfered with therein by any one else. It is incumbent on him also that by honestly acknowledging and giving effect to this deed he should assign this *riasat* to one of his legitimate and rightful issue after his death, and he, the latter, should also do the same after his death, *i.e.*, should assign this *riasat* in regular succession, subject to these customs, so that, God willing, *this riasat may be preserved in my family generation after generation.* It should also be binding that so long as there may be any male issue of any sharer this right should never be conferred upon any daughter or the issue of a daughter. But it is allowed to fix somethihg in cash for maintenance for life as I have done, in case of insufficient livelihood. The document, with all its conditions, should be in force after my death, both against my heirs and the property left by me, and every one should consider it binding on him to carry it into effect. Until my death my power will remain as it is."

[266] Now its seems to me that no rational person reading that document through can come to any other conclusion than that the only object that the maker of it had in view, to use his own words, was " the perpetuation of the *riasat*, the perpetuation of honour and the distinction of his family, and that the *riasat* might be preserved generation after generation." The mere casual mention in the middle of the document of " expenses relating to door (*darwaza*) and of ceremonies and *taziadari* in Muharram," does not appear to me to alter the real, main and direct scope and object of the instrument, about the meaning and intent of which there seems to me no room for two opinions.

Such being the nature of the deed, Mr. *Banerji*, upon the strength of a

passage appearing at page 203 of Mr. Amir Ali's Tagore Law Lectures, contended that it constituted a good *wakf* of the whole of the properties. I confess that I was a little startled at this argument, and the more I have thought of it since, the more difficult have I found it to see any force in it. In the case of *Ranee Khujooroonissa* v. *Mussammat Roushun Jehan* (1) (a case which, by the way, may be looked at for other purposes in connection with this appeal than those for which I am about to use it), there is the following passage in the judgment of their Lordships of the Privy Council:— "The policy of the Muhammadan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Muhammadan law, whereby its policy is defeated, have been complied with." This lays down a golden rule, which has ever since been followed in dealing with such documents in cases among Muhammadans.

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[267] The passage in Mr. Amir Ali's book that was the foundation of Mr. *Banerji's* argument is this:—"Kazi Khan, following Imam Ibn-ul Faze, states that *wakf* is of three kinds in relation to the state in which it is made—

(1) When it is made in health;
(2) When it is made in illness;
(3) When its operation is made dependent upon death.

"Change of possession and appropriation is necessary in the first, but *not* in the third, for that is testamentary in its nature; but the second is like the first, though it takes effect with reference to the third of the estate of the *wakif* like a gift made in death illness.

"It has been already stated that a *wakf* is irrevocable, but a *wakf* made by a person to take effect after his death, or what is called a *wakf* by way of *wasiat* (*wakf-bil-wasiat*) is revocable at any time before his death."

If this case involved the bare question as to whether a *wakf* could be constituted by bequest, and if I were unable to dispose of this appeal without determining that point, I should have thought it right to obtain the assent of my brother Tyrrell to the disposal of this appeal standing over till the decision of the Full Bench in a case which has been referred by my brothers Mahmood and Young had been given; but it seems to me that Mr. *Banerji's* concession in answer to a question I put to him, has relieved me of any difficulty, and that we may dispose of this appeal upon the assumption that a *wakf* by bequest may be created. While Mr. *Banerji's* contention upon the passage is that a *wakf* may be constituted by bequest, he was constrained to admit, that, even if so made, it must be accompanied by all the incidents of *wakf*; and that, except in so far as immediate change of possession is concerned, a *wakf* created by bequest, and a *wakf* created by a deed to take immediate effect in the lifetime of the *wakif*, stand upon the same footing. If this were not so, it is easy to see that any Muhammadan might defeat the ordinary rules of his law of inheritance and his heirs by disposing of his property by a *wakf*. No question arises here as to this [268] document having been executed

(1) 3 I A. 291.

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by Basharat Aliin death sickness, or that it was to have effect at once; indeed, it is perfectly plain he contemplated that things should continue unchanged in his lifetime. In my opinion, the Muhammadan law, whether it be Shia or Sunni law, and I have had no authority shown me to the contrary, requires that to constitute a valid *wakf* it must be for purposes that cannot fail, and it must have some pious and charitable object. If no such incident as the latter were required, then every Muhammadan intending to make a will as to his whole property would do so by costituting a *wakf* by bequest. In passing, I may remark that in former litigation in regard to this very document, it was treated as a will by the representative of Kurban Ali, and it was upon that contention that they succeeded in those proceedings.

Now it is not denied, as I have before remarked, that for the purpose of constituting a *wakf* there must be certain specific conditions. I am willing to concede also that an endowment in the nature of a *wakf* would not be bad, because out of the property endowed, provision was made for the settlor's family. But, even if it be conceded that, whilst *inter vivos*, change of the character of his possession is necessary where the settlor creates himself the *mutwalli*, or where he creates somebody else the *mutwalli* by direct *seisin* of possession, no change of possession is necessary where the endowment is created by bequest; yet there must be the other essential incident of *wakf*, *i e.*, a substantial dedication of property to charitable uses, to come into effect some time or another. I am not prepared to hold, as at present advised, that a man's gift to his male heirs in succession by ownership is a charitable gift in any such sense, and, until I am corrected by higher authority, I must decline to do so. What by this document of the 16th March 1848, Basharat Ali did was that for the maintenance of the integrity of his *riasat* and the glorification of his family he tied up his property, directed and limited its devolution, and prohibited all transfers of it. It seems to me that I have direct countenance for the view I have expressed in the judgment of their Lordships of the Privy Council **[269]** in the case of *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), where the whole question was very fully discussed. At page 36, appear the following passages, which I think may be conveniently referred to by me:—

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

On the one hand, their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court, stated by Mr. Justice Kemp in one of the cited cases. After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after

(1) 17 I.A. 28.

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those primary objects, that learned Judge says :—'We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan law.'

"On the other hand, they have not been referred to, nor can they find, any authority shewing that, according to Muhammadan law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. Arathoon indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the [270] Tagore Lectures delivered in 1885, by a learned Muhammadan lawyer. But no authority has been adduced for that proposition. The observations of Mr. Justice West, which are relied on by the learned lecturer, do not go that length, and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses."

In the concluding part of the judgment their Lordships point out that the document in question appeared in the main to contemplate aggrandisement of the family, and not charity, and they say, "the gift in question is not a *bona fide* dedication of the property, and the use of the expressions, "*fisabilillah wakf*" and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable."

It seems to me that that case is directly in harmony with the present, the only distinction being that that was an endowment *inter vivos*, while this purports to be a "*wakf*" under a document to come into effect after death. I therefore hold that no *wakf* was legally constituted, and in further support of this view I may refer to a judgment of the Bombay High Court which is to be found in the case of *Nizamuddin Gulam* v. *Abdul Gafur* (1), which goes fully into the question as to whether a *wakf* can be created without some express provision being made for the ultimate devolution of the property in respect of which *wakf* is made, for some charitable and religious object. It has been asserted that because Imam Ali did not in his lifetime assail the document of the 16th March 1848, he must be taken to have accepted and acquiesced in it. This contention was not raised in the Court below, nor am I prepared to accept it; indeed the evidence on the contrary shows that, so far as his widow and heirs were concerned, they, immediately after his death, came into Court with a suit against Kurban Ali asserting their [271] rights by inheritance under the Muhammadan law, and disputing the proposition that they were bound by the terms of the document of 1848.

I am therefore of opinion that this document of the 16th March 1848 was not a *wakf* by bequest, and that the plaintiffs are entitled to take their shares as if it never existed as the widow and daughter of Muhammad Hadi.

There only remains the question raised by the cross-objections filed on behalf of the respondents, as regards the learned Subordinate Judge's order as to costs. He says in his judgment :—"In determining the costs of this case, I cannot help remarking that the present suit savours of champerty. In this case two Mukhtars, who, as legal practitioners, ought to

(1) 13 B. 264.

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have known better, are co-plaintiffs with Jumna. The greater portion of the property goes to them. Perhaps the suit would have been amicably settled had these men kept aloof from the family dispute. Although the law of champerty does not apply in the mufassil, yet a Court of Equity ought to look with great disfavour upon contracts of this nature. Pleaders and Mukhtars specially ought not to take up civil cases as a matter of commercial speculation, and thereby promote unnecessary and vexatious litigation. Having regard to these facts, and taking into consideration all the circumstances of the case, I think it is fair and equitable that parties should pay their own costs."

I really fail to understand why the learned Subordinate Judge uses the expression 'promoting unnecessary and vexatious litigation.' Muhammad Hadi died on the 2nd June 1875; this suit would have been barred by limitation upon the 2nd June 1887; and the plaintiffs were only placed in a position to institute it by their co-plaintiffs, upon the 14th May 1887. The Subordinate Judge's own findings satisfactorily established that the suit was not unnecessary and that the litigation was not vexatious. On the contrary the female plaintiffs are fully entitled to the shares by inheritance which they claim; and I do not see why they and those who have assisted them should not have their costs. I dismiss the appeals in both cases, with costs, and allow the objections of the plaintiffs with costs.

[272] TYRRELL, J.—I agree with all that has fallen from my brother Straight, and with the decree passed by him.

Appeals dismissed.

[NOTE.—This case is connected with F. A. No. 142 of 1888 in which also similar questions were in issue and the same judgment was delivered in both cases. Of this judgment only so much had been reported as relates to the point of law decided thereby, the former portion of the judgment dealing exclusively with the facts of the case.—W. K. P.]

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13 A. 272 (F.B.) = 11 A.W.N. (1891) 61.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

JANG BAHADUR SINGH AND ANOTHER (*Petitioners*) *v.* SHANKAR RAI AND ANOTHER (*Objectors*). [20th December, 1890.]

Counsel and client—Authority of counsel to compromise a case on behalf of his client—Nature of power conferred by counsel's retainer.

A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client. *Strauss* v. *Francis* (1), *Matthews* v. *Munster* (2), and *In re West Devon Great Consols Mine* (3), referred to.

[R., 6 C.W.N. 82 (86); 15 C.P.L.R. 73 (76).]

THIS was a reference to the Full Bench by Mahmood, J. The circumstances under which the reference was made, as also the facts of the case, are sufficiently stated in the judgment of Edge, C. J.

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(1) L.R. 1 Q.B. 379. (2) L.R. 20 Q.B.D. 141. (3) L.R. 38 Ch. D. 51.

JUDGMENT OF THE FULL BENCH.

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13 A. 272 (F.B.) = 11 A.W.N. (1891) 61.

EDGE, C.J.—This was a reference by my brother Mahmood to the Full Bench for expression of its opinion on a question raised as to the authority of advocates by an application for review of a decree passed by my brother Mahmood. The applicant on the hearing of the appeal in this Court was represented by Mr. *Spankie*, one of the advocates of this Court. His opponents [273] were represented by Mr. *Conlan*, another advocate of this Court. Those gentlemen are also members of the English Bar. In the interest of their respective clients they agreed as to the form of the decree which should be passed by my brother Mahmood in the appeal. My brother Mahmood made a decree according to the terms agreed upon by those two advocates. My brother Mahmood acted under s. 577 of the Code of Civil Procedure. This applicant for review says, what we assume to be a fact, that he never agreed to those terms. He also says that he had not authorized his advocates to agree to any such terms. The question is, could my brother Mahmood interfere under the circumstances, review his judgment and alter his decree, dated the 23rd April 1890? It is not shown by the applicant that any unjust advantage was obtained by his adversary, or that Mr. *Spankie* acted under any mistake in such a way as to produce any injustice, nor is there any affidavit before us suggesting anything of the kind. From what I know of Mr. *Spankie* it is not at all likely that he lost sight of the interest of his client. I have no doubt that if we were satisfied that any unjust advantage had been obtained by the other side, or that Mr. *Spankie* had acted under a mistake in such a way as to produce injustice to this applicant, we could interfere. In order that I may not be misunderstood I had better say that what I understand as unjust advantage is not the consenting to terms which the client may object to, and which he may consider unjust; but some substantial injustice which should induce us to act. In most cases of compromise points have to be given up and concessions have to be made on each side. I may say, after many years' experience at the bar, that I think a respectable and responsible advocate of experience is a much better judge of what course he should take for the best interest of his client than the client ever is. As an illustration as to the length to which the Courts in England have gone in upholding the acts of an advocate I may refer to the case of *Strauss* v. *Francis* (1), which decided that :—" it is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the [274] counsel's apparent authority is binding on the client, notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time." I may refer also to the following passage in the judgment of Mr. Justice Blackburn in that case (at page 381):—" Mr. *Kinealy* has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill and discretion. Few counsels, I hope would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel therefore being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which in the exercise

(1) L.R. 1 Q.B. 379.

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of his discretion he may think best for the interest of his client in the conduct of the cause; and if, within the limits of this apparent authority, he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding." I do not think, I could express my views on a matter of this kind more fully or clearly than by adopting the judgment of Lord Esher in the case of *Matthews* v. *Munster* (1), which I think correctly lays down what the authority of the counsel is. I may quote the following passage from that judgment; the judgments of Lords Justices Bowen and Fry are equally instructive:—"This state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and, as he cannot put himself in that position, so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound [275] by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate, or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of Court and to act for him in Court, and, until his authority is withdrawn, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client." Now the meaning of this passage is this that a client employing an advocate cannot restrict the powers of that advocate to bind him in the suit unless he gives notice to his opponent that he has withdrawn or limited the authority of the advocate to act for him. Then again:—"I have said that the relation of an advocate to his client can be put an end to it at any moment, but that the withdrawing of the authority must be made known to the other side, and this shows that the client cannot give directions to his counsel to limit his authority over the conduct of the cause, and oblige him to carry them out; all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so." In the case of *In re West Devon Great Consols Mine* (2) in which the counsel had agreed not to appeal on terms, and his clients questioned his right to bind them, Lords Justices Cotton, Lindley and Bowen held that the clients were bound by the acts of their counsel. At page 54 of the report, Cotton, L.J., is reported to have said:—"The questions were raised in argument whether an undertaking not to appeal could be given at all by counsel without express authority, and if it could, whether it could be given after a decision on the merits. Now every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his client shall not appeal. As to the other point the counsel in fact says:—'The Judge has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' That is a compromise. The undertaking therefore is *prima facie* binding." There are other cases [276] also which show how careful the Courts are not to interfere with compromises or settlements

(1) L. R. 20 Q. B. D. 141. (2) 38 Ch. D. 51.

effected by counsel on behalf of clients in suits. The case of *Prem Sookh* v. *Pirthee Ram* (1) that of *Hakeemoonnissa* v. *Buldeo* (2), and the case of *Sirdar Begum* v. *Izzutcolnissa* (3), are cases which relate to the authority of vakils and do not affect the case before us. When the authority of vakils to bind their clients is called in question that authority must depend entirely on the terms of the particular vakalatnama. For my part I should read a vakalatnama widely and liberally, unless it appears that the client intended to limit the authority of his vakil. In my opinion my brother Mahmood should reject this application for review.

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STRAIGHT, J.—I am entirely of same view, and approve of the learned Chief Justice's answer to this reference, namely, that the compromise on which my brother Mahmood made his decree was binding on both parties to the appeal.

TYRRELL, J.—I concur in the view of the learned Chief Justice, and in the answer given to the reference.

MAHMOOD, J.—I also concur in the answer of the learned Chief Justice, and my brother Straight.

KNOX, J.—I concur.

The application for review was disposed of on the same day in accordance with the views expressed by the Full Bench by the following order :—

ORDER.

MAHMOOD, J.—This is an application under s. 626 of the Code of Civil Procedure by an applicant for review of judgment. It was referred to the Full Bench by me, and the answer which has been given by the Full Bench renders it necessary for me to deal with it under s. 627 of the Code of Civil Procedure, and the rule No. 6 of the rules of the Court. In view of the answer given by the Full Bench I reject this application. No order as to costs is necessary, as no notice has gone to the opposite party.

Application rejected.

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13 A. 277 (F.B.) = 11 A.W N. (1891) 80.

[277] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

MUHAMMAD BAKAR (*Defendant*) v. BAHAL SINGH (*Plaintiff*).*
[20th December, 1890.]

Act IX of 1887 (*Provincial Small Cause Courts' Act*), s. 25—*Small Cause Court—Revision—Circumstances under which the High Court will exercise its revisional powers under* s. 25 *of Act IX of* 1887.

Section 25 of the Provincial Small Cause Courts' Act (Act IX of 1887) was not intended to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. The revisional powers given by that section are only exerciseable where it appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. *Muhammad Nizam-ud-din Khan* v. *Hira Lal* (4) and *Masum Ali* v. *Mohsin Ali* (5) approved.

[F., 17 Ind. Cas. 470 (471) = 15 O.C. 319 (320) ; R., 13 A. 533 = 11 A.W.N. 172 ; 15 A. 139 (140) ; 16 A. 476 (477) = 14 A.W.N. 183 ; 21 A. 89 = 18 A.W.N. 157 ; 21 B. 250 (254) 23 B. 334 ; 11 O.P.L.R. 91 ; L.B.R. (1893—1900) 61.]

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* Civil Revision, No. 16 of 1890.
(1) N.W.P.H.C.R. 1867, p. 222.
(2) N.W.P.H.C.R. 1868, p. 309.
(3) N.W.P.H.C.R. 1876, p. 149.
(4) 10 A.W.N. (1890) 121.
(5) 10 A.W.N. (1890) 201.

1890 DEC. 20. — FULL BENCH. — 13 A. 277 (F.B.) = 11 A.W.N. (1891) 80.

THE facts of this case were as follows :—

The plaintiff sued in the Small Cause Court at Saharanpur for the sum of Rs. 300 on a promissory note and a sale-deed executed in favour of the plaintiff on behalf of Muhammad Hashim, the creditor, on account of the promissory note. The defendant pleaded (1) that the instrument sued on was not a promissory note, but an agreement, hence no cause of action had accrued to the plaintiff, (2) that no notice as provided by s. 13 of Act IV of 1883 had been issued to him, and (3) that the plaintiff could not derive any benefit contrary to the terms of the instrument and that the plaintiff's claim against the defendant's person was improper. The Court framed issues in accordance with these pleadings and decided all of them in favour of the plaintiff; giving the plaintiff a decree for the sum claimed with costs. The defendant then applied to the High Court for revision on the following grounds:—(1) because the learned Judge was wrong in holding that the condition about the time of payment was void under s. 29 of Act IX of 1872, (2) because the document sued upon was insufficiently stamped and was therefore inadmissible in evidence, and (3) because the suit was premature. The application came on for hearing before Straight, J., who referred it to a Division Bench. It then came [278] before Edge, C. J., and Brodhurst, J., who ordered that it should be laid before the Full Bench.

Maulvi *Ghulam Mujtaba*, for the applicant.

Pandit *Sundar Lal*, for the opposite party.

JUDGMENT.

EDGE, C. J., STRAIGHT, TYRRELL, MAHMOOD and KNOX, JJ.—We are of opinion that the powers conferred by s. 25 of Act IX of 1887 are purely discretionary. We agree with the opinion of Mahmood, J., *in re Muhammad Nizam-ud-din Khan* v. *Hira Lal* (1) and *Masum Ali* v. *Masum Ali* (2) that it was not intended by that section to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. We think we should not interfere under s. 25 of the Act unless it clearly appeared to us that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes and that this is not such a case. The application is dismissed with costs.

Application dismissed.

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13 A. 278 (F.B.) = 11 A.W.N. (1891) 83.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

OUDH BEHARI LAL (*Judgment-debtor*) v. NAGESHAR LAL (*Decree-holder*).* [22nd December, 1890.]

Execution of decree—Application for order obsolute for sale—Mortgage—Act IV of 1882 *(Transfer of Property Act)*, ss. 88 *and* 89.

The holder of a decree under s. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree.

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* Second Appeal, No. 378 of 1890.

(1) 10 A.W.N. (1890) 121. (2) 10 A.W.N. (1890) 201.

Held that this was a good application under s. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters.

1890
DEC. 22
FULL BENCH.
13 A. 278 (F.B.) = 11 A.W.N. (1891) 83.

[Diss., 21 C. 818 (823); 25 C. 133 (135); N.F., 10 C.L.J. 91 (95); F., 20 A. 302 (303); 24 A. 179 (183); Appl., 20 A. 357=18 A.W.N. 71; 23 A. 88=20 A.W.N. 209; 23 M. 521; 1 O.C. 49 (50); Appr., 23 B. 644 (650)=1 Bom. L.R. 136 (138); R., 19 A. 520=17 A.W.N. 137; 24 A. 542=22 A.W.N. 160; 27 A. 625=2 A.L.J. 371=A.W.N. (1905) 136; 28 A. 193 (194)=A.W.N. (1905) 241=2 A.L.J. 640; 30 A. 248 (250)=5 A.L.J. 272=A.W.N. (1908) 103; 33 A. 154 (161)=7 A.L.J. 1001 (1009)=7 Ind. Cas. 926 (928); 33 C. 867 (875)=4 C.L.J. 141; 25 M. 244 (250) (F.B.); 11 A.L.J. 224 (228); 12 A.W.N. 5; 16 A.W.N. 100; 10 C.L.J. 91 (95); 9 C.P.L.R. 5 (7); 12 C.P.L.R. 82 (85); 16 C.P.L.R. 111; 6 Ind. Cas. 323 (325)=13 C.L.J. 459 (462); 18 Ind. Cas. 731 (732); 5 O.C. 251; 6 O.C. 114; Disc., and Doubted, 27 A. 571 (505)=2 A.L.J. 180=A.W.N. (1905) 70.]

THIS was a second appeal in execution proceedings. The respondent was the holder of a decree for enforcement of a hypothecatory lien dated the 31st January 1885. The terms of the decree were as follows:—"It is ordered and decreed that a decree be passed against the absent defendant and against the property hypothecated, [279] for the amount claimed with costs and a future interest, by the enforcement of the hypothecation of the property mortgaged, and that the property mortgaged can be sold after six months." The decree-holder applied on more than one occasion and the judgment-debtor obtained postponements on various pleas. Ultimately, however, on the decree-holder making an application for execution, the judgment-debtor objected that execution could not be granted, the decree not being framed in accordance with the provisions of s. 88 of the Transfer of Property Act (IV of 1882). This objection was disallowed by the Subordinate Judge on the 25th November 1889. The judgment-debtor then appealed to the District Judge who upheld the Subordinate Judge's order, holding that the decree was practically in conformity with the provisions of s. 88 of the Transfer of Property Act, that the application before him was to all intents and purposes an application under s. 89 of the same Act, to have the order for sale made absolute and the property sold, and that since proceedings under s. 89 were proceedings in execution it was not necessary for the decree-holder to make two applications, one to have the order for sale made absolute and another to sell the property. The judgment-debtor then appealed to the High Court. The appeal came before Mahmood, J., who ordered it to be laid before a Bench of two Judges with the suggestion that the question involved was one which, with a view to uniformity of practice in the Court, it might be advisable to refer to the Full Bench. The case was accordingly under the order of the Chief Justice of the 7th November 1890 laid before the Full Bench.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *T. Conlan* and Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

STRAIGHT, J.—The point raised by this reference, which has been made to the Full Bench by the learned Chief Justice at the instance of my brother Mahmood, arises as to the construction to be placed upon s. 89 of the Transfer of Property Act. The appeal before my brother Mahmood was an execution appeal from an order of the District Judge of Gorakhpur, dated the 10th January 1890, by which he held that the decree before him, execution of which had [280] been sought in the first Court, was a decree

1890 DEC. 22. — FULL BENCH. — 13 A. 278 (F.B.) = 11 A.W.N. (1891) 83.

which practically complied with the requirements of s. 88 of the Transfer of Property Act, and that the application of the 23rd August 1888, for the execution of that decree was an application with the meaning of s. 89 of the Transfer of Property Act. That application was in the following terms: —"In my former application of the 6th July 1886, for sale of property, which was transferred to the Collector, the judgment-debtor applied for time and made an agreement to the effect that at the end of October 1887 he would pay, and he made an application for extension of time in Court and my application was dismissed. He has not paid, and therefore this application is made, and it is prayed that the property be attached and sold."

It has been contended this is not an application within the meaning of s. 89 of the Transfer of Property Act, for an order absolute for sale, and Mr. *Durga Charan*, who appears in support of the judgment-debtor, objector, appellant in the appeal, argues that that application is one which should be made to the Court which passed the decree as the Court which passed the decree, and it is not an application in execution. In other words, Mr. *Durga Charan* contends that before sale can be ordered, the Court which passed the original decree for sale, must make that decree absolute.

I am of opinion that an application for an order absolute for sale under s. 89 of the Transfer of Property Act is a proceedings in execution, and subject to the rules of procedure governing such matters.

In reference to the analogous s. 87 of the same Act, a like view was expressed by my brother Mahmood and myself in the case of *Kedar Nath* v. *Lalji Sahai* (1), with regard to orders absolute for foreclosure, and I see no grounds for doubting the propriety of that decision. Where a decree has been passed under ss. 86, 87, 88, 89 or 92 directing payment into Court by a specified date of a sum of money and, in the event of its not being paid, declaring that foreclosure or sale shall follow, or a right to redeem shall be barred, it would, in my opinion, be a misnomer, if payment is made to [281] describe such payment as other than one made in execution of decree. On the other hand, it appears equally clear to me that if such payment is not made, the consequences which follow are also matters concerned with the execution of the decree, flowing as a matter of course out of the decree itself, *viz.*, to give it effect against the judgment-debtor for having failed to satisfy the conditions of the decree. If decrees are properly prepared under ss. 86, 88 and 92, they should fully set out all these conditions and declare the consequences that will follow if they are or are not fulfilled.

Such being the view I take of this matter, the decision of the learned Judge below was a right decision and this appeal must be and it is dismissed with costs.

EDGE, C. J.—I concur.

TYRRELL, J.—I entirely concur.

MAHMOOD, J.—I also agree in my brother Straight's judgment, and also in everything that he has said, but I am anxious to say, as one of the Judges who referred this case to the Full Bench, and with reference to my order of reference of the 1st August, 1890, that there are three rulings of this Court, to be considered, and one ruling of the Calcutta Court. Dealing first with the printed case of *Ram Lal* v. *Narain* (2) to which reference is made in my order of reference, I cannot help feeling that the judgment delivered by my brother Straight to-day conflicts with that decision, and

(1) 12 A. 61. (2) 12 A. 539.

since his judgment in this case has the concurrence of the whole Court, I hold that the earlier decision cannot be any longer treated as authority upon this point. The next is an unreported case which also is before me *viz.*, *Babu Dina Prasad Singh* v. *Shah Sifat Alam* (F. A. No. 16 of 1889) which was disposed of by the learned Chief Justice on the 2nd July 1889. That judgment also was cited, and I must express the opinion that the view expressed by my brother Straight to-day renders that judgment also unauthoritative for any further discussion of the same question in this Court. The third case is that of *Musammat Parbati* v. *Behari Raj* (S. A. No. 512 of 1890) on the execution side, which was disposed [282] of by the judgment of the learned Chief Justice and our late colleague Mr. Justice Young, dated the 8th May 1890, and that judgment is confirmed by what my brother Straight has said. Then comes the fourth case, namely, the case in which the Calcutta Court in the case of *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1) decided the same point, and it was cited by Mr. *Durga Charan* as an authority in his favour.

1890 DEC. 22. — FULL BENCH. — 13 A. 278 (F.B.) = 11 A.W.N. (1891) 83.

There is much in that judgment which undoubtedly supports the argument which Mr. *Durga Charan* addressed to us. But it is unnecessary, after the expression of opinion which has been given to the view of this Bench by my brother Straight, that I should say anything more than this that I am not prepared to accept that or all that was said in that case either as to the theory of the *decrees nisi* in such cases or as to the decrees absolute or their effect upon the procedure of the Court, which is governed by the Civil Procedure Code. I therefore give my full concurrence to all that has fallen from my brother Straight.

KNOX, J.—I concur with what has been said by the learned Chief Justice and my brother Straight.

Appeal dismissed.

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13 A. 282 (F.B.) = 11 A.W.N. (1891) 88.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

AMME RAHAM AND OTHERS (*Plaintiffs* v. ZIA AHMAD AND OTHERS (*Defendants*).* [22nd December, 1890.]

Act XV of 1877 (Limitation Act), sch. ii, No. 127—Limitation—Suit by Muhammadans for possession by right of inheritance of shares in the property of their deceased ancestor.

The words "joint family property" in No. 127 of sch. ii of the Limitation Act (XV of 1877) mean "the property of a joint family."

Hence the period of limitation prescribed by No. 127 of sch. ii of the Limitation Act, will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immoveable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they allege they had been dispossessed by the defendants.

Bavasha v. *Masumsha* (2) dissented from.

[F., 15 M. 57 (59) ; 5 N.L.R. 41 (42) = 2 Ind. Cas. 15 (16) ; Rel., 16 Ind. Cas. 882 (883); Appl., 23 B. 137 (140) ; 22 C. 954 (959) ; 7 C.W.N. 155 (157) ; R., 29 A. 308 (309) = A.W.N. (1907) 52 = 4 A.L.J. 209 ; 30 A. 324 (327) = A.W.N. (1908) 126 = 5 A.L.J. 352 = 4 M.L.T. 38 ; 5 Bom.L.R. 355 (362); 15 O.C 111 (115) = 15 Ind. Cas. 394 (396) ; 15 O.C. 397 (400).]

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* First Appeal No. 191 of 1888.

(1) 16 C. 246.

(2) 14 B. 70.

1890
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13 A. 282
(F.B.)=
11 A.W.N.
(1891) 88.

[283] The plaintiffs in this case were two daughters and a grand-daughter of one Karamat Hussain who died in February 1862, possessed, as the plaintiffs alleged, of a certain village granted to him in recognition of his services during the mutiny. They alleged that on the 20th June 1880, Nihal Ahmad, the son of Karamat Hussain (brother and uncle of the plaintiffs) sold the said village and the vendees in their turn transferred it to others; that they came to know of this on the death of Nilhal Ahmad in 1884, and demanded possession of their shares from the assignees. This being refused, they sued the assignees together with certain other members of the family of Karamat Hussain for recovery of possession of what they alleged to be their shares in the property together with *mesne* profits. The suit was resisted amongst other grounds on the ground that it was barred by limitation. The Court of first instance dismissed the suit. The plaintiffs then appealed to the High Court and the appeal came before Mahmood and Young, JJ., who, on the question of limitation being again raised, referred the case, by their order of the 2nd July 1890, to the Full Bench for determination of the question whether or not the terms of No. 127, sch. ii of the Limitation Act, were applicable to the case.

Mr. *Amiruddin* and Mr. *Abdul Majid* for the appellants.

Pandit *Ajudhja Nath* and Pandit *Sundar Lal* for the respondents.

JUDGMENT.

EDGE, C.J.—The only question which we need decide here is whether art. 127 of the second schedule of the Indian Limitation Act applies. This admittedly is not a family that could strictly or commonly be called joint. It is a Muhammadan family of these Provinces. The difficulty has arisen from the words "joint family property" in art. 127. Now those words may possibly be construed in two different ways. They might be construed as "the joint property of the family" or as "the property of the joint family." I think in this country we would be misconstruing those words "joint family property" to hold that they apply to a case where property was joint but the family was not. Many persons besides a family may have vested in them joint property. A, B and C, in no way related, may have vested in them joint property. If we were to read [284] this article as meaning "the joint property of the family," the difficulty in my mind would arise as to what could be the reason why the Legislature intended that art. 127 should apply to a family that was not joint and made no similar provision in respect of the joint property of persons who were not members of the family. In my humble judgment "joint family property," means in art. 127 the property of a joint family and that would be strictly speaking "joint family property." The reason why the word "Hindu" which occurred in art. 127 of Act IX of 1871 was omitted from art. 127 of the present Code may be, that there are, as I believe, in some districts of India Muhammadan families which might be described as joint. The case is to go to the Bench of two Judges with this expression of opinion.

STRAIGHT, J.—By the plaint in this suit, the plaintiffs-appellants, after asserting that they had been in enjoyment of certain property, alleged that some of the defendants had dispossessed them from such enjoyment and they prayed for recovery of absolute possession of their shares according to the Muhammadan law of inheritance, in respect of the estate of a certain deceased person. They nowhere in their plaint alleged that the property is the joint property of a joint family,

1890 DEC. 22. — FULL BENCH. — 13 A. 282 (F.B.) = 11 A.W.N. (1891) 88.

that they had been excluded from the joint enjoyment and prayed that their right to share in such joint enjoyment should be enforced. It seems, therefore, to me, that the article of the Limitation law naturally and properly applicable to their suit, was the provision to be found in art. 142 of the second schedule of the Limitation Act. As I understand, the rule of interpretation to be applied to the Limitation law is that if a form of suit naturally falls within the four corners of a particular article, we are not to strain construction for the purpose of throwing it into a category of suits to which a more favourable period of limitation is given by some other article of that law. Moreover, the Legislature is to be presumed not to have made two limitation articles applicable to the same conditions of facts and identical suits.

Now I take it that art. 127 contemplates, first, a joint family in the accepted and well understood meaning of the term; next, it [285] contemplates joint family property; next, it contemplates joint enjoyment; and lastly, it contemplates exclusion from such joint enjoyment, which is the motive cause for the institution of the suit. With great respect to the learned Judge who decided it seems to me that the Bombay case of *Bavasha* v. *Masumsha* (1) overlooks the precise wording of this article. What the plaintiff in the suit to which that article applies must pray is to enforce his right to share in, not to a share of the joint family property; that is to say, it is a suit to restore the *status quo ante* of enjoyment that by his exclusion he has been deprived of. This is the particular form of suit to which that article is, in my opinion, limited, and it does not apply to such a condition of facts as are disclosed in the present case. I entirely concur with the learned Chief Justice in the answer proposed.

TYRRELL, J.—I agree.

MAHMOOD, J.—In order to render my judgment short, I wish to refer to the order of reference passed by me in this cause on the 2nd July 1890, in which Mr. Justice Young concurred and which necessitated its coming on for hearing, under the sanction of the learned Chief Justice, before this Bench of five Judges.

To what has fallen from his Lordship the learned Chief Justice and also from my brother Straight as to the exact meaning of art. 127 of the present Limitation Act (XV of 1877). I have nothing to add, beyond wishing to explain that when this case was argued in the Division Bench, much difficulty and doubt arose over some of the cases which are mentioned in my referring order.

I do not wish to deal with those cases in detail. It is enough for me to say that I will consider this point, now that it is before a Full Bench, wholly in reference to the observations which were made on behalf of the plaintiffs-appellants in connection with the alteration of the statutory words of art. 127 in the old Limitation Act (IX of 1871) as that alteration appears by a comparison with the corresponding clause of the present Limitation Act (XV of 1877). That alteration is represented not by the presence of anything, but by the absence of a word, *viz.*, the word "*Hindu*" and [286] in lieu, thereof, "*Person*" is introduced. When the case was argued on behalf of the appellants I must confess that I felt, especially in view of the sudden change, (which certainly has to be considerd seriously in statutory language) that this art. 127 was intended to be applied to Muhammadans also. The change at least sounded as an amendment of a great verbal sound, but that sound was nothing other than *vox et*

(1) 14 B. 70.

1890 DEC. 22. — FULL BENCH. — 13 A. 282 (F.B.) 11 A.W.N. (1891) 88.

præterea nihil so far as the exigencies of this case are concerned, because upon full consideration of this matter it seems to me that the Legislature never intended to apply to Muhammadans in the Provinces within the jurisdiction of this Court, a rule unknown to the land, unknown to the Muhammadan law, unknown to the people, by saying that upon the death of an ancestor or *propositus* his property does not descend to the heirs in definite separate shares, but acquires the nature of the joint property of the Hindu jurisprudence. On the contrary, the Muhammadan law presumes that each share is separate and that each sharer is the separate owner of his separate share, and if such sharers wish to live together they may do so, but their separate ownership and relations are not changed.

Enough has been said by the learned Chief Justice and my brother Straight to show that for purposes of employing art. 127 of Act XV of 1877, certain things are necessary, that at least there must be a *joint family*, and I will not go further than that because my brother Straight has already represented what, the other three conditions are. Now in this part of the country the joint family system as understood by Hindus does not exist among Muhammadans in the sense in which the law has employed it. Even if it did exist, I think I must say that the learned pleader Pandit *Ajudhia Nath's* argument before me when I made the referring order, was perfectly sound, that the law in these provinces will not allow the recognition of any such family *status* because of s. 27 of Act XII of 1887. I must also say what I felt when the learned Pandit then argued, and what I still feel, that the Bombay cases which on that occasion the learned counsel for the appellants referred to and insisted upon, have no application to this case, because it is governed [287] by a totally different statute as to the application of the Muhammadan law. I also agree with the argument of the learned Pandit, which the learned Pandit then addressed, that Regulation IV of 1872, of the Bombay Code, must not be lost sight of in determining the importance to be attached to the rulings on this point cited from that Presidency.

I wish to say, with reference to some observations which were made in the course of the argument when the case was heard in the Division Bench, (to the effect that it would be depriving the Muhammadans of this part of the country of a great right if the article in question were not applicable to suits such as this), that I have long held the opinion that the statutes of limitation are statutes of repose, and that, far from being construed in the sense of the strict construction of penal statutes against their application, they should be strictly enforced for security of titles. This I have said in more than one case to be found in the reports. I wish to add that whatever difficulty may arise over the interpretatien of art. 127, of the present Limitation Act (XV of 1877), that difficulty need not be enhanced in a case in which Muhammadan ladies, even when they are *pardanashin*, sue after the lapse of time. For this view I wish to refer to cases where I have before now pointed out the cogency of the doctrine *vigilantibus non dormientibus jura subveniunt.*

One thing more. In the case of *Bavasha* v. *Masumsha* (1), upon which Mr. *Abdul Majid* has again relied to-day, the learned Judge in reading, or rather reproducing, the art. 127 of the Limitation Act (XV of 1877) seems apparently, so far as the report goes, to have understood the phrase "*to share therein*" as if the word" *share*" was a noun and not a

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(1) 14 B. 70.

verb. I do not understand it in that sense. I understand it to mean exactly what my brother Straight has described, *viz.*, that it is a verb and means "*to have restoration to joint enjoyment.*"

1890 DEC. 22.

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13 A. 28 (F.B.) = 11 A.W.N. (1891) 88.

The other cases which have been referred to by me in the referring order must be taken subject to what in this case the learned Chief Justice and my brother Straight have said and which has the [288] concurrence of my brother Tyrrell. The answer to this reference is that art. 127 of the present Limitation Act, XV of 1877, does not govern such actions as the one represented by the plaint in this case. I therefore agree in the order made.

KNOX, J.—I agree in the answers proposed.

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13 A. 288 (F B.) = 11 A.W.N. (1891) 63.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

JAGRUP RAI AND OTHERS (*Defendants*) v. RADHEY SINGH AND OTHERS (*Plaintiffs*).* [22nd December, 1890.]

Registered and unregistered document—Priority—Mortgagee under registered deed competing with auction-purchaser at a sale under a decree on a prior unregistered mortgage-deed Act III of 1877 (*Registration Act*), s. 50.

Under s. 50 of the Registration Act the decree or order which is not to be effected by a registered document must be a decree or order made prior to the execution and registration of the registered document. Therefore where the plaintiffs, who were mortgagees under a registered instrument, sued to set aside a sale to the defendants under a decree on an unregistered mortgage, the plaintiffs' registered mortgage being subsequent to the unregistered mortgage on which the defendants relied, but prior to the decree thereon—*held* that the defendants, auction-purchasers, must take subject to the rights of the plaintiffs as mortgagees. *The Himalaya Bank, Limited* v. *The Simla Bank, Limited* (1), *Madar Saheb* v. *Subbarayalu Naydu* (2), *Kanhaiya Lal* v. *Bansidhar* (3) and *Shahi Ram* v. *Shib Lal* (4) referred to.

[F., 28 C. 139 (141); 21 A.W.N. 112; R. & D, (1911) 2 M.W.N. 461 (464) = 10 M.L.J 385 (387).]

THE facts of this case sufficiently appear from the judgment of Edge, C.J.

Mr. *Abdul Majid* and Mr. *Hamid-ullah*, for the appellants.

Munshi *Jwala Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J.—The plaintiffs were appellants here. They brought their suit to have it declared that a decree obtained on the 12th September 1882, on an unregistered bond of the 31st January 1877, and the auction-sale held under that decree at which the defendants purchased were null and void. The plaintiffs were mortgagees of the property. Their mortgage was dated the 5th December 1877, and was registered. On that mortgage they obtained a decree on the [289] 19th December 1882. The question turns on s. 50 of the Registration Act. Now in this case the unregistered mortgage which was the basis of the defendants' title was prior in date to the plaintiffs' registered mortgage, but the

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*Second Appeal No. 116 of 1889.

(1) 8 A. 23. (2) 6 M. 88. (3) 4 A.WN. (1884) 136. (4) 5 A.W.N. (1885) 63.

1890 DEC. 22. — FULL BENCH. — 13 A. 288 (F.B.) = 11 A.W.N. (1891) 63.

plaintiffs' registered mortgage was prior in date to the making of the decree on the unregistered mortgage.

It appears to me that under s. 50 of the Registration Act the decree or order which is not to be affected by a registered document must be a decree or order made prior to the execution and registration of the registered document. The question was considered by this Court in *The Himalaya Bank, Limited* v. *The Simla Bank, Limited* (1), and it appears to me that I have come to the same conclusion as the learned Chief Justice and my brother Tyrrell did in that case with respect to the question of priorities. We cannot grant the relief asked for by the plaintiffs. The decree under which the sale took place was a perfectly good decree, the only thing is that it does not affect the plaintiffs' right to have it declared that it was subject to their lien. The decree that I shall propose will be that the appeal be decreed with costs and the suit of the plaintiffs decreed to this extent that it be declared that the decree of the 12th September 1882, and the sale thereunder of the 12th March 1887 did not affect the rights of the plaintiffs under their registered mortgage of the 5th December 1877, and the decree thereon of the 19th December 1882.

STRAIGHT, J.—I am of the same opinion. I think that the law is very clearly stated on this point in the judgment of *Shahi Ram* v. *Shib Lal* (2) decided by Mr. Justice Oldfield and my brother Mahmood, and referred to in *The Himalaya Bank, Limited* v. *The Simla Bank, Limited*, and the view therein held entirely coincides with the view just now expressed by the learned Chief Justice, and is also in accordance with the view I myself expressed in the case of *Kanhaiya Lal* v. *Bansidhar* (3). A like view is taken by the Madras Court in *Madar Saheb* v. *Subbarayalu Nayudu* (4). I also agree [290] in the order proposed by the learned Chief Justice and the form which the decree should take.

TYRRELL, J.—I also concur.

MAHMOOD, J.—I am also of the same opinion, and only wish to say that in the case of *Shahi Ram* v. *Shib Lal* (2) I had the honor of considering this question with Mr. Justice Oldfield, and the views which were then expressed were approved, as my brother Straight has pointed out, by Petheram, C.J., and my brother Tyrrell in the case of the *Himalaya Bank, Limited* v. *The Simla Bank, Limited* (1). Indeed, at page 28 a passage from that judgment is quoted which is of importance in this matter: and I give my concurrence all the more willingly, because now a Bench consisting of the whole of this Court as now constituted has approved it.

KNOX, J.—I agree with the learned Chief Justice.

Appeal decreed.

(1) 8 A. 23. (2) 5 A.W.N. (1885) 63. (3) 4 A.W.N. (1884) 136. (4) 6 M. 88.

13 A. 290=11 A.W.N. (1891) 94.

1890 DEC. 11.

APPELLATE CIVIL.

13 A. 290= 11 A.W.N. (1891) 94.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BISHEN DAYAL (*Judgment-debtor*) *v.* THE BANK OF UPPER INDIA, LIMITED (*Decree-holder*).* [11th December, 1890.]

Execution of decree—Party improperly brought on the record as representative of deceased Judgment-debtor—Appeal—Costs—Civil Procedure Code, ss. 2, 244. *cl.* (*c*), 540.

One B.D. was made a party to an application for execution of a decree as one of the representatives of a deceased judgment-debtor. It had been decided in a previous suit that B.D. was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative, and his objection was allowed and the order allowing it remained unappealed and became final. The Court, however, while allowing the objection, did not give the objector his costs.

Held, that the objector did not, by being improperly brought into the execution proceedings, lose his right of appeal, and further, that he could under the circumstances appeal on the question of costs alone.

[291] THE facts of this case are fully stated in the judgment of Mahmood, J.

Munshi *Ram Prasad* for the appellant.

Mr. *J. E. Howard* for the respondent.

JUDGMENT.

MAHMOOD, J.—This is a first appeal, purporting to have been presented to this Court under the provisions of cl. (*c*) of s. 244 of the Code of Civil Procedure, read with the definition of decree contained in the interpretation clause of s. 2 of that enactment (Act XIV of 1882), and as such the appeal must be regarded as one falling under the purview of s. 540 of that enactment.

When the case was originally heard by me, Mr. *Ram Prasad* appearing on behalf of the appellant, a preliminary objection was raised on behalf of the respondent that no such appeal lay. Another point was urged against the appeal, *viz.*, that even if the appeal did lie, the Court below had exercised a discretion vested in it by s. 220 of the Civil Procedure Code, and that discretion was not open, under the circumstances of this case, to interference by this Court in appeal, because the question related only to costs and not to the substantial merits of the dispute between the parties.

In order to render the contention thus presented to me intelligible, and also because the learned Judge of the Lower Court in recording his judgment has in more than one instance mixed up the names of the parties, I consider it necessary to give the following tabular statement as representing the relative position of the parties whose names are important for the disposal of this appeal.

HAR SAHAI.

Bijai Bahadur. | Bakht Bahadur died childless. | Raj Bahadur.

Bijai Bahadur's sons: Hira Lal. | Jai Chand.

Raj Bahadur's son: Bishen Dayal. son.

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* First Appeal No. 196 of 1889, from a decree of G.J. Nicholls. Esq., District Judge of Cawnpore, dated the 24th August 1889.

1890 DEC. 11. —— APPELLATE CIVIL. —— 13 A. 290 = 11 A.W.N. (1891) 94.

The family represented by the above table is a family of Sribastub Kayasthas, whose religious doctrines, apparently, are so undefined that it became necessary for Bishen Dayal, the son of Raj Bahadur, to [292] sue the latter and other members of the family in order to establish that the family were Hindus and not Muhammadans, or at least that the Hindu law of inheritance applied to the family and not the Muhammadan law of the Kuran. This cause finally came up before a Division Bench of this Court, consisting of my brothers Straight and Tyrrell, who, in the case named *Raj Bahadur v. Bishen Dayal* (1) disposed of this question, and that report shows the exact decision at which the learned Judges arrived.

It is unnecessary for me to say more about that decision than that I have referred to it because it explains the preliminary circumstances of the question which I am going to decide in this case. The decision of the High Court was passed on the 22nd March 1882, and that decision became final and is so admitted by the parties.

Subsequently to this decision it appears that upon a hypothecation bond jointly executed by Bakht Bahadur and Bijai Bahadur, the Bank of Upper India, Ld., respondent in this appeal, obtained a decree on the 25th August 1884, and that decree, being a money-decree by enforcement of lien, also became final.

Bakht Bahadur died childless on the 14th April 1899, leaving, as the table which I have already stated shows, certain relatives, among others a brother, Raj Bahadur, the father of Bishen Dyal the present appellant before me.

Matters stood thus when on the 27th May, 1889, the Bank, decree-holder, filed an application for execution under s. 235, of the Civil Procedure Code, for execution of the decree of the 25th August 1884, and in that application, acting apparently under s. 234 of the Code, the decree-holder represented the judgment-debtors to be Bijai Bahadur, the original debtor of the decree, and along with him Jai Chand and Hira Lal, as sons of the deceased Bijai Bahadur, and besides these Raj Bahadur and Bishen Dayal, described in the application as the heirs of Lala Bakht Bahadur, the deceased.

This application initiated the present litigation, and in the course thereof, among other matters which ensued, and to which I need not [293] refer, Bishen Dayal, the present appellant before me, came forward as an objector, alleging that he had been wrongfully impleaded, because he was not the heir of the deceased Bakht Bahadur, the judgment-debtor, nor in any manner liable to the decree of the 20th August 1884, which was being put into execution. In other words, he stated that he was in no manner concerned with the decree, either by dint of representing any interest of Bakht Bahadur, or otherwise, and that the action of the Bank, decree-holder, in thus impleading him was so wrong that he had been dragged into a litigation with which he had no concern.

This objection was, rightly or wrongly, decided in the Court below and resulted in an order passed by the lower Court in the following terms:—

"Bishen Dayal on his own objection is struck out of the record, the objectors bearing their own costs."

From this adjudication no appeal has been preferred by the Bank, decree-holder, and it must, therefore, be taken that the adjudication of the Court below as to Bishen Dayal having no interest as legal

(1) 4 A. 343.

representative of the deceased judgment-debtor, Bakht Bahadur, under the decree of the 25th August 1884, is a final adjudication. 1890 DEC. 11.

But Bishen Dayal, the objector, who had thus succeeded in the Court below, has preferred this appeal, and the learned argument which has been addressed on his behalf by Mr. *Ram Prasad*, has been considered by me, bearing fully in my mind the necessity for the Court of appeal not lightly to disturb an order as to costs made under s. 220 of the Civil Procedure Code. APPELLATE CIVIL.

13 A. 290 = 11 A.W.N. (1891) 94.

I have said so repeatedly and wish to repeat it now that orders as to costs should not unnecessarily be made subject of appeal, because an appellate Court would not on slight grounds disturb the discretion of the Court of first instance.

But it seems to me that in this case the decree of this Court of the 22nd March 1882, which had not only been passed but had also been published in the Official Reports, in volume 4 of the I.L.R. Allahabad Series, page 343, ought to have put the decree-[294] holder upon caution as to whether or not Bishen Dayal was to be impleaded in the cause.

First of all, before I give effect to this circumstance, I must dispose of the preliminary objection to which I have referred, *viz.*, that no appeal lay in this case.

In the Full Bench case of *Seth Chand Mal* v. *Durga Dei* (1), I gave expression to the views which I still hold in a judgment to be found at pages 325 to 328, especially the observations made by me at page 326.

In the present case it has been argued on behalf of the respondent that because the lower Court has held that Bishen Dayal was not a representative of the deceased debtor Bakht Bahadur, therefore, he has no right of appeal at all, and much learned argument was addressed as to this matter. It seems to me that when this petition of the 27th May 1889, praying for execution, was filed, Bishen Dayal was already impleaded in the cause and no question rose over that petition as a petition for execution of decree. It was a *lis* of which the array of parties was distinctly stated in the petition whereby it was initiated; and, being so initiated, and the array of parties being such as that petition represented, the adjudication of the Court that the appellant was not the legal representative of Bakht Bahadur will not take away the right which cl. (*c*) of s. 244, confers upon him, read with s. 540 of the Civil Procedure Code. What he says is that he was called the representative of a dead judgment-debtor, Bakht Bahadur, but he was not such representative, that he was a stranger to the suit and a stranger to the decree of the 25th August 1884, in which that suit resulted, that he had been wrongly dragged into Court by the erroneous behaviour of the decree-holder, and that, because of this, the Court rightly decided that he was a third party, and in consequence that he was released from such liability as might have arisen under that decree imposing burden upon him. I have no doubt that the words of the Civil Procedure Code give him the right of appealing in order to [295] complain of the costs which have not been awarded in his favour for having been thus wrongly impleaded.

Then as to the merits of the order itself. As a question of direction, I hope it will always be remembered by Courts of Justice when exercising their jurisdiction under the discretionary power of s. 220, that when an innocent party is dragged into a *lis* and has to stand the brunt of a trial, he has to undergo much vexation of mind independent of expenses, for

(1) 12 A. 313.

1890 DEC. 11. — APPELLATE CIVIL. — 13 A. 290 = 11 A.W.N. (1891) 94.

wrongly being dragged into a cause, and such circumstances are enough consideration for allowing at least such costs as the law allows to a successful litigant.

In this case the judgment of the learned Judge of the lower Court shows the repeated mistakes he has made over the relationship of the parties. I find the name of Bakht Bahadur on more than one occasion used instead of that of Bishen Dayal, and that Bishen Dayal has been wrongly described in the cause as a party to the litigation.

It was probable on this account that the learned Judge did not follow the general rule of the law that a succesful party is entitled to his costs and that the mistakes of the opposite party are no reason for departing from the general rule. Indeed the proviso to s. 220 of the Civil Procedure Code itself gives the warning to the effect that there should be reason for any orders as to costs which do not follow the event. In the judgment of the learned Judge there are no reasons, other than that the Bank, decree-holder, was not sufficiently cautious to ascertain who were the parties against whom to proceed in the execution of their decree of the 25th August 1884.

I think I have said enough to show that the order of the Court below, so far as it relates to the costs of Bishen Dayal, objector, appellant before me, cannot be sustained. No other party has appealed, and therefore my order in this case is that this appeal, be allowed, that the order of the lower Court so far as it disallows the costs incurred by the appellant Bishen Dayal, be reversed, and that the Bank, respondent, bear the costs of the appellant in both the Courts.

Appeal decreed.

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13 A 296 (F.B.) = 11 A.W.N. (1891) 85.

[296] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell and Mr. Justice Mahmood.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*) *v.* MADARI LAL AND ANOTHER (*Defendants*).*
[5th January, 1891.]

Practice—Set-off—Suit for balance of account—Civil Procedure Code, s. 111.

The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions, one to the effect that the Government, if it saw fit at the expiration of the lease to form the bridge to any other contractor, should be bound to take over the lessee's plaint at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible he will be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease, and the Magistrate of the District, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock, which was ultimately fixed at Rs. 10,900. The Magistrate added a percentage, bringing the total amount up to Rs. 12,100; and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract.

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* First Appeal, No. 107 of 1889.

1891 JAN. 5. — FULL BENCH. — 13 A. 296 (F.B.) = 11 A.W.N. (1891) 85.

Held that the sum of Rs. 12,000 assessed in the manner above described could not strictly be regarded as a set-off. The suit was one for balance of account and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favour.

THIS was a reference to the Full Bench made by Straight and Mahmood, JJ. (by their order of the 10th February 1890), as to whether, under the circumstances detailed in the judgment of Edge, C.J., the defendants were entitled to dispute the correctness of the item given credit for to them by the plaintiff.

The facts of this case are fully given in the judgment of Edge, C. J.

Munsi *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

[297] EDGE, C. J.—This is a suit by the Secretary of State for India in Council to recover a balance of money alleged to be due under a lease, dated the 24th October 1873. The lease related to a bridge of boats over the Ganges in this neighbourhood. The lease provided that the lessee should pay the sum of Rs. 65,000 by certain instalments. The last instalment was to be paid off on the 30th September 1878, and the lease, which was for five years, would terminate on the 1st October 1878. That Rs. 65,000 was to represent the value of the plant which belonged to the Government, and by clause 4 of the lease it was provided that although the lessee might renew any portion of the plant which was unfit for work in order to keep the stock in good repair, "he should have no right whatsoever to transfer or dispose of it or any portion thereof until he has paid up the sale-price in full, the Government retaining a lien on the stock so long as any portion of the sale-price is due. Clause 17 of the lease provides that the Government if it saw fit at the expiration of the lease to farm this bridge to any other contractor should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration. Clause 18 provides for a different event. It is as follows :—" Should Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible, he will be entitled to full compensation from Government for all losses."

On the 24th June 1878, Kalka Prasad, the lessee, died. In the following July, the Magistrate of Allahabad, acting for the Secretary of State for India, deprived Kalka Prasad's representatives of the use of the bridge and seized all the stock and materials. On the 23rd August 1878, the Magistrate directed two gentlemen to assess the value of the stock. Those gentlemen assessed the value of the stock at Rs. 10,700. It was subsequently ascertained that there was a portion of the stock which was not included in that valuation. That omitted portion was valued at Rs. 200, increasing the valuation of these gentlemen to Rs. 10,900. The Magistrate added a percentage to that valuation and fixed the value of the [298] entire stock and boats at Rs. 12,100. Neither the fifth instalment of Rs. 6,500 nor the final instalment ever was paid. The time never came to pay the final instalment, because, without any reason, so far as I can see and during the currency of the lease, the Magistrate of Allahabad took it on himself to determine the lease and to deprive the lessee's representatives of such possession of the stock as they were entitled to under the lease. The Secretary of State for India in Council has brought this suit to recover a balance alleged to be due to him in respect of the final

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and penultimate instalments, after making an allowance for certain sums which he admits the defendants are entitled to take credit for. The eighth paragraph of the plaint is as follows:—"That on the expiry of the said lease the plaintiff saw fit not to renew the same, and thereupon, with a view to Government taking over the lessee's plant under the term of the said lease, the valuation of such plant was duly referred to arbitration and the value thereof determined by the arbitrators to Rs. 10,900." Now I have no hesitation in saying that the statements contained in that paragraph are the reverse of truth. From beginning to end it is a misleading statement. The taking of the plant, out of the possession of the lessee's representatives took place in July 1878, the so-called arbitration, which was in truth no arbitration at all, took place in August 1878, and the Magistrate of Allahabad passed his order dealing with figures on the 17th September 1878. Looking to the plaint, particularly at paragraph 8, one would think this was a case falling under clause 17 of the lease, namely, the clause which provided that Government should take over the lessee's plant at a fair valuation to be determined by arbitration in case of its seeing fit on the expiration of the lease to farm the bridge to any other contractor. The defendants contended before the Divisional Bench that they were entitled to question the accuracy of the so-called valuation of Rs. 10,900 and to show that the fair value of the stock and plant seized by the Government far exceeded that of Rs. 10,900, which, according to the plaint, the Government were prepared to allow for it. On the other hand, those who represented the Secretary of State here contended that the defendants were not entitled to show that the value of that stock and [299] plant exceeded Rs. 10,900 mentioned in the tenth paragraph of the plaint. In my opinion this is not strictly a case of set-off or counter claim. The Secretary of State for India in Council, if he is entitled to maintain this suit, as to which I have under these circumstances grave doubts, asked for a balance alleged to be due to him on account between him and the defendants. That balance was arrived at, so far as this point is concerned, by the plaintiff by admitting that the defendants were to be credited in the account with the value of the stock and plant seized by the representative of the Secretary of State, but by an utterly erroneous paragraph, namely, the eighth of the plaint, he endeavours to tie down the defendants to a valuation of Rs. 10,900 as if that was a sum which could not be questioned. In my judgment the defendants are entitled to show what the value of the plant and stock in question was with the object of showing that balance claimed by the plaintiff is not the true balance of the accounts between the parties. This is my answer to the reference.

STRAIGHT, J.—I entirely concur in the answer of the learned Chief Justice to the reference, which is entirely in accordance with the view I entertained on the hearing of the appeal before my brother Mahmood and myself. As I said then so I repeat now, that it does not appear to me there is any difference between this case and a case in which, on a plaintiff coming into Court and seeking a balance of account from a defendant in which account certain amounts are credited to the defendant, the defendant, as the part of his defence, says—"those credits which you have given in account are incorrectly stated."

TYRRELL, J.—I entirely concur with everything that has fallen from the learned Chief Justice.

MAHMOOD, J.—I also agree with the learned Chief Justice, but wish to add that the reference to the Full Bench was partly due to the doubt

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which I entertained as to the effect of s. 111 of the Code of Civil Procedure upon the pleadings of the parties and the facts of the case. I felt that the expression " an ascertained sum of money " which occurred in that section restricted its operation, as it [300] undoubtedly does, to matters of set-off of a very limited kind, and excluding as it does counter-claims as understood in the Judicature Acts in England it might preclude the defendant from proving in this action the value of the plant and boats which had been taken over by the Magistrate of Allahabad as stated by the learned Chief Justice. I am, however, now after having had the advantage of conferring with the learned Chief Justice and my learned brothers waived my doubt, and I have done so with special reference to the terms of paragraph 17 of the deed of the 24th October 1873, which, as the learned Chief Justice has explained, renders the dispute between the parties as to the value of the boats a question forming part and parcel of the claim. the matter being one which arises out of the same transaction as the claim. I think therefore that there is nothing in s. 111 of the Code of Civil Procedure to prevent our going into the question of the value of the plant. This is my answer to the reference.

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13 A. 300 (P.C.) = 18 I.A. 55 = 6 Sar. P.C.J. 14 = 15 Ind. Jur. 283.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris, and Sir R. Couch.
[*On appeal from the High Court at Allahabad.*]

RAJA HAR NARAIN SINGH (*Defendant*) *v.* CHAUDARAIN BHAGWANT KUAR AND ANOTHER (*Plaintiffs*). [27th January, 1891.]

Arbitration under the Civil Procedure Code—Invalidity of award when not made within the time fixed by the Court—Civil Procedure Code, ss. 508, 514, 521—*Cost.*

When once an award has been delivered, it is no longer competent to the Court to grant further time, or to enlarge the period for the delivery of this award under section 514 of the Code of Civil Procedure.

Where an award was not made within the period fixed by the Court's order but was made after the date given in the last order extending the time for its delivery, *held*, that the award was invalid. The decree of the Court dealing with the award as if duly made within the time, could not be treated as enlarging it.

The judgment in *Chuha Mal* v. *Hari Ram* (1) approved.

Order to be that the suit should proceed. Neither party to be entitled to costs in either Court below after the first judgment with regard to the stage at which the objection was taken; and the costs prior to that to abide the issue.

[**F.**, 38 C. 522 (524) = 12 Ind. Cas. 13; 15 M. 384 (386); 16 Ind. Cas. 223 (224) = 16 C.L.J. 573; 2 N.L.R. 81; **Appl.**, 13 A. 400; 14 A. 347 (348); 25 C. 141; 34 C. 941 = 11 C.W.N. 959 = 6 C.L.J. 237; 11 A.W.N. 150; **Cons.**, 16 B 263 (265); **R.**, 26 A. 105 = A.W.N. (1903) 205; A.W.N. (1905) 47 = 27 A. 459 = 2 A.L.J. 201; 30 A. 169 = A.W.N. (1908) 59 = 5 A.L.J 144; 31 C. 849 (853) = 8 C.W.N. 705; 33 C. 498; 22 M. 22 (24); 7 Bom.L.R. 688; 8 C.W.N. 916; 14 C.P. L.R. 42; 2 N L.R 121; 84 P.R. (1901) = 112 P.L.R. (1901); 89 P.R. (1907); 3 S.L.R. 106 (108) = 4 Ind. Cas. 590 (600); 6 S.L.R. 89 (95); 6 S.L.R 168 (175; 9 Ind. Cas. 173 = 9 M.L.T. 251 (256; 17 Ind. Cas. 688 (639) = 8 N.L.R. 174 (176); 19 Ind. Cas. 348 (350); (1911) 1 M.W.N 151 (164) = 21 M.L.J. 263 (280) = 16 O. C. 94 (98) = 17 Ind. Cas. 320 (322); **Not Appl.**, 7 Ind. Cas. 595 (598) = 4 S.L.R., 26; **D.**, 14 A. 343 (345); 17 Ind. Cas. 7 (8); 119 P.L.R. (1902) = 88 P.R. (1902), (F.B.).]

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(1) 8 A. 548.

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[301] APPEAL from a decree (16th December 1887) affirming a decree (6th April 1885) of the Subordinate Judge of the Agra district.

This suit was brought by the respondents, the widow and mother of Chaudhri Bishambhar Singh, deceased, against the appellant and two other defendants, to recover money and property alleged to have been deposited with them. The appellant denied having appropriated, or possessed, the property. On the 16th July 1884, the parties filed in the Court of the Subordinate Judge an agreement to refer all matters in dispute to the arbitration of Lalas Bansidhar and Jaganath Prasad, nominated by the plaintiffs, and Lalas Radha Prasad and Janki Prasad, by the defendant, with Lala Saghan Das as umpire. On the 17th an order of reference, made by the Court, fixed the 19th August 1884 for the hearing of the suit by the Court. On the 9th August the time for the delivery of the award was extended to the 5th November, and again on the 4th November to the 30th. On the 5th December there was an application for further extension which was granted till the 5th January 1885, on which day a further extension was granted until the 19th January. The award was not, however, delivered till the 23rd March. It was in favour of the plaintiff for Rs. 29,431 payable by the Raja, defendant, he being the only one of the defendants whom the arbitrators held liable. His objections were heard by the Subordinate Judge. They did not include the objection that the award had been delivered after the expiration of the time for delivering it. The award was maintained by the decree, which was for the above amount, each party to pay their own costs.

From that decree the defendant appealed to the High Court. A Division Bench (STRAIGHT and TYRRELL, JJ.) dismissed the appeal with costs.

The first objection taken in the High Court was that the award was not a valid one. The judgment, however, (having pointed out that the Court, which makes the reference, is intended by the Code to have complete control in the matter,) was that the direction to the Court to fix a time might be regarded as merely directory, not as [302] mandatory. And the conclusion of the Senior Judge of the Division Bench was the following:—

"At any rate, whatever defects there may have been in the order of the 5th January 1885, they were, in my opinion, defects that could be cured, and I hold that the adoption of the award must be taken to amount to an enlargement of the time for the delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators. Moreover, no objection was taken by either of the parties to his acceptance of the award on the ground now urged, and it seems to me not unreasonable to assume that any such objection was waived by them."

On this appeal—

Mr. *J. H. A. Branson*, for the appellant, argued that the award not having been made within the period allowed by the Court, for that reason, was invalid. On three occasions the time fixed for the delivery of the award expired, without any award having been made, or any extension of time having been granted. No date had been fixed in the first instance, and on the last occasion when extension of time was granted, the time limited in the previous order of extension had already expired. Thus the last date was irregularly fixed, but even that had expired when the award was delivered.

He referred to *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan, wullud* (1) decided on reference to the Bombay Regulation VII of 1827. Also to the Code of Civil Procedure, Act XIV of 1882, ss. 508, 514 and 521, and to the previous law in s. 318 of Act VIII of 1859. Also to the Statute 52 and 53, Victoria, chapter 49, the Arbitration Act, 1889, s. 9, where the Court's power to enlarge the time, after the expiration of the time for making it, is expressly enacted for England, and to *Gunga Gobind Naek* v. *Kalee Prosunno Naek* (2) ; *Simson* v. *Venkatagopalan* (3) ; *Behari Das* v. *Kalian Das* (4) ; *Chuha Mal* v. *Hari Ram* (5).

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Mr. *Lumley Smith, Q. C.*, and Mr. *Reginald Brown*, for the respondents, supported the decree of the High Court. They con- [303] tended that the Court had power to enlarge the time and in fact had done so. If the appellant had at any time a right to extensions made, that right had been waived. The sections of the Civil Procedure Code were directory; the appellant did not take his objection at the right time, and passed over the irregularity.

They referred to *Lord* v. *Lee* (6) ; *May* v. *Harcourt* (7). The Common Law Procedure Act, 1854 (17 and 18 Vic., C. 125, s. 15.)

Mr. *J. H. A. Branson*, in reply, referred to *Mason* v. *Wallis* (8). Their Lordships' judgment was delivered by LORD MORRIS.

JUDGMENT.

LORD MORRIS.—This case must, in their Lordships' opinion, be decided entirely upon the construction of the Civil Procedure Code, ss. 508, 514 and 521, and it does not appear that the construction of those sections can be very much added by analogies drawn from sections of the English Common Law Procedure Act which have been referred to, dealing with arbitrations, because a specific rule has been laid down in the Code for dealing with arbitrations, probably grounded on reasons of public policy.

By s. 508 it is laid down that the Court shall by Order refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the Order. In this case the Order of Reference made by the Court does not specify, directly, any time. It merely fixes a date for the hearing of the case by the Court, which is not in strict compliance with the terms of the section though it might be sufficient. Their Lordships are of opinion that s. 508 is not merely directory, but that it is mandatory and imperative. S. 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if s. 508 is to be merely treated as directory. In the present case, however, the Subordinath Judge repeatedly made orders enlarging the time, and in those orders fixed the time within which the award was to be made, although he did not do so in the orginal Order of [304] Reference ; and their Lordships are of opinion that it was competent for the Subordinate Judge to do so under s. 514 of the Code, which enables the Court to grant a further time and from time to time to enlarge the period for the delivery of the award in cases when it cannot be completed within that period, from want of necessary evidence or from any other cause. The last order of enlargement made by the Subordinate Judge was on the 13th of March 1885, extending the time to

(1) 6 M.I.A. 134. (2) 10 W.R. 206. (3) 9 M. 475. (4) 8 A. 543.
(5) 8. A. 548. (6) L.R. 3 Q.B. 404. (7) L.R. 13 Q.B.D. 688.
(8) 10 B. and C. 107.

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the 20th of March 1885, and no longer. No award was delivered within that time, though one was delivered on the 24th of March 1885, and the first question which appears to their Lordships to arise is, whether it would have been competent for the Subordinate Judge to have extended the time after the award was made. Their Lordships are of opinion that it would not. When once the award was made and delivered the power of the Court under s. 514 was spent, and although the Court had the fullest power to enlarge the time under that section as long as the award was not completed, it no longer possessed any such power when once that time was passed. The Court did, however, receive the award delivered on the 24th of March 1885, and a decree was made upon it by the Subordinate Judge, which was confirmed by the High Court. The objection now put forward for the appellant is that this award is not valid. That contention has to support the express statutory enactment that no award shall be valid unless made within the period allowed by the Court. The utmost period allowed by the Court was until the 20th of March 1885, and therefore the award delivered on the 24th of March 1885 was so delivered by arbitrators who no longer had any lawful authority to make it. Again, as a matter of fact, there was no enlargement of the time made by the Court after the 20th March 1885.

This objection to the award was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the Statute is there, and the Judges were bound to take judicial notice of it.

In the case of *Chuha Mal* v. *Hari Ram* (1), Mr. Justice Oldfield lays down the law upon this subject very clearly. He says—"The [305] award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid; that is, there was no award on which the Court could make a decree." That judgment appears quite in point in this case, and it is a judgment of which their Lordships entirely approve.

Upon these grounds their Lordships will humbly advise Her Majesty to reverse the judgments of the Subordinate Court and the High Court, to declare the award invalid, and to direct that the suit shall be proceeded with, and that neither party shall be entitled to costs in either Court below from and after the date of the first of the said judgments; and that the costs prior to that date shall await the issue of the case. The respondents must pay to the appellant the costs of this appeal. The reason for not giving the appellant the costs in the Courts below arises from the fact that their Lordships are of opinion that the point upon which this award is now held to be invalid, was certainly not raised before the Subordinate Judge, nor, as far as appears, in the objections that were urged before the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*
Solicitors for respondent: Messrs. *Linklater and Co.*

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(1) 8 A. 548.

13 A. 305 = 11 A.W.N. (1891) 99.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

1891 JAN.

APPELLATE CIVIL.

13 A. 305 = 11 A.W.N. (1891) 99.

BISHNATH PRASAD (*Plaintiff*) v. JAGARNATH PRASAD AND OTHERS (*Defendants.*)* [30th January, 1891.]

Limitation—Application for leave to appeal in forma pauperis—*Subsequent appeal in regular form—Payment of court-fee on appeal, no retrospective effect.*

Where an application for leave to appeal *in forma pauperis* having been presented and rejected, a regular appeal was subsequently filed, but after the period of limitation had expired.

[306] *Held* that the payment of the court-fee on the regular appeal could not be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper, so as to convert that memorandum of appeal into a good appeal within time. Until the regular appeal was filed there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal.

[**N.F.**, 84 P.R. (1904) ; **F.**, 78 P.R. (1906) = 150 P.L.R. (1906) ; **Relied upon**, 18 Ind. Cas. 518 ; **R.**, 159 P.L.R. (1901) ; **D.**, 26 A. 329 = A.W.N. (1904) 24 ; 11 C.P.L R. 3 (4).]

IN this case the plaintiff filed a suit in the Court of the additional Subordinate Judge of Ghazipur on the 24th September 1885. That suit was dismissed on the 10th May 1887. The plaintiff appealed ; and the case was remanded to the lower Court for trial on the merits. Judgment was given on remand on the 3rd May 1889, and the plaintiff's claim was again dismissed. On the 22nd May 1889, the plaintiff presented to the District Judge an application for leave to appeal *in forma pauperis*, accompanied, as required by law, by a copy of the proposed memorandum of appeal. That application was rejected on the 27th May. On the 31st May 1889, the plaintiff applied to the Judge to review his order of the 27th May. That application also was rejected on the 13th June. On the 22nd June, the plaintiff applied to the High Court for revision of the Judge's order of the 13th June. The High Court disallowed that application on the 16th August. On the 25th August the plaintiff applied to the Judge to be allowed to file a regular appeal in respect of so much of the property claimed as would be covered by a court-fee of Rs. 10. That application having been allowed, the plaintiff paid in Rs. 10, and on the 19th September, filed a regular appeal. When that appeal came on for hearing on the 3rd January 1890, it was dismissed as being barred by limitation. The plaintiff then appealed to the High Court, where it was contended that a memorandum of appeal, namely, that presented on the 22nd May 1889, was already before the Court, and that the payment of the court-fee would convert that memorandum into a good memorandum of appeal from the very date when it was presented along with the application for leave to appeal in *in forma pauperis*.

Mr. *Abdul Raoof* and Munshi *Gobind Prashad* for the appellant.

Munshi *Ram Pershad* and Pandit *Sundar Lal* for the respondents.

JUDGMENT.

EDGE, C.J., AND STRAIGHT, J.—This is an appeal from a judgment of the Additional Judge of Ghazipur, dated the 3rd January,

*Second Appeal No. 423 of 1890, from a decree of H. F. D. Pennington, Esq., Additional Judge of Ghazipur, dated the 3rd January 1890, confirming a decree of Munshi Lalta Prasad, Subordinate Judge of Ghazipur, dated the 3rd May 1889.

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[307] 1890, by which he dismissed the plaintiff's appeal to his Court on the ground that it was not presented within the limitation period. The following are the dates material for consideration. The plaintiff-appellant brought a suit in the Court of the Subordinate Judge of Ghazipur which was dismissed on the 3rd May 1889. The plaintiff-appellant then presented a petition under s. 592 of the Code of Civil Procedure for leave to appeal as a pauper, and that petition was accompanied by a memorandum of appeal as required by law. The Judge, acting in the matter as required by the second paragraph of s. 592, perused the judgment and decree of the first Court, and, being of opinion that they were not open to objection as being "contrary to law or some usage having the force of law" or as being "otherwise erroneous or unjust," on the 27th May 1889, rejected the petition. The plaintiff-appellant still had time up to the 13th June, within which to file an appeal on a properly stamped memorandum, but he did not do so; on the contrary he applied to the Judge for review of his order of refusal on the 31st May, and on the 13th June that application was also refused. On the 22nd June 1889, the plaintiff-appellant then came to this Court with an application for revision of the Judge's order under s. 622 of the Code of Civil Procedure, and that application was refused by this Court on the 16th August 1889. The plaintiff-appellant then went back to the Court of the Judge of Ghazipur, and, on the 25th August, asked permission, while abandoning a portion of his claim, to be allowed to confine his appeal to so much of the property as would be represented by payment of the court-fee of 10 rupees. On the 17th September, this prayer of the plaintiff was granted and on the 19th September, the memorandum of appeal was filed and registered. It was in reference to these facts that when the appeal came to hearing on the 3rd January 1890, the Judge who had to deal with it came to the conclusion that it was not presented within the period of time allowed by law, and it could not be regarded as an appeal until the 19th September 1889, when it was filed and registered. The contention which has been raised before us by Mr. *Gobind Prasad* on behalf of the plaintiff-appellant is that although the petition of appeal *in forma pauperis*, [308] dated the 22nd May 1889, was rejected on the 27th May, nevertheless there was already on the file of the Judge's Court a memorandum of appeal in respect of which that Court was competent to make orders granting time for supplying the deficiency in stamp, and that when the deficiency in stamp *pro tanto* was made good on the 28th August 1889, by the payment of 10 rupees, that payment acted retrospectively so as to make the memorandum of appeal a good memorandum of appeal from the very date on which it was presented along with the application *in forma pauperis*. The learned pleader has laid much stress on the case of *Stuart Skinner* v. *William Orde* (1). That case has reference to Act VIII of 1859, as ss. 308 and 310, though I am not aware that in the present Code of Civil Procedure the provisions relating to pauper suits are materially different to those of the former Act, and, if we were dealing on the present Code with the same facts as appear in that case, we should probably have to hold ourselves governed by the ruling of their Lordships of the Privy Council. The case before us, however, is distinguishable. In the first place, we have to deal with a memorandum of appeal, and in the next place, we have to deal with a memorandum of appeal which accompanied an application to appeal *in forma pauperis* which was refused. I am of opinion that when the petition to appeal *in forma pauperis* was disallowed on the 27th May, the whole

(1) 2 A. 241.

of that proceeding came to an end and that along with it fell the so-called memorandum of appeal which accompanied it. I do not think that a piece of unstamped paper which only accompanied a petition to appeal *in forma pauperis* could be called a memorandum of appeal. It was never a memorandum of appeal in the proper sense of the term which the Judge of the appellate Court could take cognizance of or make any order upon. Consequently, whatever directions were given by the Judge, either in his order of rejection of the 27th May, or of his refusal to review his judgment on the 13th June, were *ultra vires*. Mr. *Gobind Prasad* has urged that the provisions of s. 54 of the Code are applicable in the Courts of first appeal below. Conceding that it is so for sake of argument, he has not satisfied me that the [309] words "insufficient stamp" in paragraph 2 of s. 54 refer to or include a wholly unstamped paper. If this view were correct a litigant on the last day of limitation with what purported to be a plaint or memorandum of appeal written on a plain paper might come to a Court and insist on the Court receiving it for the purpose of making an order under s. 54, and thereby obtained an extension of the period of limitation. I think whenever insufficient stamps are used the Court may consider the memorandum of appeal under s. 54; but in this case the paper had no stamp, therefore it was not a memorandum of appeal and never became a memorandum of appeal until, at the earliest, the 26th August 1889, when Rs. 10 was paid into Court, though probably, strictly speaking, not till the 19th September, when it was filed and registered. Consequently as there was no memorandum of appeal, we hold that the orders of the Judge of the 27th May and 13th June, were of no effect and that the filing and registration of the 19th September, was long beyond the period of limitation. The appeal is dismissed with costs.

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Appeal dismissed.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

NASRAT-ULLAH (*Plaintiff*) v. MUJIB-ULLAH AND OTHERS (*Defendants.*)*
[3rd February, 1891.]

Act XIX of 1873 (*N.W.P. Land Revenue Act*), s. 113—*Civil Procedure Code, s.* 13—*Question of title arising on an application for partition before a Revenue Court, how to be determined—Suit for declaration of right to partition*—Res judicata.

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforcible, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. Such a suit will not be barred by reason of the former decree for partition, though that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been, raised in the suit in which it was passed.

If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of [310] s. 113 of Act XIX of 1873. If it disposes of the application otherwise than in the manner contemplated by s. 113, its proceedings are *ultra vires* and will

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* First Appeal No. 27 of 1889 from a decree of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 28th February, 1888.

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not debar the parties from suing in a Civil Court for a declaration of their right to partition.

[Overruled, 20 A. 75 (76) = 17 A.W.N 197; 23 A. 291; F., 28 A. 627 = A.W.N. (1906) 142 = 3 A.L.J. 379, 10 C.W.N. 839, Rel., 17 Ind. Cas. 955 (956) = 14 Bom. L.R. 1198; R., 17 C.W.N. 521 (523) = 16 Ind. Cas. 383; D., 3 Bom. L.R. 94.]

THE facts of this case are briefly as follows:—One Kadir Baksh, the common ancestor of the parties, was the owner of the property in dispute cosisting of twenty-seven villages. He died leaving a will by which he divided his whole estate into five equal shares. According to the plaintiff the villages were divided by private arrangement with the exception of four, namely, Ganeshpur, Rekua, Mahadeva and Aspur, which remained joint. In 1860 Miran Baksh, the father of the plaintiff, obtained a decree for partition to the effect that any inequality in the shares held by the various members of the family should be made up from the four villages above-mentioned, and the residue should be divided into five equal shares. It appears that that decree was never acted upon. In 1871 another order for partition was obtained by one of the share-holders, but that too seems to have remained inoperative. In 1883, the present plaintiff and others applied for the partitioning of Ganeshpur, and another share-holder, Musammat Hamira Bibi, for the partitioning of Rekua. Both these villages were divided, the partitioning of Ganeshpur being effected subsequently to the institution of the present suit. In 1887 the plaintiff brought the present suit alleging that his share was deficient by 300 bighas and praying that the deficiency might be made up out of the villages Ganeshpur, Aspur and Mahadeva, and that after the cancellation of the order for the partition of Rekua all four villages might be divided into five equal shares, or that the whole estate might be divided into five equal shares and one-fifth of it allotted to him. The Court of first instance dismissed the plaintiff's claim on three grounds:—(1) that as to the partition of Ganeshpur and Rekua the Court was not competent to interfere with the proceedings of the Revenue Court; (2) that the claim of the plaintiff was *res judicata*: and (3) that the suit was barred by limitation. The plaintiff then appealed to the High Court.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *D. Banerji* and Maulvi *Mehdi Hasan*, for the respondents.

JUDGMENT.

[311] EDGE, C. J., and KNOX, J.—The appellant here was the plaintiff below. All the defendants below were respondents here. The group of the defendants below No. 2 are represented here by Mr. *Banerji* and Mr. *Mehdi Hasan*. The other defendants-respondents have not appeared here and have not been represented. The suit was brought to obtain a declaration of the plaintiff's right to partition. His father had, in 1860, obtained a decree for partition against the persons whose representatives the defendants to this suit are. According to the plaint, that decree for partition of 1860 was never carried into effect, and no partition took place. Whether that is true or not we need not now decide. The plaint further alleges that the defendant grouped as No. 2 conspired to prevent the plaintiff getting his full share, and, having colluded together obtained an order for the partition of mauza Rekua in a manner contrary to his rights. The plaint also alleges, amongst other things, that the defendants caused the patwaris in the villages to record separate possession in respect of the joint villages. Some of the defendants admitted in their written statements the plaintiff's right to the partition, others disputed it.

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The defendants grouped as No. 2 alleged that the claim was bad under s. 42 of the Specific Relief Act, and was barred by s. 13 of the Code of Civil Procedure. They alleged that in 1841, that is, long prior to the decree of 1860, the whole *ilaka* was privately partitioned. They further alleged, in paragraph 4, that their ancestor in his lifetime and they were in proprietary and exclusive possession. There are other allegations which it is not necessary to allude to now. The Subordinate Judge tried this case. He dismissed the plaintiff's claim on two main grounds. The first main ground being that s. 13 of the Code of Civil Procedure applied, the other main ground being limitation. He also apparently held that a partition which was made by the Revenue Court could not be interfered with by a Civil Court. To deal with the last point first.—A question of title was raised by the plaintiff in a partition proceeding before a Revenue Officer. That Revenue Officer had two courses open to him. Under s. 113 of Act XIX of 1873, he could have refused to proceed with the partition until the question of title and properietary right which was [312] in dispute between the parties had been decided by a competent Court, or he could have proceeded to enquire into the merits of the objection as to title. In the latter case he was bound himself to make the necessary inquiry, to take such evidence as might be produced, and to record a proceeding declaring the nature and extent of the interest of the parties applying for the partition and of any other party or parties that might be affected thereby. The procedure he was bound to follow in the latter case was the procedure laid down in the Code of Civil Procedure for the trial of original suits. He might, with the consent of the parties, refer any question arising in such a case to arbitration. If he had proceeded to inquire into the merits of the objection in accordance with s. 113, his decision, when given, would, under s. 114, have been a decision of a Court of civil jurisdiction and would be open to appeal to the District Court or the High Court, as the case might be. Now the Collector adopted neither of those courses. He made some inquiry from the Settlement Department, and on the result of that inquiry, whether conducted by him or not we do not know, he came to the conclusion that the village he was dealing with, namely, Ganeshpur, was one of imperfect pattidari-tenure and he proceeded to partition the village on that basis. We need not inquire at present whether the village was in fact one of imperfect pattidari-tenure or not. That is a question yet to be decided in this suit. The plaintiff alleged that the village was one of pure zemindari-tenure. Coming to the conclusion at which he arrived, the Collector really was deciding a question of title. Mr. *Banerji* has contended that the Civil Court has no power to interfere in a case of a partition. The Civil Court is a Court of competent jurisdiction to decide questions of title. The Collector or Assistant Collector is not a Court of competent jurisdiction to decide questions of title unless he proceeds in the manner specified in s. 113 of the Land Revenue Act. In the case of *Muhammad Abdul Karim* v. *Muhammad Shadi Khan* (1) the question of the jurisdiction of the Collector in such matters was considered. The decision of the Collector under the [313] above circumstances cannot disentitle the plaintiff to have his legal right declared in the Civil Court. The course adopted by the Collector precluded the plaintiff from questioning his decision by appeal to the District Judge or to this Court. That remedy not having been open to the plaintiff, he is entitled, under the circumstances, to maintain this

(1) 9 A. 429.

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suit and have his legal right declared. The next question is as to whether s. 13 of the Code of Civil Procedure applies in this case. Undoubtedly, the decree of 1860 operates as *res judicata* to any claim or defence that was set up, or should have been set up, at that date, as for instance, the allegation in the third paragraph of the written statement of the group of defendants No. 2, namely, "In 1248 Fasli the whole of the *ilaka* was divided privately by the ancestors of the parties and from the date of the partition each party has held proprietary possession of the entire divided villages Ganeshpur, Rekua and Aspur without the inteference of any other." That defence is not now open to the defendants. If that were a true statement of fact, it would, in the suit of 1860, have afforded grounds of defence. Whether it were then made or not is immaterial. To put it more plainly, the decree of 1860 settled the rights of the parties as they were at that date and cannot now be questioned. But that decree cannot operate as *res judicata* on any question arising as to rights of the parties acquired since that date. As for instance, the defendants would be entitled to show that since that date they had obtained adverse possession, or that there was a partition in which no question of title was raised or other similar defences. It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect, suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right [314] to partition and desiring to partition has his right challenged, it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforceable. In the partition suit questions have arisen which could not have been determined in the suit which ended in the decree of 1860. The Subordinate Judge relied on certain decisions to which he refers in his judgment. On the question of *res judicata* it appears to us those authorities either do not apply or do not support the view which he adopted. The first of those in order of date is *Kishen Singh* v. *Dabeer Singh* (1). All that case decided was that a partition in the Revenue Court could not be enforced on a decree which by reason of lapse of time had become inoperative. The next case is *Doobee Singh* v. *Jowkee Ram* (2).

That case to some extent supports the contention of the plaintiff here. There the Court decided that, notwithstanding that the plaintiffs had obtained a prior decree for possession, they would be entitled to maintain a suit for partition and separate possession, if since the date of the first decree they had been in possession of the undivided half share by that decree decreed to them. The next case was *Yaqoob Ali* v. *Khajeh Ubdoolrahman* (3). That case the Subordinate Judge has misunderstood. It has no application. The same observation may be made as to the fourth case relied on by him, namely, the case of *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (4). In the Course of argument we have been referred to the case of *Jagat Singh* v. *Durjan Lal* (5) which has some bearing on the questions dealt with by the Subordinate

(1) N.W.P.H.C R. 1867, p. 272.
(2) N W.P.H.C.R. 1868, p. 381.
(3) N.W.P.H.C.R. 1868, p. 393.
(4) N.W.P.H.C.R. 1871, p. 62.
(5) 4 A.W.N. 1894, 2.

Judge. We have no doubt that if the plaintiff had drawn his plaint alleging the decree of 1860, and showing how he and the defendants were bound by it, that is, that they were representatives of the parties to it, and alleging that the state of things of 1860 continued up to the present, and alleging that the defendants or some of them resisted his right of partition, and asked for a declaration of his right to partition, that would be a claim to which even this Subordinate Judge would not have applied s. 13 of the Code [315] of Civil Procedure. The present claim is in effect such a claim as I have referred to, although not so in form. The last point we need refer to is that of limitation. The Subordinate Judge held that this suit was barred by limitation, because the defendants in the suit of 1860 had denied the plaintiff's right of partition and set up an adverse possession. He overlooked the fact that those issues were decided by the decree in that suit adversely to the defendants there. The question of limitation does not arise on the point suggested by the Subordinate Judge. It may be that some question of limitation arises from circumstances subsequent to 1860 and may have to be decided in this suit. We have not got the materials before us to express any opinion as to whether a question of limitation does arise. The Subordinate Judge in truth did not try the rest of the case, but he disposed of it on those preliminary points to which we have referred. That being so, we set aside his decree, and, under s. 562 of the Code of Civil Procedure, remand the case for trial on the merits and on such points of law as really arise. The costs here and hitherto will abide the result.

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Cause remanded.

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13 A. 315=11 A.W.N. (1891) 90.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

NAMDAR CHAUDHRI (*Plaintiff*) v. KARAM RAJI AND OTHERS. (*Defendants*).* [5th February, 1891.]

Mortgage—Prior and puisne incumbrancers—Puisne incumbrancer not made a party to suit upon prior incumbrance—His right to redeem not thereby affected.

If a prior incumbrancer, having notice of a puisne incumbrance, does not when he puts his mortgage into suit, join the puisne incumbrancer as a party, that puisne incumbrancer's right to redeem will not thereby be affected.

Mohan Manor v. *Togu Uka* (1) ; *Muhammad Sami-ud-din* v. *Man Singh* (2) ; and *Gajadhar* v. *Mul Chand* (3) referred to.

[R., 17 A. 537; 20 B. 390; 14 C.L.J. 530 (534); (1911) 1 M.W.N. 165 (173)=21 M.L.J. 213=9 M.L.T. 431=9 Ind. Cas. 513 (519); 12 Ind. Cas. 155 (157); 1 O. C. 53; F., 132 P.W.R. 1908=64 P.R. 1908.]

THE facts of this case are fully stated in the judgment of Straight, J.

[316] Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Jwala Prasad* and Munshi *Kashi Prasad*, for the respondents.

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* First Appeal No. 200 of 1889 from a decree of Maulvi Ahmed Hasan, Subordinate Judge of Gorakhpur, dated the 8th July 1889.

(1) 10 B. 224. (2) 9 A. 125. (3) 10 A. 520.

1891
FEB. 5.

APPELLATE CIVIL.

13 A. 315= 11 A.W.N. (1891) 90.

JUDGMEMT.

STRAIGHT. J.—This is a suit for possession brought under the following circumstances:—On the 9th July 1873, one Bhaiya Agar Singh executed a simple mortgage in favour of two persons named Beni Madho and Achambit Singh, for a sum of Rs. 22,000. Interests in 19 villages belonging to the mortgagor were charged, and among them were 6 as. 4 p. of a village called Sirsia. This mortgage may conveniently be termed mortgage No. I. On the 5th August 1874, the same mortgagor and others made a usufructuary mortgage of their property, including the whole of Sirsia, for a sum of Rs. 4,500 in favour of Pir Ghulam and Jurai; and there seems to be no doubt or question that those mortgagees obtained possession under their mortgage. To this latter mortgage, by a further advance about October 1874, a charge was tacked on, on the 9th October 1874. This may be conveniently called mortgage No. II.

With regard to mortgage No. 1, of which, as I have stated, Beni Madho and Achambit Singh were the mortgagees, it appears that the proportions of the mortgage-money advanced were divided between them to the extent of two-thirds to Beni Madho and one-third to Achambit Singh. Some time prior to March 1880, the mortgagee, Achambit Singh, and his mortgagors came to a settlement to the extent of one-third of the mortgaged property, and to that extent the mortgage was apparently discharged and satisfied. Subsequently, on the 15th March 1880, Beni Madho put the remaining interest under the mortgage in suit, and obtained a decree against the mortgagor for Rs. 14,875. On the 24th December 1883, Beni Madho transferred his interests as decree-holder to two persons of the name of Sharif and Dular, who as assignees thereof took steps in execution, and in those execution-proceedings they came to an arrangement with their judgment-debtor, mortgagor, to purchase the 6 annas 4 pies of the village of Sirsia for a sum of Rs. 5,684. That transaction was prefected by a private [317] sale, and it must be taken that that interest has now disappeared from and is no longer subject to the mortgage of 1873. The interest which those two persons had so acquired was on the 4th September 1887, assigned over to the plaintiff and that is his title. He, therefore, *prima facie* is the holder of a title acquired at a sale under a prior incumbrance to that under which, as I will in a moment show, the defendants acquired their interests.

The mortgage No. II has never been put in suit, and it appears that Pir Ghulam and Juria, the original mortgagees, are both dead, each of them leaving numerous heirs behind him. With regard to the heirs of Pir Ghulam, they, on the 20th September 1886, sold their one-half mortgage interest under the mortgage of the 5th August 1874, to Musammat Karam Raji Kuari, the wife of Bhaiya Agar Singh, the mortgagor. The consideration for that sale was a sum of Rs. 2,750, which was paid by an assignment to Vazir and others of the interests of Bhaiya Agar Singh along with a number of other persons in a village known as Sehri Sidhi, representing a sum of Rs. 1,751 accompanied by a bond of Bhaiya Agar Singh alone, mortgaging a zemindari-interest of his for the payment of Rs. 999.

As to the share of jurai of the mortgage of the 5th August 1874, that was, on the 18th October 1886, sold by the sons of Jurai also to Musammat Karam Raji for a sum of Rs. 2,750. In this case also the consideration for the sale was represented by a cross-conveyance, by Bhaiya Agar Singh along with several other persons, of their interest in the village of Maidai, representing a value of Rs. 2, 450, and by a bond of Bhaiya Agar

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Singh alone for Rs. 300, mortgaging a zemindari share of his own. This represents the title of the defendants.

Now I have stated exactly the mode in which this litigation presents itself and how it comes about that the plaintiff, who represents mortgage No. I, seeks to have possession as against the holder of the interest under mortgage No. II. There can be no doubt, I think, that at the time of the suit which was brought upon the mortgage No. I, the mortgagee had notice of the mortgage No. II. [318] Not only was that a registered instrument, but in addition to that the mortgage was of a usufructuary character, the mortgagees were in possession; and upon this point the learned Subordinate Judge below found in terms that the plaintiff in that litigation had knowledge and notice of the usufructuary mortgage.

It is said that at that time there being no Transfer of Property Act in force, and the provisions of s. 85 not being in operation, no obligation rested upon the plaintiff to include the parties to mortgage No. II in that litigation. Section 85 of the Transfer of Property Act, which is now in force, only applies a principle which was long before recognized by the Courts of this country, and is a principle to which injustice, equity and good conscience, it seems to me those Courts were bound to give effect. The learned pleader on behalf of the plaintiff-appellant has said that, looking to the precise nature of the circumstances under which the purchasers under the second mortgage transferred their rights to the defendants, it must be taken that the payment made to them was in fact a payment made by the mortgagor himself, and therefore it must be assumed that the mortgage of 1874 was satisfied and discharged, and the defendants have no right to take their stand upon that security, and claim any rights under it. It is to be noted in regard to this contention that the conveyances which represent the more substantial portion of the transfers from Bhaiya Agar Singh to those transferees were conveyances not by himself alone, but by himself in conjunction with several other persons; and I am not aware, as I have pointed out to the learned pleader on behalf of the appellant, who has put his points so clearly and well in this case that there is any thing to prevent a mortgagor doing what the mortgagor in this case is said to have done, namely, assisting in finding funds for his wife to purchase the mortgagee interest, which the mortgagee was desirous to transfer. It does not appear to me that this contention has force or effect, and it cannot prevail.

Then comes the main and crucial point in the case; what are the rights of the parties in respect of their several mortgages. This matter is not without authority. It has been dealt with in the case [319] of *Mohan Manor* v. *Togu Uka* (1). It has been dealt with by my brother Tyrrell and myself in *Muhammad Sami-ud-din* v. *Man Singh*, (2) which latter ruling has been adopted and followed by the learned Chief Justice and my brother Brodhurst in *Gajadhar* v. *Mul Chand* (3), and has also been adopted by myself in many rulings to which I have been a party in this Court. All those rulings are to the effect that if a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage in suit, join the puisne incumbrancer as a party, that puisne incumbrancer is in no way affected or prejudiced by the decree in the rights which the Transfer of Property Act gives him to redeem the prior incumbrancer. If he has been left out of that litigation the puisne

(1) 10 B. 224. (2) 9 A. 125. (3) 10 A. 520.

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incumbrancer must be placed in the same position he would have held had he been a party to that litigation.

The defendant is the puisne incumbrancer admittedly. She is willing and ready to discharge all the obligations that the law reasonably calls upon her to discharge, and she is prepared to satisfy the amount which properly is proportioned to the 6 annas 4 pies of mauza Sirsia. It is not denied that Rs. 5,684 was the amount which, by private arrangement between the mortgagor—who must be presumed to have had the best regard for his interest, and the mortgagee, who must be presumed not to have paid more than a fair price—was paid for the purchase at the private sale of the 6 annas 4 pies. I have not heard one word that that was not a reasonable sum, and we are both agreed that that is the extent to which equity requires that the defendant should pay the plaintiff, if she is to retain possession of this particular share of mauza Sirsia. That being the view I take of this case, I think that the decree of the Court below was wrong, in that it called upon the prior incumbrancer, before getting possession, to pay out the puisne incumbrancer. I think that the position should have been reversed. I therefore decree the appeal and reverse the decision of the Court below, and declare that the plaintiff-appellant is entitled to possession of the 6 annas 4 pies share of Sirsia, subject to this condition [320] that if within 6 months from the date of this our decree, the defendant do pay into this Court the sum of Rs. 5,684 to the credit of the plaintiff, the plaintiff's suit will stand dismissed and the defendant will retain possession of the 6 annas 4 pies of mouza Sirsia. If the money is not paid within the stipulated period, the plaintiff's decree for possession will stand, and he will be entitled to enforce it according to law. In either event the parties will bear their own costs of this litigation.

TYRRELL, J.—I concur.

Appeal decreed.

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REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

MAHABIR SINGH AND ANOTHER (*Petitioners*) *v.* BEHARI LAL AND OTHERS (*Opposite Parties*).* [7th February, 1891.]

Act I of 1887 *(General Clauses Act)* s. 3, *cl.* (13)—*Act XII of* 1887 *(Bengal, N. W. Provinces and Assam Civil Courts Act)*, s. 21, *cl.* (a)—"*Value of the original suit*"—"*Amount or value of the subject-matter of the suit*"—*Jurisdiction—Civil Procedure Code*, s. 2—*Decree, definition of.*

For the purpose of determining the proper appellate Court in a Civil suit what is to be looked to his the value of the original suit, that is to say, the "amount or value of the subject-matter of the suit." Such "amount or value of the subject-matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint.

An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the

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* Miscellaneous application under s. 622 of the Civil Procedure Code. Civil Revision No. 292 of 1889.

pecuniary limits of his jurisdiction is not a decree within the meaning of s. 2 of the Civil Procedure Code.

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[Appr., 23 C. 536; R., 15 A. 363; 16 A. 252; 16 A. 286; 17 A. 69; 28 A. 545=3 A.L.J. 266=A.W.N. (1906) 99; 22 B. 963 (966); 18 A.W.N. 74; 2 O.C. 103; 2 O.C. 133; 6 O.C. 255; 101 P.R. 1900; 9 Ind. Cas. 414.]

THE facts of this case sufficiently appear from the judgment of the Court.

Hon'ble Mr. *Spankie* and Mr. *C.H. Hill*, for the appellants.

Munshi *Ram Prasad* and Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

[321] EDGE, C.J. and KNOX, J.—This is an application to us to exercise our powers of revision under section 622 of the Code of Civil Procedure.

The order to which this application relates was one by which the late District Judge of Ghazipur returned a memorandum of appeal to the present applicants for presentation to this Court. The District Judge declined to hear the appeal on the ground that the appeal lay to this Court and not to the District Court.

The suit out of which this appeal arose was one for pre-emption of a share in a village. The plaintiffs in their plaint valued the share at Rs. 4,000 and brought this suit in the Court of the Subordinate Judge of Ghazipur. The defendants valued the share at Rs. 8,160. The Subordinate Judge having found the value of the share to be Rs. 7,464-10-3 made a decree for pre-emption on payment of that amount. From that decree the plaintiffs, who are the applicants here, filed an appeal in the Court of the District Judge. The District Judge, having found the value of the share to be Rs. 7,526, was of opinion that he had no jurisdiction to hear the appeal and consequently passed the order to which this application relates.

Mr. *Kashi Prasad* for the respondents raised a preliminary objection that s. 622 of the Code of Civil Procedure did not apply, his contention being that either a first appeal from the order lay or that the applicants had a second appeal.

Mr. *Hill* for the applicants contended that no appeal lay from the order in question, and that this was a case within s. 622.

In first Appeal from order No. 145 of 1889 we have to-day held that the order in question was not appealable as an order.

We are also of opinion that the order in question is not a decree as defined by s. 2 of the Code of the Civil Procedure. The order did not decide the appeal. On the contrary it was an order by which the District Judge, on the ground of jurisdiction, refused to decide the appeal and returned the memorandum of appeal to the [322] appellants, so that they might have their appeal decided by this Court.

The construction to be placed upon the clause defining a "decree". in s. 2 of the Code of Civil Procedure was considered by this Court in *Balkaran Rai* v. *Gobind Nath Tiwari* (1). The question then arose—Had the District Judge jurisdiction to hear and determine the appeal? If he had, then he failed to exercise a jurisdiction vested in him by law.

That question turns upon the construction of the words " value of the original suit " in clause (*a*) of s. 21 of Act XII of 1887, read with clause (13)

(1) 12 A. 129.

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of s. 3 of Act I of 1887. By the latter clause—"value with reference to a suit shall mean the amount or value of the subject matter of the suit."

Mr. *Kashi Prasad* contended that "the value of the subject matter of the suit" is the value which may be found by the Court hearing the suit. On the other hand Mr. *Hill* contended that the "value of the subject matter of the suit" is the value stated by the plaintiff in his plaint.

There has been much difference of opinion in the Courts in India, including this Court, on this question of how the jurisdiction is to be ascertained. It is a question not without difficulty.

It is, however, clear that by s. 21 of Act XII of 1887, the jurisdiction of the district Judge in appeal is to be determined by the value of the original suit and not by the value of the appeal. It appears to us that the "amount" of the subject matter of the suit mentioned in clause (13) of s. 3 of Act I of 1887 must mean the amount, that is, the amount in money, which the plaintiff claims to recover in his suit and not the amount which the Court may give him a decree for, and that for purposes of jurisdiction the amount of the subject matter of the suit must consequently mean the amount as stated by the plaintiff in his plaint.

It seems to us that the same principle must be applied when we have to ascertain the meaning of the "value of the subject matter [323] of the suit" in the same clause, and that the value of the subject matter of the suit must be the value as stated by the plaintiff in his plaint. The opinion which we express is that which was held by this Court in *Jag Lal* v. *Har Narain Singh* (1) and by the High Court at Bombay in *Lakshman Bhatkar* v. *Babaji Bhatkar* (2). The fact that in the Allahabad case s. 22 of Act VI of 1871 was in question, and that in the Bombay case the section in question was s. 25 of Act XIV of 1869 does not appear to us to make the decisions in these cases inapplicable as authorities on the subject which we are now considering. Mr. Justice Straight and Mr. Justice Tyrrell inform us that in a case which unfortunately has not been reported they held that the "value of the subject matter in dispute" within the meaning of s. 90 of Act VI of 1871 was the value stated by the plaintiff in his plaint. Whilst holding that the value of the subject matter of the suit for the purposes of jurisdiction is the value as stated by the plaintiff in his plaint, we entirely agree with the learned Judges in the Bombay case to which we have referred "that the jurisdiction of the Court properly having cognizance of the cause is not to be ousted by unwarrantable additions to the claim," and that an exaggerated claim which cannot be sustained and which there is no reasonable ground for expecting to sustain, brought for the purpose of getting a trial in a different Court from the one intended by the Legislature, is substantially a fraud upon the law and must be rejected, whether it arises from a mere recklessness or from an artful design to get the adjudication of one Judge instead of that of another. The words which we have used are almost precisely those of the Bombay High Court. Such a case as is referred to would be an instance of an attempt to evade s. 15 of the Code of Civil Procedure. The result is that as the applicants, the plaintiffs in the suit, had in their plaint valued the subject matter of their suit at Rs. 4,000, the District Judge had jurisdiction to hear and determine the appeal, and, as he failed to exercise the jurisdiction vested in him by law, we, under section 622 of the Code of Civil Procedure, make

(1) 10 A. 524. (2) 8 B. 31.

our order setting aside his order, the subject of this application, and directing that the appeal [324] be restored to the file of the pending appeals in the Court of the District Judge of Ghazipur, and that it be disposed of according to law; and we further order that the costs of this application shall abide the result of the appeal.

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Application allowed.

13 A. 324 = 11 A.W.N. (1891) 96.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

MANGAL SEN (*Plaintiff*) *v.* RUP CHAND AND ANOTHER (*Defendants*).* [10th February, 1891.]

Suit pending in Court of Subordinate Judge with Small Cause Court powers—Transfer to Munsif's Court—Civil Procedure Code, s. 25—Act IX of 1887 *(Provincial Small Cause Courts Act), s.* 35.

The plaintiff filed his suit as a Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers. During the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers. In consequence of this the District Judge made an order under s. 25 of the Code of Civil Procedure, transferring all cases above the value of Rs. 50. then pending before the Subordinate Judge in his capacity as a Small Cause Court, to the Munsif to be tried as Munsif's Court cases. The Munsif had Small Cause Court powers up to Rs. 50. The plaintiff's suit was for Rs. 69. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed.

Held that, granting that the suit was a Small Cause Court suit (which was not decided), whether s. 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887) was applicable, it would remain throughout a Small Cause Court suit and be subject to the incidents of such a suit.

[**Diss.**, 23 B. 382; 31 C. 1057; 6 O.C. 81; **F.**, 2 O.C. 143; 154 P.L.R. (1903) = 83 P. R, 1903; **Appr.**, (1912) M.W.N. 1086 (1090) = 23 M.L.J. 373 (380); **R.**, 17 Ind. Cas. 425 (428); **D.**, 11 Ind. Cas. 431 (432) = 227 P.L.R. 1911 = 145 P.W.R. 1911.]

THIS was a reference from the Subordinate Judge of Saharanpur under circumstances which are fully detailed in the judgment of the Court.

JUDGMENT.

EDGE, C. J. and KNOX, J.—This is a question referred to us by the Subordinate Judge of Saharanpur, under s. 617 of the Code of Civil Procedure. A suit was filed as a Small Cause Court suit in the Court of the Subordinate Judge of Saharanpur, the Subordinate Judge having had Small Cause Court powers conferred upon him. [325] While the suit was pending before that Court, the Subordinate Judge went on leave. The gentleman who was appointed to officiate in the absence of the Subordinate Judge had not had conferred upon him Small Cause Court powers. The District Judge made an order transferring this suit and others to the Court of the Munsif of Saharanpur to be tried and disposed of as a Munsif's case. The Munsif had had conferred upon him Small Cause Court powers to the extent of Rs. 50.

* Miscellaneous Application, No. 112 of 1890, under s. 617 of the Civil Procedure Code.

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The suit in question was one for Rs. 69. The plaintiff, being dissatisfied with the decree of the Munsif, appealed to the District Judge of Saharanpur, who transferred the appeal to the Court of the Subordinate Judge. In what we are going to say we are not deciding whether the suit was a suit of the nature of Small Cause Court suits or cognizable by a Court of Small Causes as such. That may be a question yet to be decided by the Subordinate Judge. We merely assume for present purposes that it was a Small Cause Court suit. On that assumption we give the following opinion :—It is not necessary to decide whether or not the decision in *Kauleshar Rai* v. *Dost Muhammad Khan* (1), was right in law and applies to this case. If s. 25 of the Code of Civil Procedure applies here, and the order was in fact made under that section, the last clause of that section would apply, and the Munsif, for the purposes of this suit, must be deemed to have been a Court of Small Causes competent to try it as such. The transfer to the Munsif's Court was made after the Subordinate Judge, who had Small Cause Court powers, had proceeded on leave. If, by reason of this fact, s. 25 of the Code of Civil Procedure did not apply, then we must apply s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887). That section requires to be carefully looked at. It is quite possible that the Legislature may not have expressed in the section what it intended, but we must construe the section as we find it. Clause (1) of the section is as follows :—

"Where a Court of Small Causes or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in [326] relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit."

The suit in the section referred to is a Small Cause Court suit, and the proceeding in the section is a proceeding in the Small Cause Court suit. The result is, according to our construction of the section, that when, by reason of a Small Cause Court ceasing to exist a suit is transferred to another Court, the proceedings still continue to be Small Cause Court proceedings, and for this purpose the Court to which the transfer is made must be treated as if it was a Court of Small Causes having jurisdiction to hear the suit transferred to it. In other words, whatever the intention of the Legislature was, we read s. 35 of Act IX of 1887 in the same sense that we read the concluding paragraph of s. 25 of the Code of Civil Procedure. With this expression of opinion the record will be returned to the Court of the Subordinate Judge of Saharanpur.

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(1) 5 A. 274.

13 A. 326=11 A.W.N. (1891) 97.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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APPELLATE CIVIL.

13 A. 326=11 A.W.N. (1891) 97.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*) v. BHAGWANTI BIBI AND OTHERS (*Defendants*).*
[11th February, 1891.]

Suit in forma pauperis—Appeal—Right of Government to appeal in respect of Court fee on portion of plaintiff's claim dismissed—Civil Procedure Code, ss. 411, 412.

In a suit *in forma pauperis* the District Judge decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion which was dismissed. The Secretary of State, not having been a party to the litigation in the Court below, then preferred an appeal in respect of the court-fee on that portion of the plaintiff's claim which had been dismissed.

Held that such an appeal would lie; though the more suitable procedure would have been for the Government to have applied, through the Collector, to the Court of first instance to review its judgment and to repair the [327] omission in its decree. *Janki* v. *The Collector of Allahabad* (1) referred to.

[Cons., 23 M. 73.]

Musammat Bhagwanti Bibi brought a suit *in forma pauperis* against Hardeo Das, Ram Kishan, Murlidhar and Binda Prasad, three brothers and a nephew of her deceased husband, for the recovery of certain ornaments, which she alleged to have been wrongfully retained by the defendants, and also for maintenance at the rate of Rs. 20 per mensem, the same being interest on a sum of Rs. 2,000, which, according to the plaintiff, had been left for her use in the defendant's shop under the will of her father-in-law, Sohan Lal. She also claimed Rs. 812 as arrears of interest on the said sum. The defendants denied the right of the plaintiff to bring her suit *in forma pauperis*. They also pleaded that the will set up by the plaintiff was not binding on them, that they never had possession of any of the plaintiff's ornaments, and that the plaintiff had forfeited her rights to maintenance by reason of her unchastity, or if she was entitled to any, interest at the rate of 6 per cent. was sufficient. The Court of first instance found in favour of the validity of the will, and, fixing the rate of interest at 9 per cent. gave the plaintiff a decree for maintenance from the date of suit at the rate of Rs. 15 *per mensem*., dismissing the claim for arrears of maintenance and for recovery of the jewels. In framing its decree, however, the Court omitted to provide for the payment to Government of the court fee on that part of the plaintiff's claim which had been dismissed.

An appeal was accordingly filed on behalf of Government to recover the court-fee on such portion of the plaintiff's claim.

Munshi *Ram Prasad* for the appellant.

The respondent was not represented.

JUDGMENT.

STRAIGHT, J.—This appeal is of a very unusual character, the Secretary of State, appellant, having been no party to the litigation below and his right to appeal only constructively arising under the terms of ss. 411 and 412 of the Code of Civil Procedure. The respondent, Musammat Bhagwanti, who does not appear and is [328] not

* First Appeal No. 125 of 1889, from a decree of W.T. Martin, Esq., District Judge of Mirzapur, dated the 16th March 1889.

(1) 9 A. 64.

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represented, brought a suit against Hardeo Das, Ram Kishan, Murlidhar and Binda Prasad for recovery of arrears of maintenance amounting to Rs. 812, for restoration of ornaments withheld from her, valued at Rs. 4,600, and for a declaration of her right to future maintenance at the rate of Rs. 15 per mensem. The suit was instituted by the plaintiff as a pauper on the 2nd May, 1888, and the learned Judge, having dismissed the first two items of the plaintiff's claim, gave her Rs. 172-8-0, being maintenance at the rate of Rs. 15 per mensem from the date of the suit to the date of the decree, and declared her right to maintenance thereafter at the rate of Rs. 15 per mensem. The decree, to be precise, was expressed thus:—"That Rs. 172-8-0, due to the plaintiff on account of the maintenance from the 2nd April, 1888, the date of the suit, to this day, be allowed to the defendants as the costs due to them in proportion to the amount dismissed, or Rs. 5,412, but that the defendants do pay out of the plaintiff's costs such amount as is payable by the plaintiff to the Government. Or in other words, a decree be passed in favour of the plaintiff for recovery of maintenance from this day at Rs. 15 per mensem, defendants, being entitled to no costs. The defendants shall pay the plaintiff's costs in proportion to the amount decreed."

The effect of this decree is that the measure of the plaintiff's costs was declared to be the amount payable by the plaintiff to Government, and the measure of the defendants' costs was declared to be Rs. 172-8-0 arrears of maintenance decreed. It will thus be seen that in the decree of the learned Judge no provision was made for payment by any person to the Government of the court-fee on that portion of the plaintiff's claim which was dismissed, namely, Rs. 5,412, on which the court-fee would be Rs. 250. It is this omission in the decree of the learned Judge which is the subject of complaint in this appeal by the Secretary of State. I am constrained to say that in my opinion a most inconvenient course has been adopted, and that, instead of coming to this Court, with an appeal, the proper method would have been for the Secretary of State, through the Collector of Mirzapur, to apply to the learned [329] Judge who passed the judgment and decree, to review his judgment and reframe the decree in such a way as to effect the object at which this appeal is aimed. Looking to the language of s. 411 of the Code of Civil Procedure, read with s. 412, I am not prepared to say that the Secretary of State cannot properly be regarded as a party to the litigation so as to be in a position to prefer such an appeal as that which is before us. In the case of *Janki* v. *The Collector of Allahabad* (1) my brothers Brodhurst and Tyrrell held, that in execution-proceedings arising out of a pauper suit the Secretary of State who has obtained an order under s. 411 may be regarded as a party to the suit within the meaning of s. 244. I am not prepared to hold that that was an erroneous view, and, adopting the principle therein enunciated, it seems to me therefore that it was open to the Secretary of State, as being a party aggrieved by the decree below, to prefer this appeal.

When, however, I come to deal with the policy and propriety of such an appeal, I can only remark that I think we might well have been spared it. Musammat Bhagwanti apparently is a Hindu widow with such small means that she was constrained to come as a pauper to obtain the assistance of the Court for the purpose of wresting from the hands of the male members of her husband's family the small allowance of maintenance

(1) 9 A. 64.

which has been decreed to her. The amount involved is, after all, to Government a very trifling one, and all the delay and expense that has been incurred in preferring this appeal might well have been avoided. However, we have no alternative but to administer the law as we find it. The terms of s. 412 are, in my opinion, mandatory, and it was obligatory upon the learned Judge below when he passed his decree to provide in that decree for payment by the plaintiff of the court-fees upon that portion of her claim which was dismissed, namely, Rs. 250. The result of this view is that the plaintiff will have to pay many months of her small maintenance allowance of Rs. 15 a month before she is quit of her liability to Government. Looking to her pauper position, I cannot help saying that I think the case was one [330] in which the Government might have refrained from preferring this appeal. The appeal is decreed, and the judgment and decree of the Court below are modified in this way that a declaration must be inserted in the decree to the effect that the sum of Rs. 250, court-fee payable in respect of that portion of the plaintiff's claim which was dismissed, is due from the plaintiff, Bhagwanti, to the Secretary of State, who will recover it in the same manner as the costs of suit are recoverable under a decree. The other defendants to the suit have been cited here as respondents for no earthly purpose or reason that I can see, because under s. 412 no power existed in any Court to order them to pay the costs of that portion of the claim of the pauper plaintiff which was dismissed. The appeal is decreed in part, *qua* Musammat Bhagwanti, but without costs, and the decree will be amended in the manner I have indicated. As to the other respondents, the appeal is dismissed with costs.

TYRRELL, J.—I concur.

Appeal decreed qua *Musammat Bhagwanti.*
Appeal dismissed qua *the other respondents.*

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13 A. 330=11 A.W.N. (1891) 66.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SRI NIWAS RAM PANDE (*Plaintiff*) v. UDIT NARAIN MISR AND ANOTHER (*Defendants*).* [11th March, 1891.]

Mortgage-bond—Interest post diem—*Damages—Act IV of* 1882 *(Transfer of Property Act)*, ss. 67 *and* 86.

Interest *post diem* on a mortgage-bond for a certain term and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of contract.

Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge", upon the property, though nominally damages. In respect of *post diem* interest given by way of damages no distinction is to be drawn between simple bonds and mortgage-bonds. *Monsab Ali* v. *Gulab Chand* (1); and *Bhagwant Singh* v. *Darya Sing* (2) followed; *Cook* v. *Fowler* (3); *Bishen* [331] *Dayal* v. *Udit Narain* (4); and *Rajpati Singh* v. *Kesh Narain Singh* (5) referred to.

[N. F., 21 P.L.R. (1903)=25 P.R. (1902); F., 6 C.P.L.R. 22; Rel., 8 C.P.L.R. 95; 15 Ind. Cas. 911 (913)=15 C.L.J. 684; R., 17 A. 581; D., 22 B. 107.]

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* First Appeal, No. 203 of 1888, from a decree of Babu Brij Pal Das, Subordinate Judge of Gorakhpur, dated the 7th September 1888.

(1) 10 A. 85. (2) 11 A. 416. (3) L.R. 7 H L. 27.
(4) 8 A. 486. (5) 10 A.W.N. (1890) 549.

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In this case the plaintiff sued for himself and as heir to his deceased brother, Shiam Narain Pande, to recover the sum of Rs. 15,156 together with interest at the rate of 8 annas per cent. per mensem, in all Rs. 25,822 As. 7, from the defendants, Udit Narain Misr and Sarju Prasad Misr, by sale of property mortgaged under a bond, dated the 8th September 1879. The debt secured by the mortgage was expressed to be payable with interest at 8 annas per cent. per mensem, in one lump sum at the expiration of two years from the date of the bond, but no provision was made for the payment of *post diem* interest. The defendants pleaded as their main ground of defence that the plaintiffs were not entitled to interest after the day fixed for payment of the money due under the bond. The Court of first instance gave the plaintiffs a decree for the principal amount secured with interest for two years at the rate agreed upon, but dismissed the rest of the claim. The plaintiff then appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Jwala Prasad* for the appellants.

Munshi *Kashi Prasad* and Munshi *Ràm Prasad* for the respondents.

JUDGMENT.

STAIGHT and TYRRELL, JJ.—In this appeal by the plaintiff in the suit only two questions arise. The first is whether, upon a proper interpretation of the mortgage of the 18th December 1879, provision is expressly or impliedly made for the payment of *post diem* interest, and the second, whether, such a provision being absent, and the right of the plaintiff to such interest sounding in damages, such damages form an integral part of the amount due under the mortgage, and in that way should be regarded as secured thereby, or at least as money "charged" on the immoveable property covered by the mortgage.

[332] Upon the first point I have no doubt as to the true nature of the instrument, namely, that it was for a certain term, *i.e.*, two years, within which period the principal, Rs. 15,156, together with interest at 8 as. *per cent. per mensem* was to be paid up in "a single sum;" and further, that it only provided for payment of interest "*ad diem*," and not "*post diem*." It says :—" in case of our being unable to pay the whole of the principal and interest due hereunder on the promised date, the said Pandeys, creditors, shall be at liberty to recover the principal and interest of this bond in a single sum and to a farthing by auction sale of the hypothecated property and from our other moveable and immoveable properties in anyway they may like." In face of such terms as these, it seems to me impossible to say that any covenant for "*post diem*" interest can be implied, unless we are prepared to go the length of holding that when once the relation of mortgagor and mortgagee is established under an instrument for a specified term, there is always an imperative implication of such a covenant. There the mortgagors undertook to pay up the principal and interest within a specified time in "a single sum," and, if not paid upon that date, certain clearly defined consequences were to follow. It is not denied in the present case that the money was not paid as agreed, nor had it been paid up to the date of the institution of the suit on the 30th July 1888. I have no doubt that the claim of the plaintiff for interest after the 18th December 1881 could only be treated as one for damages to be assessed by the Court trying the suit and not for interest due under a covenant, express or implied. In *Cook* v. *Fowler* (1) Lord Cairns, after finding the instrument then in question to be a warrant-of-attorney and defeasance to secure

(1) L.R. 7 H.L. 27.

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a debt up to a certain day without any mention of subsequent interest, observes :—" If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson* v. *Redshaw* (1), any claim in the nature of a claim for interest after the date up to which interest was stipulated for would be a claim, really, not for a stipulated sum and interest but for damages; and then it would be for the [333] tribunal before which that claim was asserted to consider the position of the claimant and the sum which properly and under all the circumstances should be awarded for damages." In the same case Lord Selborne remarked :—" Although interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract." This view has been adopted and followed by this Court in *Mansab Ali* v. *Gulab Chand* (2); *Bhagwant Singh* v. *Daryao Singh* (3); *Rajpati Singh* v. *Kesh Narain Singh* (4); and *Bishen Dayal* v. *Udit Narain* (5). The first point is therefore decided against the appellant. Upon the second point Pandit *Ajudhia Nath* addressed to us a very able argument, the main object of which was to show that the cases of *Mansab Ali* v. *Gulab Chand* (2) and *Bhagwant Singh* v. *Daryao Singh* (3) decided by the learned Chief Justice and my brother Tyrrell and above referred to were wrongly decided, and that the question involved is one that we might well refer to a Full Bench. I have heard the learned pleader at length and have carefully examined all the authorities cited by him, and I not only see no reason to doubt, but I entirely concur in the judgments in those two cases and in the reasoning upon which they proceeded. As this opinion of mine, however, has the effect of committing at least a majority of the Court to a particular view, I think it well briefly to consider Pandit *Ajudhia Nath's* argument and the cases to which he has referred. His first position was that a broad distinction must be drawn between simple bonds and mortgage-bonds, as in the case of the latter an absolute presumption is always to be drawn that interest is intended to run on after due date as a charge on the property; and he laid stress upon the fact that in the case of *Cook* v. *Fowler* (6) the document in suit was not a mortgage. At a subsequent stage of his argument the learned pleader admitted that he had perhaps put his contention too high, and he then urged that, conceding *post diem* interest to sound in damages, it was not to be regarded as damages in the ordinarily accepted sense, but as interest in fact, though damages in name, running *pari passu* [334] with the interest stipulated for under the contract and in like manner entitled to be treated as secured on the property. Let me then examine this position. A man covenants to pay a sum of money certain, with an amount of interest certain, upon a date certain, and mortgages his land for the stipulated period as security for such principal and interest and declares it liable to sale in enforcement of the mortgage immediately on default at the expiration of the given period. Now I suppose the reasonable presumption is, first, that a man will perform his contract and not break it, and secondly, that if parties place a limit of time upon the engagement entered into between them, they do so with their eyes open and intend what they put in black and white into their contract. If, then, A says to B, "I will pay you Rs. 1,000 on the 1st January 1890, with interest at 12 per cent. per annum, meanwhile mortgaging to you my 4-anna

(1) 1 Wm. Saund 201 (*n*). (2) 10 A. 85. (3) 11 A. 416.
(4) 10 A.W.N. (1890) 149. (5) 8 A. 486. (6) L.R. 7 H.L. 27.

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zemindari share, and, if I fail to pay on due date, you may realize the amount by sale of such share," the presumption is that A intends to pay and B intends that he shall pay the Rs. 1,000 on the 1st January 1890, and that what is in contemplation between them is a fulfilment of the covenant as to payment on the date specified, and, if it is not fulfilled, an enforcement of the condition of sale. It is open to both of them to make provision for the case of default over and above what I have already mentioned by a covenant as to "*post diem*" interest, and if they do not do so, it must be presumed that the omission was intentional, and that the time to which tho contract was limited was deliberately defined. What, then, is the special excellence that belongs to a contract of mortgage for a stipulated term in preference to any other contract to pay a sum of money certain on a particular date, such as a promissory note for example? In either case upon default of payment on due date the right of action accrues, because the time for performance has come and gone, and the contract has been broken. It seems to me, if effect is to be given to the contention of the learned pleader for the appellant, that no real distinction can be drawn between a mortgage for a fixed period, with a covenant as to interest limited to that period, and a mortgage with no such limitation but charging the property until repayment of [335] principal and interest, with the result that an express covenant for "*post diem*" interest has practically no higher scope or operation than an assessment by a Court of such interest under the name of damages, because, if he is right, in either case the *post diem* interest becomes a portion of the amount in respect of which the mortgagee may foreclose or sell the mortgaged property, or goes to swell the mortgage-money, a mortgagor must pay before he can redeem. In this view of the matter a mortgagee can allow his claim to *post diem* interest in the shape of damages to accumulate up to the last day of limitation, and, though the amount of it has in the end to be assessed and need not necessarily be any particular sum, it is when assessed to be regarded and treated as if it had all along constituted a charge or been secured on the mortgaged property. I would ask from what date such charge is to hold; from that of the mortgage, or from the breach, or from the end of each year for which interest remains unpaid, or from the date of the decree; and what is to be the position of a mortgagee who has taken an incumbrance subsequently to the date of breach, but prior to the bulk of the *post diem* interest, as damages, becoming assessable? If the interest *post diem* were recoverable as interest pure and simple, the recovery of it would be limited to three years from the date when it fell due (Act XV of 1877, sch. II, No. 64), yet if we push the argument for the appellant to its logical conclusion, upon the view that '*post diem*' interest assessed as damages becomes part of the " money secured by the mortgage," it is difficult to see from what point of time, for the purposes of art. 147, the money secured by the mortgage could be said to " become due." It seems to me a contradiction in terms to hold that something the mortgagor becomes liable to pay in consequence of his breach of contract can either legally or equitably be regarded as payable according to the terms and conditions of that contract. The learned pleader relied more particularly on the cases of *Morgan* v. *Jones* (1), *Price* v. *Great Western Railway Company* (2), *Gordillo* v. *Weguelin* (3), and certain passages to be found in Chapter XI, [336] Part 2, of Fisher on Mortgage. I have carefully looked into and exmined all these authorities, and

(1) 22 L. J. Ex. 232. (2) 16 L. J. Ex. 87. (3) L.R. 5 Ch. D. 287.

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I am unable to regard them as making it incumbent on me to hold that interest accruing on a mortgage after the date fixed in the deed forms a portion of the "mortgage-debt." In my opinion, on the contrary, it can only be recovered as damages for the detention of that debt, which damages cannot be treated as "secured by the mortgage" or "charged on immoveable property," but as compensation for breach of the contract of mortgage. This is borne out by the note to *Mounson* v. *Redshaw* (1), which is mentioned by Lord Cairns in his judgment in *Cook* v. *Fowler* (2). "The usual covenant in a mortgagee-deed is to pay the interest and principal on a certain date, but there is no covenant after that date, therefore in debt on such a deed the interest subsequent to the day of default in strictness should not be claimed as part of the debt but as damages for the detention of the debt." The learned Pandit for the appellant pressed upon us the remarks of Lord Justice Amphlett in *Gordillo* v. *Weguelin* as indicating that the Court of Chancery would, in dealing with the question of redemption on equitable grounds, hold the mortgagor bound to pay *post diem* interest assessed as damages as a part of the amount payable by him before he could redeem. However that may be, the action of our Courts in such matters is guided and governed by the Transfer of Property Act, and I cannot hold the expressions therein of "mortgage money" (s. 67) or "principal and interest due on the mortgage" (s. 86) as covering and including interest '*post diem*,' assessed as damages. It was said that this view will involve considerable hardship to a mortgagee, which I fail to see. Like every other party to a contract it is open to him on breach to proceed at once for the default, and the presumption is that he will do so, and not that he will lie by, for the purpose, as in this country we know, of allowing interest indefinitely to accumulate till it reaches an amount which, if given as damages assessed at the rate of interest on the mortgage-deed, will be far beyond what the mortgagor can pay. That this assessment need not necessarily adopt the contractual rate where it is abnormally [337] high, or where there has been delay, is abundantly clear from the case of *Cook* v. *Fowler* (2), and it seems absurd to me to talk of there being any hardship to a mortgagee for a fixed term in putting him on the same footing in the matter of damages for breach of contract as any other party to a contract whose right to sue arises on such contract being broken. Moreover, it is open to a mortgagee at the time of the making of the contract of mortgage to have a covenant entered therein making provisions for '*post diem*' interest, and this is more frequently than not to be found in such contracts; if he does not do so he has no one but himself to blame.

I entirely concur in what was said by the learned Chief Justice in *Mansab Ali* v. *Gulab Chand* (3) and *Bhagwant Singh* v. *Daryao Singh* (4), and I dismiss this appeal with costs.

Appeal dismissed.

(1) Wm. Saund. 201 (*n*). (2) L. R. 7 H. L. 27. (3) 10 A. 85.
(4) 11 A. 416.

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13 A. 337 = 11 A.W.N. (1891) 93.

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APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* MUHAMMAD MAHMUD KHAN.*
[17th March, 1891.]

Sessions Court—Assessors—Assessors prevented by death or illness from attending a trial—Criminal Procedure Code, ss. 268 *and* 285.

During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on, another assessor became too ill to take any further part in the trial, and the third assessor was obliged to retire at the begining of the accused's pleader's address to the Court and did not return until it was finished.

Held, that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provisions of s. 268 of the Code of Criminal Procedure) been held before a Court, not having jurisdiction.

[R., 24 M. 523 (536) = 2 Weir 345.]

THE facts of this case, so far as they are necessary for the purposes of this report, are stated in the judgment of Tyrrell, J.

Mr. *Pogose* for the appellant.

The Government Pleader, Munshi *Ram Prasad*, for the Crown.

JUDGMENT.

[338] TYRRELL, J.—A preliminary point was raised by the learned Counsel who appeared for the appellants. He contended that the conviction of his clients was bad in law for want of jurisdiction in the Court below. The trial began before the learned Sessions Judge of Moradabad and three assessors on the 10th day of August 1890. This was in due conformity with the rule contained in s. 268 of the Code of Criminal Procedure, that all trials before a Court of Sessions shall be either by jury or with the aid of assessors. In an early stage of the trial one assessor died, and later on another assessor became too ill to take any further part in the trial. The trial reached its latest stage at the sitting of the 18th day of September 1890, when the assessor Govind Ram alone attended. The case for the prosecution having closed, and the examination of the accused and of some of their witnesses having been had, the learned pleader for the accused addressed the Court for about an hour and a half on the law and merits of the case. Before he had spoken more than ten minutes, Mr. Govind Ram obtained leave from the Judge to leave the Court-house on the plea of illness and consequent confusion of mind. He did not return till the address on behalf of the accused was finished, and having heard the Government Pleader's reply for the prosecution, he gave his opinion that the accused were guilty, on vague and unsatisfactory grounds. On these facts Mr. *Pogose* claims that the trial was bad with reference to ss. 268 and 285 of Act X of 1882. The point is new and of considerable importance. It is clear that a trial held by a Sessions Judge without any assessor would be bad for want of jurisdiction. It is equally certain that if all the assessors with whose aid a Sessions Court commenced a trial " are prevented from attending (throughout the trial) or absent themselves, the proceeding shall be stayed and a new trial " must be

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* Criminal Appeal No. 749 of 1890.

held. The question arises, however, as to what is the meaning of the words "prevented from attending, or absent themselves." Mr. Govind Ram attended throughout the most part of the trial and absented himself for a portion thereof only; but can he be said to have attended and not to have been absent in the substantial sense of s. 285? I have had the advantage of con-[339]sulting my brother Straight, and I am of opinion that this question must be answered in the negative.

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The first part of s. 285 explicitly provides that the assessors shall attend throughout the proceedings, that is to say, that there shall be no break in their attendance, which shall be exactly commensurate with the entire continuance of the trial down to the time when the finding is made. In the case before me the portion of the trial covered by the provisions of s. 290, a very important portion from the point of view of the accused, was conducted without the aid of any assessor, and to that extent the attendance was not continuously complete. I must allow this plea, with the result that I am constrained to find that the trial was before a Court without jurisdiction, and must therefore be set aside. The conviction, sentence and all other proceedings before me are annulled, and a new trial must be had according to law.

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13 A. 339=11 A.W.N. (1891) 100.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

KALYAN SINGH (*Plaintiff*) v. KAMTA PRASAD (*Defendant*).*
[23rd March, 1891.]

Execution of decree—Attachment—Previous assignment in satisfaction of decree of third party—Suit by assignee to establish right to attached property—Civil Procedure Code, ss. 258 and 283.

Where a regular suit under s. 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property, on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor,—

Held, that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above-mentioned relates only to the Court executing the decree.

[D., 20 A. 254.]

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

[340] Munshi *Ram Prasad* and Munshi *Gobind Prasad* for the appellant.

Maulvi *Mehdi Hasan* and Munshi *Jokhu Lal* for the respondent.

JUDGMENT.

MAHMOOD, J.—The facts of this case are the following:—

Kalyan Singh, plaintiff-appellant, obtained a money-decree for arrears of rent against one Bhurwa, who is stated to have been a tenant of the said Kalyan Singh. This decree was for a sum of Rs. 9 as. 15 p. 2, and dated the 11th July 1882. It is then stated that for the money

* Second Appeal, No. 1222 of 1889, from a decree of G.J. Nicholls, Esq., District Judge of Cawnpore, dated the 27th August 1889, reversing a decree of Babu Khettar Mohan Ghose, Munsif of Fatehpur, dated the 30th June 1888.

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due upon that decree and some other money due by Bhurwa to Kalyan Singh, the former transferred certain trees to the latter.

Against the aforesaid Bhurwa, the defendant-respondent Kamta Prasad also obtained a simple money-decree. This was some time in 1885. In execution of his decree Kamta Prasad attached the trees now in dispute. Thereupon Kalyan Singh objected to the attachment, upon the allegation that he was the owner of the trees, and that the aforesaid Bhurwa no longer possessed any attachable or saleable interest in the trees. The Court executing the decree allowed the objections by its order dated the 14th January 1888; but on appeal that order was set aside on the 28th March, 1888. The objections were thus disallowed and the attachment maintained.

Kalyan Singh thereupon instituted the present regular suit under s. 283 of the Code of Civil Procedure, suing to set aside the order of the 28th March 1888. This suit was filed on the 9th April 1888, and was decreed by the first Court; but upon appeal the lower appellate Court reversed the first Court's decree on the 27th August 1889, thus dismissing the suit.

By an oversight the learned Judge in delivering his judgment and decree wrongly used the name of Kalyan Singh, the plaintiff-appellant, instead of Kamta Prasad, the defendant-respondent, in whose favour he was passsing the judgment. This matter, however, was brought to his notice, and the learned Judge, acting under the provisions of s. 206 of the Code of Civil Procedure, amended the [341] judgment and the decree by his order dated the 20th November 1889.

Whilst the matter stood thus, this second appeal was filed by Kalyan Singh to this Court on the 26th November 1889. The appeal was preferred againt the decree of the lower appellate Court of the 27th August 1889, and in the grounds of appeal objection was taken to the error the Judge had made and afterwards corrected by the order of the 20th November 1889.

Mr. *Mehdi Hasan* has raised a preliminary objection that the appeal cannot prevail, because it has not been preferred from the final decree of the 20th November 1889. In view of this objection Mr. *Gobind Prasad*, the learned pleader for the appellant, has amended his memorandum of appeal by striking out the first and the fourth grounds of appeal and by inserting reference to the amendment as made by the order of the 20th November 1889. This he has been allowed to do under rule 22 of the rules of this Court. The preliminary objection is thus disposed of.

Upon the merits of the case the learned Judge has held that because the alleged transfer of the trees by Bhurwa to Kalayan Singh was made in satisfaction of the decree of the 11th July 1882, it was necessary, under s. 258 of the Code of Civil Procedure, that the aforesaid transfer and satisfaction should have been certified; that no such certification took place, and that therefore the alleged transfer cannot be taken into account even in the regular suit.

This view of the law is erroneous, and it is enough for me to refer to the case of *Ram Ghulam* v. *Janki Rai* (1) to show that the prohibition to take cognizance of payments in execution of decrees is limlted to the Court which has to deal with the execution of the decrees and does not extend to Courts that have to try the allegations of the parties on the

(1) 7 A. 124.

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merits. In delivering my judgment in that case I expressed my dissent from some of the Bombay rulings therein referred to.

[342] In support of my view Mr. *Gobind Prasad* has drawn my attention to the cases noted in the margin. I need not enter into a detailed consideration of these cases, because what I said in the case reported in I.L.R. 7 Allahabad, is enough to show that the prohibition to take cognizance of adjustments and payments referred to in s. 258 of the Code of Civil Procedure relates only to Courts executing the decree and to no others. Such, indeed, is the clear effect of the last few words of the section itself as they now stand.

Sellammyyan v. *Muthan* (1). *Pat Dasi* v. *Sharup Chand Mala* (2). *Mallamma* v. *Venkappa* (3).

In my opinion the learned Judge of the lower appellate Court, by reason of his having taken an erroneous view of the law, precluded himself from deciding the case upon its merits. The learned Judge has not considered the nature of the alleged transfer of trees by Bhurwa in favour of Kalyan Singh, nor has he considered whether the transfer is valid with reference to the rules of the Transfer of Property Act and the requirements of the Registration Law. It was further necessary to ascertain whether, notwithstanding such transfer, Bhurwa still possesses rights and interest in the said trees, and the nature and extent of such rights.

A proper adjudication of all these various points would be trial upon the merits. The learned Judge did not do so, having disposed of the case on a preliminary point, and having taken an erroneous view of the provisions of s. 258 of the Code of Civil Procedure.

I think the case should be tried on the merits as indicated above. I decree the appeal, set aside the judgment and decree of the Court below, and remand the case to that Court under s. 562 of the Code of Civil Procedure for disposal upon the merits. Costs to abide the result.

Cause remanded.

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13 A. 343 = 11 A.W.N. (1891) 119.

[343] REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

JAWAHIR MAL (*Petitioner*) *v.* KISTUR CHAND AND ANOTHER (*Opposite parties*).* [31st March, 1891.]

Execution of decree—Decree of appellate Court—What that decree should contain.

Where the judgment of an appellate Court directed that a certain sum over and above what had been decreed to him in the Court of first instance should be decreed to the appellant, but the decree of the appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based and to the decree of the Court of first instance,—

Held that though the decree as thus drawn was informal, yet as the amount due to the decree-holder was ascertainable from the record, and the decree was thus practically capable of execution, execution should, as a matter of equity, be granted to the decree-holder.

[Appr., 18 A. 344; R., A.W.N. (1908) 257 = 5 A.L.J. 742.]

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* Reference under s. 18, Ajmere Courts Regulation No. I of 1877.

(1) 12 M. 61. (2) 14 C. 376. (3) 8 M. 277.

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13 A. 343 =
11 A.W.N.
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THIS was a reference under s. 18 of the Ajmere Courts Regulation No. I of 1877, made by the Commissioner of Ajmere-Marwara upon the following facts:—

On the 22nd December, 1883, one Jawahir Mal obtained a decree for Rs. 4,110-12-8 in the Court of the Subordinate Judge of Beawar. The decree-holder appealed to the District Judge against this decree, claiming an additional sum of Rs. 1,601-7-0. The appellate Court found in favour of the appellant, but omitted to enter the sum found in his favour in its decree. The first application for execution was made on the 4th December, 1886, and it was ultimately struck off. On the 19th November, 1889, a second application for execution was filed and the usual proceedings commenced. On the 21st October, 1889, the decree-holder applied in the appellate Court to bring the decree of that Court into conformity with the judgment. That application was rejected on the 29th November, 1889, on the ground that there was no reason for amendment of the decree. The execution proceedings initiated on the 19th November, 1889 were terminated by an order of the 19th December, striking off the execution proceedings as barred by [344] limitation. From this order the decree-holder appealed, but his appeal was rejected. He then applied that a reference might be made to the High Court on the point of limitation and other legal questions which were considered to have arisen in the case.

The reference came before Edge, C.J. and Knox, J., who gave judgment as follows:—

JUDGMENT.

EDGE, C. J., and KNOX, J.—This is a reference from the Commissioner of Ajmere. Jawahir Mal obtained a decree against Kistur Chand and another for Rs. 4,110-12-8 with costs. That decree was obtained on the 22nd December, 1883. The defendants appealed, and their appeal was dismissed. The plaintiff also appealed and his appeal was allowed. The result of his appeal was that he obtained a decree for certain costs of the appeal and for a sum found by the Commissioner to be Rs. 1,601-11-7 in addition to the amount of the original decree. On the 4th December, 1886, he applied for execution, and on the 19th February, 1887 his application was struck off, on the ground that he had not complied with the direction of the Court to file an inventory of the property to be attached and on the further ground that he was not present. There is no doubt in our minds that the decree to be executed is the decree of the appellate Court. We are informed that Jawahir Mal applied to the appellate Court to bring its decree into accordance with its judgment, and that the appellate Court dismissed that application, being of opinion that the decree was in accordance with its judgment and the application unnecessary. If the decree of the appellate Court had been drawn up strictly in form, it should have shown in itself the ultimate relief granted, that is, it should have shown a decree in Jawahir Mal's favour, not only for the amount of the decree in the Court of first instance, but for the additional amount decreed in appeal by the appellate Court, and should also have shown the costs. The decree did not specify these amounts except by reference to the decree of the Court of first instance and to the finding of the Commissioner. Now, although this decree is not in form, still from the record it can be ascertained what the amount was, and in our opinion the informality in the decree which was the result of the [345] manner in which it was drawn up in the office of the appellate Court, should not be

allowed, where equity and good conscience are to guide us, to stand in the way of Jawahir Mal's obtaining execution for the amount found in his favour and for his costs. The application for execution was also informal, but we think it may be treated as an application to execute the decree in the case. It referred not only to the decree of the Court of first instance, but also to the decree of the appellate Court. Now as to the question of limitation. The application of the 4th December, 1886, although it was struck off on the 19th February, 1887, was still, in our opinion, an application for execution, or a taking a step-in-aid of execution within the meaning of art. 179 of the second schedule of the Indian Limitation Act, and therefore the present application is not time barred. Owing to the view which we take and have expressed in this case it does not appear to us to be necessary to discuss the question as to the conflict between the decisions of the High Courts. With this expression of opinion we order the papers to be returned to the Commissioner of Ajmere-Marwara.

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REVISIONAL CIVIL.

13 A. 343 = 11 A.W.N. (1891) 119.

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13 A. 345 = 11 A.W.N. (1891) 102.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* R. HAWTHORNE.* [3rd April, 1891.]

Criminal Procedure Code, ss. 191 *and* 342—*Magistrate taking cognizance of an offence on his own personal knowledge—Right of accused to have the case transferred—Power of Magistrate to question the accused.*

Where a Magistrate was found to have taken cognizance of an offence under cl. (c) of s. 191 of the Code of Criminal Procedure. *Held* that he had no power, on an application being made under the last clause of the section abovenamed, to refuse to transfer the case.

Held also that where a Magistrate, before evidence taken for the prosecution, put questions to the accused of the nature of a cross-examination, such procedure was illegal, as it could not be said that the questions were put "for the purpose of enabling the accused to explain any circumstances appearing against him in the evidence," within the meaning of s. 342 of the Code of Criminal Procedure.

[R., 9 Cr. L.J. 56 (57) ; 4 N.L.R. 163 (164) ; Rat. Unrep. Cr. Cas. 679 (680)].

[346] THE facts of this case are briefly as follows :—

Robert Hawthorne was tried before the Superintendent of Dehra Dun and a jury on three charges under Act XXV of 1867 in connection with the printing and publishing of a newspaper known as "The Beacon" at Mussoorie. Prior to the issue of summons to the accused, certain correspondence had passed between the Superintendent and Assistant Superintendent of Dehra Dun and the accused, the former calling the latter's attention to certain provisions of Act XXV of 1867, the latter asserting that he had complied with them. The Superintendent of Dehra Dun also seems to have directed the police to make some inquiries in connection with the case, the result of which was embodied in a report, which, however, was not in the nature of a formal statement of facts constituting an offence alleged to have been committed by the accused. At the commencement of the trial the accused applied to the Court, under s. 191 of the Code of Criminal Procedure, for the transfer of the case, but his application was disallowed. It also appeared that before any evidence

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* Criminal Revision No. 613 of 1890.

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was taken in the case, the Court questioned the accused as to the charges against him, and used his answers as evidence against him in the course of the trial.

The accused was convicted on each of the charges and sentenced to fines which aggregated Rs. 500, or, in default of payment, to imprisonment amounting to two months and fifteen days.

The accused thereupon appealed to the Sessions Judge, who held that, though the procedure of the Magistrate was undoubtedly irregular, both as to his refusal to transfer the case and as to his examination of the accused, these were irregularities which could be and were cured by s. 537 of the Code of Criminal Procedure. The Judge, however, quashed the sentence of imprisonment altogether, as one not warranted by law, and in place of the original fine of Rs. 500 substituted a nominal fine of Rs. 5. The accused then applied to the High Court for revision of the Judge's order.

Mr. *A. Strachey*, for the petitioner.

The Public Prosecutor, Mr. *C. Dillon*, for the Crown.

JUDGMENT.

[347] STRAIGHT, J.—I entirely concur with the learned Sessions Judge that the District Magistrate must be regarded as having taken cognizance of the case under cl. (*c*) of s. 191 of the Code of Criminal Procedure. It is patent from the record that there was no "complaint" or "police report," in the well-understood sense of the Code, and it is difficult to understand how the District Magistrate could even have brought himself to think that there was. It is clear to my mind that the process was really issued by him upon his personal knowledge and suspicion that an offence against Act XXV of 1867 had been committed. For this no possible fault can be found with him. On the contrary, it was his imperative duty to see that the provisions of a very salutary Act were complied with, and if they had been disobeyed that the offender should be punished. But the District Magistrate having, as I have no doubt he did, taken cognizance under cl. (*c*) of s. 191, he had no option or alternative but to grant the application of the accused to send the case to the Court of Sessions or transfer it for trial to another District Magistrate. The words "shall be entitled to require" are mandatory, and he could not refuse to comply with them. It therefore becomes unnecessary to examine the reasons given by him in his order of the 3rd October, though I may say I quite agree with the learned Judge that there is nothing in chapter XVIII of the Code which excludes or overrules the provisions of s. 191, cl. (*c*). That being so, the District Magistrate was, in my opinion, without jurisdiction and was not a "Court of competent jurisdiction," the error or defect in whose procedure could be cured by s. 537. In this respect, therefore, I differ with the learned Sessions Judge and am unable to sustain the District Magistrate's proceedings. Moreover, I am constrained to remark that it is impossible, upon a perusal of all that took place prior to the case being launched, not to feel that the Magistrate had a "personal interest" in the proceedings, and I must most emphatically express myself as to the impropriety and irregularity of the examination to which the accused was subjected on the 23rd August. The case was a warrant case and not a particle of evidence had been recorded, so that the power given by s. 342 of the Code to examine an accused "for the purpose of [348] enabling him to explain any circumstance appearing in *the evidence* against him" had not come into

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play. A Magistrate has no right, in such a way as was adopted here, to elicit damaging or incriminating admissions from a person against whom he has issued process, for the purpose of afterwards treating them as evidence in the case, and chapter XXI of the Code gives no countenance to any such procedure. The impression left upon my mind upon a perusal of all the papers, is that the case was tried in too much of a storm, and that from the beginning to the end the Magistrate lost sight of the fact that one of the not the least important incidents in the administration of criminal justice "is to clear away everything which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the administration of justice which is so essential to social order and security" *Sergeant* v. *Dale* (1). It is, however, unnecessary for me to enter at large into the proceedings of the trial, being of opinion, as I am, that the accused having claimed his right under the last clause of s. 191 of the Code, the jurisdiction of the Magistrate was ousted.

I quash the conviction and fines in all Courts, and having regard to all that has taken place, I think no further action should be ordered by me or adopted by the local authorities. Any money that has been realised as fine should be refunded.

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13 A. 348 = 11 A.W.N. (1891) 115.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

IN THE MATTER OF THE PETITION OF MALCOLM DECASTRO.*
[4th April, 1891.]

Criminal Procedure Code, ch. XV, s. 488—Order for maintenance of wife—Wife living apart from her husband for good cause—Jurisdiction.

Where a wife, after a temporary absence from her husband on a visit, found on her return that he was living with another woman and thereupon left him and went to live in a different district and in that district applied for an order for maintenance against her husband,—

Held that, the wife being justified in refusing to live with her husband and in choosing her own place of residence the neglect of her husband to maintain her was an offence within the jurisdiction of the appropriate Court [349] at the place where the wife resided—*In re the petition of Shaik Fakrudin* (2) distinguished—*In the matter of the petition of W.B. Todd* (3) followed.

[R., 3 P.R. 1893 (Cr.).]

THE facts of this case sufficiently appear from the judgment of Knox, J.

Mr. J. Simeon, for the applicant.

Mr. C. Ross Alston, for the opposite party.

The Government Pleader (*Munshi Ram Prasad*), for the Crown.

JUDGMENT.

KNOX, J.—On the 15th October 1890, Mary DeCastro, lawfully married wife of Malcolm DeCastro, applied under s. 488 of the Code of Criminal Procedure for an order directing her husband to make a monthly allowance for her maintenance and that of her three children. Summons

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* Criminal Revision No. 170 of 1891.

(1) L.R. 2 Q.B.D. 558. (2) 9 B. 40. (3) 5 N.W.P.H.C.R. p. 237.

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to appear and answer to this application was served upon Malcolm DeCastro. It is evident from the record and as a matter of fact admitted by him that he made no appearance and allowed the case to proceed against him *ex-parte*.

From the statement on oath of Mrs. DeCastro it appears that she lived with her husband till the year 1881; that she went on a temporary visit to her sister, and on her return to her husband found herself compelled to leave him because he had a woman living with him.

Upon these statements the Magistrate of Allahabad passed an order for maintenance. Malcolm DeCastro now applies to this Court to revise that order on the ground that he was a resident of Ajmere at the time. Mrs. DeCastro had made the application for maintenance, and consequently the Cantonment Magistrate of Allahabad had no jurisdiction to entertain the application. He put forward two other grounds as grounds why the order of the Magistrate should be revised, but they are grounds which entirely deal with facts, and, sitting as a Court of Revision, I see no reason to interfere with the Magistrate's finding on those facts.

There remains the question of jurisdiction. Mr. *Simeon*, who appeared for the petitioner, maintained that the only Court which had [350] jurisdiction was the Court within the local limits of whose jurisdiction his client was actually residing at the date when the application for maintenance was instituted. He referred the Court to the case of *Fakrudin* (1).

Mr. *Ross Alston*, who appeared for Mrs. DeCastro, contended that the Magistrate of Allahabad had jurisdiction and that the case before this Court differed from that before the Court at Bombay. It was proved in the case before this Court that the wife had good cause for refusing to live with her husband, and in such a case she was at perfect liberty to choose her own place of residence. She had, moreover, the right to be maintained by her husband at the place of residence which she might choose, and if he failed to maintain her she had a right to institute her application for maintenance in the district in which she happened to reside.

The learned Government Pleader, who appeared in support of the Magistrate's order, drew attention to the case of *W. B. Todd* (2).

The question of jurisdiction is one which must be decided by the provisions of the Code of Criminal Procedure. The neglect to maintain a wife is an offence, inasmuch as it is an omission which is made punishable by the Code, and as an offence its place of trial must be determined by the provisions laid down in Chapter XV of the Code. In the present instance I am satisfied that Mrs. DeCastro has proved that her living apart from her husband was a lawful act, and that she was entitled to be maintained by him at Allahabad, which she had chosen as her place of residence. The neglect to maintain her was thus an offence committed within the local limits of the jurisdiction of the Magistrate of Allahabad. This is in accordance with the view taken by this Court in *Todd's* case, and I therefore find that the contention of want of jurisdiction fails.

The case before the Bombay High Court appears to have been based upon facts of a different kind.

The application is dismissed and the order of the Magistrate of Allahabad maintained.

(1) 9 B. 40. (2) 5 N.W.P.H.C.R. p. 237.

13 A. 351=11 A.W.N. (1891) 109.

[351] REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Straight.

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11 A.W.N.
(1891) 109.

QUEEN-EMPRESS *v.* BUDH SEN AND ANOTHER.* [4th April, 1891.]

Act XLV of 1860 (*Indian Penal Code*), s. 182—*Definition of offence provided for in* s. 182, *explained.*

In order to constitute the offence defined in s. 182 of the Indian Penal Code it is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information. *Golam Ahmed Kazi* (1) dissented from.

THE facts of this case are fully stated in the judgment of Straight, J.

Mr. *W. Colvin*, Hon'ble Mr. *Spankie*, Mr. *A. H. S. Reid* and Pandit *Sundar Lal*, for the petitioners.

The Public Prosecutor, Mr. *C. Dillon*, for the Crown.

JUDGMENT.

STRAIGHT, J.—This is an application for revision of an order in appeal passed by the District Judge of Aligarh on the 4th December 1890, affirming a decision of the Assistant Magistrate of the same place, dated the 17th November 1890, by which he convicted the two petitioners, Budh Sen and Narain Das, of offences under s. 182 of the Indian Penal Code and sentenced them respectively to undergo rigorous imprisonment for four months, and severally to pay a fine of Rs. 300, and in default of payment to suffer a further term of imprisonment for one month and fifteen days. The facts which have been found by both the lower Courts, behind whose findings in that respect I cannot go, are as follows:—The petitioners are banias by caste residing in different muhallas of the city of Aligarh, but having their places of business in Pidruganj. On the evening of the 24th August 1890, about 9 P. M., the then Magistrate of the district, who was out on duty in connection with the Muharram festival then going on, received a telegram which, no doubt, came from Budh Sen and Narain Das, couched in the following terms:—"Yester night at one, two hundred Kasais Phopala, bearing lathis, attacked Kalyanganj, Pidruganj, for [352] plunder and murder. Sadik Ali, Kotwal, Shiam Lal, Jamadar, dispelled them: there is danger from them to-night also; please arrange." The Magistrate in his evidence, which was given on the hearing of this charge, stated that he took no action on the telegram, as he did not believe the statements. Had he done so, he would have sent police to take care of the places mentioned in it. It is in respect of the sending of this telegram to the Magistrate of the district that the petitioners have been convicted under s. 182 of the Indian Penal Code. Mr. Colvin, who argued the petition for revision, has urged that it was a bad conviction in law, because there was nothing in the terms of the telegram to show that the persons who sent it intended to cause or knew it to be likely that they would thereby cause a public servant to use his lawful power to injure or annoy any particular person or persons, or to do or omit to do anything which he ought not to have done or have omitted to do had the true state of facts in

* Criminal Revision No. 618 of 1890.

(1) 14 C. 314.

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regard to which such information was given been known to him. In support of his contention he has referred to the case of *Golam Ahmed Kazi* (1) and no doubt there the Chief Justice of Bengal remarks that as to s. 182, "that section must be read as a whole, and taken as a whole, we think it applies to those cases in which the police are induced upon the information supplied to them to do or omit to do something which might affect some third person and which they would not have done had they known the true state of things." If this view is correct it goes even further than the exigencies of the learned counsel's contention required; but, with the most profound respect for the learned Chief Justice and the Judge who agreed with him, I regret that I cannot concur in the opinion so expressed. It appears to me to proceed, first, upon an erroneous apprehension of the scope and object of s. 182 and the mischief at which it was aimed, that section appearing in the chapter relating to "contempts of the lawful authority of public servants," and, secondly, upon an erroneous construction of the language of the section itself. I cannot, having carefully examined the terms of the section, come to the conclusion that it is essential for the public servant mentioned [353] therein to have been induced to do anything or to omit to do anything. It is sufficient if the party charged gave information which was false, with the intention of causing or knowing it likely that a public servant would be caused to exercise his lawful power or authority to the injury of an individual, or to do or omit to do something which he ought not to do or omit to do were the true state of facts known to him. In other words, the criminality contemplated by s. 182 does not depend upon what is done or omitted to be done by the public servant on such false information, but what was, from the facts, the reasonable intention to be inferred on the part of the person who gave the false information. I also wish to remark that it seems to me that s. 182 contemplates two intentions on the part of the person giving the false information; first, the intention to cause or the knowing it to be likely that he will thereby cause a public servant to use his lawful power to the injury or annoyance of any person or persons, and, secondly, the intention to cause or the knowing it to be likely that he will thereby cause such public servant to do or omit to do same act, which, if the true state of facts were known to him, he would not do or omit to do. Applying this construction of the section to the facts of this case, I am quite unable to say that the convictions of these two persons were wrong. The Magistrate has said that if he had believed the statements contained in the telegram he would have sent police to take care of the places mentioned in it. The result would have been that he must have withdrawn police from other parts of the town, and, moreover, he might, with this telegram before him, have caused a considerable body of police to go into the Kasais' quarter to keep them in their houses and prevent them creating a disturbance. It is immaterial, however; to consider the precise nature of the action of the Magistrate; the question is, what action the persons who sent that telegram contemplated that the Magistrate would take? At least they intended and contemplated that the Magistrate would do some act, which, had he known the true facts, he would not have done.

In my opinion this is the kind of mischief at which the latter portion of s. 182 is aimed. Persons are not, by making reckless [354] statements to a public servant, to bring the office of that public servant

(1) 14 C. 314.

into contempt, and it is absolutely indifferent whether, by means of false information given with any of the intentions I have mentioned, he is or is not induced to do or omit to do any act. The criminality of the party is determined by his giving information which he knows or believes to be false with certain specified intentions to the nature of which I have referred. The convictions are most proper and should be sustained. The offence is a most mischievous one, particularly at such a time as this telegram was sent, when the relations between the Muhammadans and the Hindus of Aligarh were greatly strained and the Magisterial authorities were placed in a position of great difficulty and delicacy to prevent friction and disturbance between these two sections of the community. False information given to the Magistrate at such a time, which might lead him to take action which, if he had known the truth, he would not have taken, might have led to most serious consequences, and it is well that people should understand that offences of this description will not be punished merely with a fine. The only thing to be said for these petitioners is that they did put their names to the telegram that was sent and that there was no difficulty in discovering its origin. I hope I am not showing undue leniency if, while rejecting the application for revision in its main details and sustaining the fine of Rs. 300, I reduce the term of rigorous imprisonment from four to two calendar months.

EDGE, C. J.—It appears to me that the High Court at Calcutta in the case of *Golam Ahmed Kazi* (1) read s. 182 of the Indian Penal Code as if no offence could be committed under that section unless the public servant referred to in it had been induced by information supplied to him to do or omit to do something which might affect some third person, and which he would not have done or omitted to do had he known the true state of things, I entirely agree with my brother Straight that the question whether the public servant was induced to take action or to omit to take action is absolutely [355] immaterial so far as this section is concerned. The offence is giving information which the informant knows or believes to be false and his intention thereby to cause or his believing or knowing it to be likely that he will thereby cause the public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which the said public servant ought not to do or omit if the true state of facts respecting which information is given were known by him. It appears to me that there may be many cases, which, in truth, may be cases of hoaxes, which would still come within this section; as, for example, suppose a man, knowing the statement to be untrue, but intending the Magistrate to act upon it, informed the Magistrate of the District that a violent fire was raging in a city in the district of which he had charge. Now if the Magistrate believed that statement, he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military, if there were any in the neighbourhood. That would be a perfect example of a hoax, and I have not a doubt that it would come within s. 182, whether the Magistrate acted upon the information or not. To take another example of a case which in my opinion would come within the section, although the public servant was not induced to take an action or to omit to take action upon the information given to him. Let us say that a man had absconded for an offence from Allahabad and that it was surmised that he would seek to escape at one of

(1) 14 C. 314.

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the shipping ports. Information of his having absconded would be communicated to those ports, Calcutta amongst the number. A person who, knowing that that man had not been arrested, and intending that the authorities at Calcutta should cease to watch the outward-bound shipping, telegraphed to the authorities at Calcutta informing them that the absconder had been arrested elsewhere, would in my opinion have committed an offence under s. 182, although the public servant at Calcutta had not acted on the telegram but had persisted in his surveillance of the outward-bound shipping. I agree with my brother Straight that the intention of the Legislature was that a public servant should not be falsely given information with the [356] intent that he should be misled by a person who believed that information to be false and was intending to mislead him. In this particular case probably a sentence of two months' rigorous imprisonment and a fine of Rs. 300 will be sufficient to operate as a warning to others who may desire to give false information to public servants; and they may take this further warning that, if in future in similar cases the full penalty given under s. 182 is awarded, I shall hesitate before interfering with such a sentence. The application for revision to the extent of the punishment being reduced is allowed, otherwise it is rejected.

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13 A. 356 = 11 A.W.N. (1891) 104.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

DURGA DAI (*Opposite party*) *v.* BHAGWAT PRASAD (*Petitioner*). *
[7th April, 1891.]

Execution of decree—Act IV of 1882 *(Transfer of Property Act)*, s. 90—*Nature of decree contemplated by that section.*

The plaintiff obtained a decree on a hypothecation bond, the decree providing that the money secured by the bond was to be realised by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment-debtor. The hypothecated property was sold and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied for enforcement of that portion of the decree which related to the other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under s. 90 of the Transfer of Property Act (IV of 1882). This objection was allowed and the decree-holder applied for and obtained a decree under the said section. The judgment-debtor then appealed against that decree on the ground, amongst others, that, looking to the terms of the original decree, the application under s. 90 was superfluous.

Held, that the decree contemplated by s. 90 of the Transfer of Property Act is in fact an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortagaged property. *Miller* v. *Digambari Debya* (1) distinguished; *Hafizud-din Ahmad* v. *Damodar Das* (2) and *Raj Singh* v. *Parmanand* (3) referred to.

[Diss., 33 C. 367 = 4 C.L.J. 141; F., 21 A. 453; R., 14 A. 513 = 12 A.W.N. 80; 28 A. 365 = A.W.N. (1906) 44 = 3 A.L.J. 171; 6 O.C. 114.

[357] THE facts of this case sufficiently appear from the judgment of Straight, J.

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* First Appeal, No. 70 of 1890, from an order Babu Brijpal Das, Subordinate Judge of Gorakpur, dated the 11th January 1890.

(1) 10 A.W.N. (1890) 142. (2) 9 A.W.N. (1889) 149. (3) 11 A. 486.

Mr. *Abdul Raoof* and Munshi *Gobind Prasad* for the appellant.
Mr. *J. E. Howard* for the respondent.

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APPELLATE CIVIL.

13 A. 356 = 11 A.W.N. (1891) 104.

JUDGMENT.

STRAIGHT, J. (TYRRELL, J., concurring).—This is an execution first appeal from an order of the Subordinate Judge of Gorakhpur, dated the 11th January, 1890. On the 19th August, 1882, one Lala Kunjbehari, husband of Durga Dai, appellant, executed an hypothecation bond for Rs. 5,000 in favour of the respondent. On the 26th October, 1887, the respondent obtained a decree against Durga Dai, her husband being then deceased, upon the bond for Rs. 7,205, principal and interest, with a direction contained therein that the decretal amount was to be realised by sale of the hypothecated property, and, in the event of that proving insufficient, by sale of other property of the deceased obligor. On the 8th May, 1888, the first application for execution was made, and it was confined to an application for sale of the mortgaged properties. Objections were taken by a third party, but they were disallowed, and subsequently, by an order of the 21st September, 1888, the Court held that the decree-holder must obtain an order absolute for sale. On the 26th February, 1889, an order absolute for sale having been obtained, a further application or execution was put in, and, as it appeared that the property sought to be sold was ancestral property, the execution was transferred to the Collector, who, on the 21st July, 1889, sold the properties for Rs. 5,600 which amount was insufficient to satisfy the amount due under the mortgage. On the 23rd September, 1889, the decree-holder asked the Court to enforce that part of the decree which provided that, in the event of the mortgaged property being insufficient, the decree might be executed against other property of the judgment-debtor, mortgagor, and he prayed for attachment and sale of 2 annas of Mouza Pindra and 2 annas of Baikantpur. On the 25th November, 1889, Durga Dai filed objections, the only material one of which was the following:—"That the property against which the decree was passed [358] enforcing hypothecation has been sold. Now other property not hypothecated cannot be sold until a decree under s. 90 of Act IV of 1882 be obtained." This objection was allowed on the 14th December, 1889. On the 19th December, 1889, the decree-holder asked that the decree under s. 90 of Act IV of 1882, might be framed for the balance of the decretal money, and that such balance might be realised. On the 11th January, 1890, the Subordinate Judge ordered that the decree-holder be empowered to proceed for Rs. 3,976 by attachment and sale of the other property of the judgment-debter, and on the same day a decree was formally prepared in accordance with s. 90 of the Transfer of Property Act. It is this proceeding of the Subordinate Judge of the 11th January, 1890, that is made the subject of this appeal, and the only point seriously argued before us was that, as the decree itself provided further sale of other property than the mortgaged property in the event of the mortgaged property proving insufficient, no decree under s. 90 was necessary. This contention comes with very bad grace from the judgment-debtor, who, on the 23rd November, 1889, successfully objected to a then pending application for execution of the decree as it stood, upon the ground that a decree under s. 90 was necessary. No doubt the object of this was patent enough : the judgment-debtor wishes to clear out of the way the application of December, 1889, in hopes of successfully hereafter contending that any subsequent application for execution is barred by limitation. In my opinion the decree mentioned in s. 90 of Act IV of 1882, is one that is given in the execution-proceedings

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arising under a decree for sale upon a mortgage and stands upon the same footing as an order absolute for sale, which the Full Bench of the Court has held to be a proceeding in execution. Even if it be contended by the judgment-debtor that the application of the 19th December, 1889, was superfluous, having regard to the terms of the decree, I am not prepared to say that it may not properly be treated and regarded as an application for execution of decree by enforcement of a portion of it against property other than the mortgaged property. In the course of the argument of this case, a ruling of my [359] own was referred to in the case of *Miller* v. *Digambari Debya* (1). I pointed out to the learned pleader for the appellant the inapplicability of that ruling to the present suit. What was held there was that if a mortgagee comes into Court upon an instrument which contains not only ordinary mortgage terms in reference to the immoveable property but a personal covenant upon the part of the mortgagor, and, as part of the relief he seeks, asks for a decree declaring his rights personally against the mortgagor, the Court should not refuse to grant that relief upon such grounds as were stated in that particular case. There are also two rulings to which reference was not directly made, but which have some bearing upon the present case and they are reported in the *Weekly Notes* for 1889, pages 149 and 191. The former was one of my own, which I referred to in the case reported in the *Weekly Notes* for 1890, page 142. The other is a ruling of the learned Chief Justice and my brother Tyrrell, and in none of these rulings is there anything in conflict with the view that I am now expressing that the decree contemplated in s. 90 of the Transfer of Property Act is in fact nothing more nor less than an order to be obtained in execution of a decree for sale, when, under that decree for sale, the sale has taken place and has proved insufficient to satisfy the mortgage-debt. Even if the application in the present case of the 19th December 1889 were looked as strictly as it professes to be, *viz.*, for a decree under the terms of s. 90 of the Transfer of Property Act and for an order to attach and sell other properties of the judgment-debtor, I should not myself regard it as in any way invalidating or disturbing the legality or force of the decree itself as it originally stood.

In my opinion it would be a positive scandal to give effect to the contention now made, when it was by the action of the judgment-debtor herself that the order was made by which her objection succeeded on the 14th December, 1889.

I dismiss the appeal with costs. *Appeal dismissed.*

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13 A. 360 = 11 A.W.N. (1891) 127.

[360] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BATAK NATH (*Decree-holder*) *v.* PITAMBAR DAS AND OTHERS (*Judgment-debtors*).* [9th April, 1891.]

Mortgage—Decree against the person and other property of the judgment-debtor as well as against the property mortgaged—Act IV of 1882 (Transfer of Property Act), s. 90.

In a suit for enforcement of a mortgage security the plaintiff prayed for a decree both as against the mortgaged property and also, in the event of the

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* First Appeal, No. 61 of 1890, from an order of Babu Ganga Saran, Subordinate Judge of Mainpuri, dated the 21st December 1889.

(1) 10 A.W.N. (1890) 142.

mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment-debtors were to be liable.

1891 APRIL 9. — APPELLATE CIVIL. — 13 A. 360 = 11 A.W.N. (1891) 127.

Held that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree-holder to obtain a separate decree under s. 90 of the Transfer of Property Act, (IV of 1882).

Miller v. *Digambari Debya* (1) referred to.

[R., 32 M. 534 (536) = 5 M.L T. 246 (247) = 4 Ind.Cas. 1120; D., 14 A. 513; 21 C. 26.]

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

The respondents were not represented.

JUDGMENT.

STRAIGHT, J. (TYRRELL, J., concurring).—This is an execution first appeal and it relates to execution-proceedings in regard to a decree of the 17th December 1886. That decree was couched in the following terms:—"It is decreed and ordered that the plaintiff's claim for Rs. 6,251-8-0, with proportionate costs and interest due for the period of pendency at the rate of 8 annas per cent. on the principal amount, from this date on the whole, be decreed by enforcement of lien and sale of 5 biswas of Gadanpur; that if the property hypothecated be not sufficient, then the persons and the other property of Pitambar Das and Dhanput Rai and the property of Chandan Lal will be liable; that the rest of the claim be dismissed."

It is to be observed that this decree was partly a decree for sale of mortgaged property by enforcement of a mortgage security, and [361] it also declared that, in the event of the mortgaged property being insufficient to pay the mortgage-debt when sold, the balance should be recoverable from the other property and person of the judgment-debtor. That decree is very similar in terms to one that was drawn up by my brother Mahmood and myself in the case reported in the *Weekly Notes* for 1890 at page 142.

When a Court passes a decree for sale under s. 88 of the Transfer of Property Act and that is the only relief asked for in the plaint, the decree should be limited to a decree for sale of the hypothecated property; and it is in that case that the subsequent contingency contemplated by s. 90 of the Transfer of Property Act arises. But here in the present case, having regard to the prayer in the plaint, provision was in terms made in the decree itself for what was to be done in the event of the proceeds of the sale of the hypothecated property proving insufficient to pay the mortgage-debt. With a decree so shaped the Court whose business it was to execute it had no option to go behind its terms, and when the condition precedent mentioned in it as to the enforcement of the decree against the person and other property of the judgment-debtor came into effect, it was bound to give effect to that provision and to enforce it against the person and other property. It was with this object and for that purpose that the decree-holder put in his application of the 14th December 1889, which was the subject of the Subordinate Judge's order that is made the ground of this

(1) 10 A.W.N. (1890) 142.

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appeal. It was objected by the judgment-debtor that the decree-holder could not sell the other property of the judgment-debtor or proceed against his person for the unsatisfied balance of the mortgage-debt without first obtaining a decree under s. 90 of the Transfer of Property Act. I have already pointed out that, looking to the terms of the decree, no such further decree was necessary. But the Subordinate Judge, whilst he appears to have been of opinion that it was necessary for the decree-holder to have a decree under s. 90 of the Transfer of Property Act, refuses to grant him such a decree upon the ground that the grant of such a decree is purely discretionary, and that, having regard to the contention of the judgment-debtors—"That the mortgaged [362] property purchased by the decree-holder is more in value than the whole sum due on the mortgage, and in proof of this fact they offer to pay up within a month the whole sum due, if the decree-holder gave up the property. * * * I would therefore presume that the decree-holder in fact has got all that he was justly entitled to."

This seems to me to be not only a wrong method of dealing with this execution proceediug, because the question of s. 90 of the Transfer of Property Act never entered into consideration at all, but a very insufficient reason for disposing of an application for a decree under s. 90. The Subordinate Judge's order in our opinion cannot stand, and, in decreeing this appeal and reversing the order of the Subordinate Judge, we direct that he take up the application of the 14th September 1889, and dispose of it according to law. The appellant will have his costs of this appeal.

Appeal decreed.

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13 A. 362 = 11 A.W.N. (1891) 115.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF JAI LAL.

[23rd April 1891.]

Criminal Procedure Code, s. 145—Order for interim *possession of immoveable property—Point of time possession at which is to be looked at in determining which party is entitled to an order under s. 145.*

The possession which a Magistrate acting under s. 145 of the Code of Criminial Procedure has to find and support, is possession at the time of the Magistrate's proceedings. Hence, where a Magistrate decided a question of possession under s. 145 upon evidence taken si x months previously,—*held* that such order was irregular and unsustainable.

[R., 18 M. 41 (42).]

THIS was a reference made by the Sessions Judge of Farakhabad under the circumstances stated in his order of the 23rd March 1891, which is as follows :—" This is an application for the revision of an order of Mr. C. D. Steel, Joint Magistrate of Farakhabad, purporting to have been passed under the provisions of s. 145, Criminal Procedure Code. From the record of the proceedings it appears that the Joint Magistrate made no inquiry as to the actual [363] possession of the parties at the time the question came before him, but relied on an order passed by the Collector six months previously. That order, even if it could be relied on in

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* Criminal Revision No. 174 of 1891.

these proceedings, does not clearly determine the question of actual possession by one or other of the contending parties, for the Collector observes :—'It seems to me that both are in possession, though perhaps not to an equal extent.' The ruling of the Bombay High Court in—*In the matter of Huchapa and Shivagangava* (1) is in point.

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In my opinion the order of the Joint Magistrate ought moreover to have been addressed to the person who asserted herself to be the owner of the land and not to her agent.

For the above reasons I report the case to the High Court with the recommendation that the Joint Magistrate's order be set aside, and that if he is still of opinion that a dispute likely to cause a breach of the peace exists, he be directed to decide the case after taking evidence as to actual possession. The Joint Magistrate's explanation is herewith submitted in accordance with the instructions contained in C. L. No. 2 of 1885."

The reference came before Straight, J., who passed the following order :—

ORDER.

STRAIGHT, J.—The Joint Magistrate's explanation does not meet the difficulty. He has decided the question of possession entirely upon the finding, of the Officiating Collector of the 6th June 1890, which was no evidence of the issue he had to try, namely which of the contending parties was in actual possession *at the time of his* (the Joint Magistrate's) *proceedings*. The Joint Magistrate would be well advised to carefully examine the terms of a section before he proceeds to act under it, as his irregularity of action in this matter has necessitated this reference by the learned Judge. I quash his order, but it will be open to the Joint Magistrate to hold a fresh proceeding if the required conditions still exist.

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13 A. 364 = 11 A.W.N. (1891) 107.

[364] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MIRZA ANAND RAM (*Defendant*) v. MAUSAMA BEGAM (*Plaintiff*).*
[24th April, 1891.]

Landholder and tenant—Suit for rent where the right to receive it is disputed—Jurisdiction of Civil and Revenue Courts—Act XII of 1881 *(North-Western Provinces Rent Act)*, s. 148.

M sued *I* and another for rent in the Court of the Collector. The defendants pleaded payment to *V*, who was accordingly brought on to the record as a co-defendant under s. 148 of the North-Western Provinces Rent Act (XII of 1881). The Collector decided in favour of *V*. The plaintiff appealed to the District Judge making all three persons respondents. The District Judge reversed the decision of the Collector and ordered the whole costs to be paid by *V*, who thereupon appealed to the High Court.

Held that the District Judge had no jurisdiction to entertain the appeal so far as the party brought in under s. 148 was concerned, and, that being so, had no power to award costs against him.

[R., 12 C.P.L.R. 1.]

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* Second Appeal, No. 946 of 1888, from a decree of F.W. Fox, Esq., District Judge of Gajipur, dated the 18th April 1888, reversing a decree of F.B. Mulock, Esq., Collector of Ballia, dated the 2nd May 1887.

(1) 15 B. 152.

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IN this case the plaintiff, Musammat Mausuma Begam, sued two persons, named Ilahi Bakhsh and Abdul Rahman, whom she alleged to be her tenants, under s. 93, cl. (*a*) of the North-Western Provinces Rent Act (XII of 1881) for arrears of rent for the years 1291, 1292 and 1293 fasli. Her case was that the land in respect of which the rent was claimed had been her *sir* down to the end of 1292 fasli, when her proprietary rights had been disposed of to the Maharaja of Vizianagram; and that since that time she had held ex-proprietary tenant rights in the land, and was therefore entitled to receive the rents. The Maharaja of Vizianagram intervened under s. 148 of Act XII of 1881, alleging that he was the person entitled to receive the rents and denying the plaintiff's ex-proprietary rights in the land. The defendants, Ilahi Bakhsh and Abdul Rahman, admitted the rent to be due and expressed their willigness to pay it to the person in whose favour the Court should decide. The Court of first instances (the Collector of Ballia) found that the defendants, Ilahi Bakhsh and Abdul Rahman, were not tenants of the plaintiff, and accordingly dismissed her suit. The plaintiff, then appealed to the District [365] Judge, making the Maharaja, Ilahi Bakhsh and Abdul Rahman respondents. The District Judge found in favour of the appellant, and, reversing the decree of the Court below gave a decree for the plaintiff for the amount claimed against Ilahi Baksh and Abdul Rahman and ordered the whole costs of the suit to be borne by the Maharaja. The Maharaja then appealed to the High Court.

Mr. *T. Conlan* and Munshi *Kashi Prasad*, for the appellant.

Hon'ble Mr. *Spankie*, for the respondent.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This is an appeal by the Maharaja of Vizianagram against so much of the decree of the District Judge of Ghazipur, sitting as a Court of appeal in a rent suit as affected the Maharaja. Musammat Mausuma Bibi brought her suit against Ilahi Bakhsh and another for rent alleged to be due by them to her for land which had been her *sir* land. The Maharaja was brought in under s. 148 of Act XII of 1881. The Collector decided the case in favour of the Maharaja. The plaintiff appealed, making Ilahi Bakhsh, the other man, and the Maharaja respondents. The District Judge reversed the decision of the Collector, holding that the rent was payable to the plaintiff and decreed the whole costs of the suit and appeal to be borne by the Maharaja. The appeal so far as the question between the plaintiff and her two alleged tenants was concerned lay to the District Judge. The question raised in this appeal is whether, so far as the Maharaja is concerned, the District Judge had jurisdiction to entertain the appeal. If he had not jurisdiction to entertain the appeal, he had no jurisdiction to decree the costs of the suit and appeal against the Maharaja. There is a long current of rulings bearing on this question some relating to the corresponding section of the former Act. The rulings do not appear to have been brought to the notice of the District Judge. We consider they are binding on us. We do not propose to discuss those rulings, all we need say is that we agree with them. The first of those is the case of *Chotu* v. *Jitan* (1). The next is the case of *Kishna Ram* v. *Hingu Lal* (2). Next is *Madho Prasad* v. *Ambar* [366] (3) and the case of *Gobind Ram* v. *Narain Das* (4). Also there is a case

(1) 3 A. 63. (2) 4 A. 237. (3) 5 A. 503. (4) 9 A. 394.

decided in 1866, viz., *Musammat Thakoorayeen Bhagmanee Koonwar* v. *Syud Farzand Ali and others* (1). It appears to us that these cases are in point.

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APPELLATE CIVIL.

13 A. 364 = 11 A.W.N. (1891) 107.

Following these authorities, we allow this appeal with costs and set aside so much of the decree of the Court below as affects the Maharaja of Vizianagram. We do not disturb the decree so far as it affects Ilahi Bhakhsh and Abdul Rahman.

Appeal modified.

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13 A. 366 = 11 A.W.N. (1891) 129.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

UMMI FAZL (*Defendant*) *v.* RAHIM-UN-NISSA AND OTHERS (*Plaintiffs*).* [2nd May, 1890.]

Civil Procedure Code, ss. 522, 525—Award—Decree on an award filed in Court, how to be framed—Appeal.

When an award has been filed in Court, as provided by s. 525 of the Code of Civil Procedure, the judgment and decree based thereon must be drawn up specifically in terms of the award. If the decree merely decrees in general terms the claim of one party or of the other, it cannot be said that such decree is in accordance with the award, and being "not in accordance with the award" an appeal will lie therefrom.

[R., 10 C.W.N. 601 (605) = 2 C.L.J. 153 (158).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Sundar Lal* and Mr. *Malcomson*, for the appellant.

Munshi *Ram Prasad*, Maulvi *Ghulam Mujtaba* and Maulvi *Mahmud Husain*, for the respondents.

JUDGMENT.

EDGE, C. J., and KNOX, J.—An agreement of reference having been entered into between certain parties, the arbitrator appointed by that agreement made his award. Musammat Rahim-un-nissa, one of the persons interested in the award, applied to the Court of the Subordinate Judge of Saharanpur to have the award filed in Court. The application was made under s. 525 of the Code of Civil Procedure. In her application she also asked that a decree should be passed according to the award in her favour against the [367] defendants, who were other parties to the arbitration. On the 13th of November 1889, the Subordinate Judge delivered a judgment and made a decree. So far as the filing of the award is concerned, it appears to us that that was a good order, but that we need not consider, as there is no appeal from an order directing an award to be filed. So far as that decree purports to be a decree under s. 522 of the Code of Civil Procedure, it was appealable if it was in excess of, or not in accordance with, the award. The decree was as follows:—"It is decreed and ordered that the plaintiff's claim be decreed with costs. The costs incurred by the defendants be borne by themselves except the defendant Zahur Muhammad, who shall get his costs from the plaintiffs. The plaintiff to get her whole costs from Musammat Ummi Fazl, the answering defendant. The rest of the defendants

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* First Appeal, No. 38 of 1890, from a decree of Maulvi Sayyid Muhammad, Subordinate Judge of Saharanpur, dated the 13th November 1887.

(1) N. W. P. H. C. R. 1866, R. C. A. 20.

1890 MAY 2. — APPELLATE CIVIL. — 13 A. 366 = 11 A.W.N. (1891) 129.

are exempted from the costs incurred by the plaintiff." That is not a decree as contemplated by s. 522 of the Code of Civil Procedure. A decree in general terms of that kind does not comply with that section. A Judge when proceeding under s. 522 of the Code to give judgment and make a decree, must give a judgment according to the award; that is, he must state in his judgment what his construction of the award is as to the rights and interests of the parties. He must say, for instance, that under the award the plaintiff is entitled to mauza A, the defendant is entitled to mauza B, and so on, and, having given that judgment, the decree must be drawn up in accordance with that judgment; that is, it must be a decree dealing with the specific rights of the parties, and not merely decreeing the plaintiff's claim in general terms, as was done here. When a decree so framed upon the judgment has been drawn up, the question whether an appeal would lie from it would depend on whether it was in excess of, or not in accordance with, the award. In the case of a decree in general terms, such as that in this case, a Court has no opportunity of judging whether the decree is in excess of the award. Certainly it is not in accordance with the award, because it defines specifically no rights and interests whatsoever. Errors of this kind by judicial officers would probably not arise if those officers, before proceeding under a particular section, took the trouble to read the section care-[368]fully, in order to ascertain what was the procedure the law required them to follow. We must set aside, as we do, the decree of the 13th November 1889, so far as it purports to be anything beyond an order for filing the award. We express no opinion on the merits of this case. The appeal is allowed on the one ground which we have considered. The other grounds in the view which we take of this case do not at present arise. We remand the case under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge, and direct him to dispose of the suit according to law. The costs of this appeal will be costs in the cause.

Appeal decreed.

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13 A. 368 = 11 A.W.N. (1891) 130.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

CHAND MAL AND ANOTHER (*Plaintiffs*) *v.* ANGAN LAL (*Defendant*).*
[20th May, 1891.]

Suit by purchaser of decree to recover money of deceased judgment-debtor in the hands of his agent—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 120.

One A P, having certain moneys lying at his credit in Calcutta, empowered A L to receive the same and hold them on his behalf. A P died at Moradabad, and subsequently to his death, the said moneys, which remained in the hands of A L, were attached by one of the creditors of A P in execution of a decree. The decree-holder sold his rights under the decree in respect of the moneys in the hands of A L to the plaintiffs, who sued to obtain the same from A L.

Held that the period of limitation applicable to such a suit was that prescribed by art. 120 of the second schedule of the Indian Limitation Act (Act XV of 1877.)

Gurudas Pyne v. *Ram Narain Saha* (1) referred to.

[D., 36 P.R. 1913 = 17 Ind. Cas. 311 (314) = 16 P.L.R. 1913.]

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* First Appeal, No. 29 of 1890, from a decree of Babu Anant Ram, Subordinate Judge of Moradabad, dated the 9th January 1890.

(1) 10 C. 860.

1891 MAY 20. — APPELLATE CIVIL. — 13 A. 368 = 11 A.W.N. (1891) 130.

THE fact of this cases were as follows :—Narain Das, an ancestor of the plaintiffs, obtained a decree for a debt against Ajudhia Prasad, the elder brother of the defendant, on the 23rd July 1878, from the Court of the Judicial Assistant Commissioner, Peshwar, for Rs. 30,545-12-0. Nothing having been realized in respect of this decree, a certificate under s. 223 of the Code of Civil Procedure was obtained in 1881, for the execution of the decree in the district of Moradabad, of which Ajudhia Prasad was a resident, but it appears [369] that nothing was effected in pursuance of this certificate. Afterwards, on the 30th April 1884, another certificate was obtained from the Peshwar Court by one Damodar Das, as representative of the deceased decree-holder, Narain Das, and in pursuance of that certificate Chand Mal and Musammat Bhana Dai applied on the 20th August 1885 for execution of the decree in the Court of the Judge of Moradabad. They also applied for the transfer of the decree to the Court of the Subordinate Judge, and, Ajudhia Prasad having died on the 13th June 1883. for the substitution of his widow and minor sons as judgment-debtors. They further prayed that the amount of the debt to the extent of Rs. 9,635-4-9 might be recovered from Angan Lal, the brother of Ajudhia Prasad, he having received that money from the Commissariat Office at Calcutta as money due to Ajudhia Prasad. Notice was sent to Angan Lal, who objected, His objections were disallowed, and he thereupon filed a regular suit to get rid of his liability, alleging that the money in question had been paid over to Ajudhia Prasad. That suit was dismissed by the Court of first instance, but, in appeal the High Court reversed the decision of the Court below, on the ground that the proceedings taken by that Court against Angan Lal were without jurisdiction. The decree-holders in consequence attached the money in question in the hands of Angan Lal. Both Angan Lal and the widow of Ajudhia Prasad attempted to get rid of the attachment, but unsuccessfully. The plaintiffs in the present suit purchased the debt due by Angan Lal on the 17th December 1888 and sued in the Court of the Subordinate Judge of Moradabad to recover the same. The Subordinate Judge found that the suit was barred by limitation under art. 62 of the second schedule of the Limitation Act (XV of 1877). The plaintiffs thereupon appealed to the High Court.

Pandit *Sunder Lal* and Babu *Rajendro Nath*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J., and TYRRELL., J.—The only question which we need consider is a question of limitation. Angan Lal received a large sum of money as special agent for that purpose of Ajudhia Prasad, [370] his brother. The money was received on behalf of Ajudhia Prasad. The money was attached in the hands of Angan Lal by a judgment-creditor of Ajudhia Prasad ; the plaintiffs became the purchasers of the rights of that judgment-creditor and they sought in this suit to recover the money from Angan Lal. It was contended on behalf of Angan Lal that art. 62 of the second schedule of the Indian Limitation Act of 1877 applies. If that article did apply, the suit was barred by time. On the other hand, on behalf of the plaintiffs-appellants, it was contended that art. 120 of that schedule was the only article which applied, If that article applies, the suit was within time, inasmuch as the plaintiffs appear to us to be standing, *qua* Angan Lal in the shoes of Ajudhia Prasad ; we should have thought that the article of limitation, namely, art. 62, which would clearly have applied to a suit by

1891 MAY 20. — APPELLATE CIVIL. — 13 A. 366 11 A.W.N. (1891) 130.

Ajudhia Prasad, would also apply to the suit of the plaintiffs, but we have been referred on behalf of the plaintiffs to the case of *Gurudas Pyne* v. *Ram Narain Sahu* (1) as an authority to show that art. 62 would not apply here. In that case the plaintiff sought to recover money which had been received by the defendant for one Musammat Moti Dasi as the price of timber sold for her. The timber, in fact, was the timber of the plaintiff who had been wrongfully dispossessed by the husband of Musammat Moti Dasi. Then the defendant contended that art. 60 of the second schedule of the Limitation Act of 1871 applied.

That article is word for word the same as art. 62 of the second schedule of the present Act. Their Lordships held that as the defendant was, when selling the timber, acting as the agent of Musammat Moti Dasi, and as he received the money for her and not for the plaintiff, art. 60 of the second schedule of the Limitation Act of 1871 did not apply, and that the article which did apply was art. 118 of the schedule, which article corresponds with art. 120 of the second schedule of the present Act. When we regard the specific words used by their Lordships of the Privy Council in that case when explaining that art. 60 did not apply, and having regard to the fact that Angan Lal received the money for Ajudhia Prasad, **[371]** and not for the plaintiffs or the judgment-creditors whose interest they purchased, we are bound to decide that art. 120 of the second schedule of the Limitation Act of 1877 is the article which applies to this case and that the suit is consequently within time. The other issues have been found in the Courts below in favour of the plaintiffs. Those findings have not been objected to by objection filed under the Code of Civil Procedure. We must consequently accept them, as we do. We accordingly decree the appeal with costs and pass a decree for the amount claimed by the plaintiffs, namely, Rs. 9,635-4-9 with 6 *per cent.* interest from the date of our decree and costs of both the Courts. *Appeal decreed.*

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13 A. 371 = 11 A.W.N. (1891) 133.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

BALDEO SAHAI (*Defendant*) *v.* BAIJ NATH (*Plaintiff*).*
[27th May, 1891.]

Act IV of 1882—(*Transfer of Property Act*), ss. 52 *and* 82—*Contribution—Lis pendens.*

Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and having obtainted a decree caused property A to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage-debt. Before such sale, however, X had, in execution of a simple money-decree, acquired a share in property A. X accordingly sued for contribution from property B, in that, so far as his share in property A went, he had satisfied the mortgage debt, and ultimately obtained a decree in his favour; but, during the pendency of that litigation, property B had been transferred to Y,

Held that Y must take the property subject to X's right to contribution from it in respect of the loss of his share in property A.

[R., 26 A. 407 (444) = A.W.N. (1904) 74 (88) ; 26 B. 379 (385) = 4 Bom. L.R. 61 ; 24 M. 96 (108).]

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* Second Appeal, No. 1562 of 1888, from a decree of Maulvi Muhammad Abdal Quaium, Subordinate Judge of Bareilly, dated the 27th March 1888, confirming a decree of Babu Ganga Prasad, Munsif of Bareilly, dated the 16th December 1887.

(1) 10 C. 860.

1891 MAY 27. —— APPELLATE CIVIL. —— 13 A. 371 = 11 A.W.N. (1891) 133.

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *T. Conlan* and Mr. *Amir-ud-din*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

STRAIGHT, J.—It is unfortunate that the facts and dates relating to the circumstance out of which this litigation has arisen were [372] not more distinctly and specifically stated by the lower appellate Court in a more concise form. To put it shortly, the matter stands thus. In the year 1873, Ramji Mal and Nath Mal Das executed a simple mortgage for Rs. 625 in favour of one Bansi Dhar. As security for the loan, Ramji Mal mortgaged his 1 biswa 14 biswansis of Namdarganj, and Nath Mal Das his 1 biswa 5 biswansis of Siruli. In April 1877, the mortgagee, Bansi Dhar, put his bond in suit, and, having obtained a decree, caused Ramji Mal's 1 biswa 14 biswansis of Namdarganj to be brought to sale, and it was sold for Rs. 1,525, which was more than sufficient to satisfy and discharge the mortgage-debt. Bansi Dhar, therefore, disappears from the transaction and need not be further mentioned.

Prior to this sale the present plaintiff, Baij Nath, on the 23rd October 1876, in execution of a simple money-decree against Ramji Mal had acquired 17 biswansis 1 kachwansi out of the 1 biswa 14 biswansis of Ramji Mal's in Namdarganj. When, in execution of that decree upon the mortgage, the whole of Ramji Mal's interest in Namdarganj was sold, the plaintiff was deprived to the extent of the interest which he had acquired therein; namely, 17 biswansis 1 kachwansi. In other words, he, to the extent that that interest represented in the sale, satisfied and discharged the mortgage-debt. He therefore, in my opinion, became entitled to the equities provided for in s. 82 of the Transfer of Property Act, and, as standing in the shoes of Ramji Mal, he was entitled to call for contribution from Siruli in proportion to what Siruli should have paid to the mortgage-debt.

A suit was instituted by the plaintiff, therefore, against Ramji Mal and Nath Mal Das, Ramji Mal apparently being added more as a matter of form. By that suit the plaintiff in explicit terms claimed from the immoveable property of Siruli its fair contribution to the mortgage-debt, which to the extent of his 17 biswansis 1 kachwansi in Namdarganj, he had had to pay. That suit went through three Courts, ending in the decree of this Court, by which it was found that the plaintiff was entitled to a contribution from Siruli of Rs. 401-5-2.

[373] In my opinion that was not a more money-suit. That was a suit which by operation of law affected the immoveable property of Siruli and was directed towards obtaining from that property, Siruli what by law it was bound to contribute under s. 82 of the Transfer of Property Act. Now it is not denied that, pending that suit, and obviously for the purpose of defeating the just claim of the plaintiff Siruli was transferred by Nath Mal Das to the present defendant, Baldeo Sahai. In my opinion this was a transfer *pendente lite* which would come within s. 52 of the Transfer of Property Act, and any such transfer so made would convey to the transferee that property with all the imperfections upon its head that it would be subject to under the suit that was then pending. Consequently, the defendant, Baldeo Sahai, took the property in and under circumstances that constrain him to hold that property subject to the decree that was passed in that suit. The aim and object of the principle of *lis pendens* is

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to avoid multiplicity of litigation, and if some such doctrine were not to hold good, the party to a litigation in which immoveable property was concerned might part with that property to a dozen different transferees, with the result that a dozen different suits would have to be brought for setting aside those transfers. For the reasons I have given I hold that the decree of the lower appellate Court is right, and that this appeal should be and it is dismissed with costs.

KNOX, J.—I concur. *Appeal dismissed.*

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13 A. 373 = 11 A.W.N. (1891) 136.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

JASODA NAND AND ANOTHER (*Defendants*) v. KANDHAIYA LAL (*Plaintiff*).* [28th May, 1891.]

Pre-emption—Wajib-ul-arz, construction of—Muhammadan Law.

In a suit for pre-emption based on a *wajib-ul-arz* the material words of the *wajib-ul-arz* under the heading of "custom for pre-emption" were as follows:—"At the time a proprietary share is transferred a right of purshase will [374] vest, first, in a co-sharer of the same family, and then in the other co-sharers of the village in preference to a stranger, provided that the same price is paid by the co-sharer as is offered by the stranger."

Held that these words were intended to define a special custom of pre-emption and did not merely mean that the custom of pre-emption according to the Muhammadan law was to be followed.

Ram Prasad v. *Abdul Karim* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. Banerji*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

STRAIGHT, J., (KNOX, J., concurring).—This was a suit for pre-emption and the vendee is the appellant. The plaintiff is an admitted co-sharer within the terms of the *wajib-ul-arz* and the defendant is a stranger. The terms of the *wajib-ul-arz* are as follows, under the head of "custom for pre-emption":—At the time a proprietary share is transferred a right of purchase will vest, first, in a co-sharer of the same family, that is, of the vendor, and then in the other co-sharers of the village, in preference to a stranger, provided that the same price is paid by the co-sharer as is offered by the stranger."

The Court below has decreed the claim, and it is contended by Mr. *Banerji* on behalf of the vendee-appellant that this passage in the *wajib-ul-arz* merely defines the parties entitled to enjoy the custom of pre-emption and that it does not specify or define the custom, which must be looked for in the Muhammadan law, which law, in the absence of contract or custom to the contrary, supplies the custom. In support of this view,

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* Second Appeal, No. 1594 of 1888, from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 30th July 1888, reversing a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Jaunpur, dated the 19th March 1888.

(1) 9 A. 513.

1891 MAY 28. — APPELLATE CIVIL. — 13 A. 373 = 11 A.W.N. (1891) 136.

he called our attention to the case of *Ram Prasad* v. *Abdul Karim* (1), which was a considered judgment of the learned Chief Justice and my brother Mahmood. It seems to me that that case is clearly distinguishable and that the language used there in the *wajib-ul-arz* is wholly different from that used here. There the words of *wajib-ul-arz* [375] were—"the custom of pre-emption prevails according to the usage of the country," and, as I understand the learned Chief Justice, there was no evidence in that cause beyond the declaration contained in the *wajib-ul-arz* of what the nature of the custom was, and the learned Chief Justice therein said, what I entirely agree in, namely, that where such general terms are used, the custom that must be looked for is that custom which mostly prevails, *viz.*, the custom as recognised by the Muhammadan law. But in the present case it appears to me that the *wajib-ul-arz* itself defines and declares what the custom is, and that within the four corners of the paragraph to which I have called attention the mode in which that custom is to be exercised and regulated is specifically fixed, in other words, that the right of pre-emption vests primarily in the co-sharer *ekjaddi*, and secondly in the co-sharer of the village, and that as to both of them there is this proviso that they must give the same price for the property sold as a stranger was prepared to give for it. The interpretation then I have placed upon the case of *Ram Prasad* v. *Abdul Karim* (1) is consistent with what the learned Chief Justice himself said in *Husain Khan* v. *Umedi Bibi* (2) and in unison with the remarks of Mahmood, J., in *Muhammad Rustam Ali Khan* v. *Niadar Singh* (3). I therefore think that the claim of the plaintiff was rightly decreed, and he was entitled to pre-empt the property in suit. While dismissing the appeal with costs, we direct, in accordance with the rule laid down in the recent Full Bench of this Court, that the time for the payment of money be extended to the 1st of August 1891, and the decree will declare that if the money is paid in by that date, the plaintiff will get the property, and if the money be not paid by that date, the plaintiff's suit will stand dismissed with costs. To leave no doubt upon the question, I think it well to add that in the event of the money being paid in by the specified date, the plaintiff will have his costs in all the Courts.

Appeal dismissed.

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13 A. 376 (F.B.).

[376] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

KODAI SINGH (*Plaintiff*) *v.* JAISRI SINGH AND OTHERS (*Defendants*). [10th December, 1889.]

Pre-emption—Decree conditional on payment of price stated within a fixed period, otherwise suit to stand dismissed—Non-payment of pre-emptive price—Appeal after expiration of period fixed by decree.

The plaintiff in a pre-emption suit obtained a decree in his favour for pre-emption of the share in suit on payment of a fixed sum within a period specified in the decree, otherwise his suit was to stand dismissed.

Held, that such plaintiff could appeal from such decree after the period prescribed therein had elapsed without his paying in the pre-emptive price fixed

(1) 9 A. 513. (2) 9 A.W.N. (1889) 192. (3) 6 A.W.N. (1886) 114.

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thereby, both as to the correctness of the pre-emptive price and as to the reasonableness of the time allowed for payment.

[R., 14 A. 350 (354); 14 A. 529; 16 A. 126 (128) = 14 A.W.N. 3 (4); 18 A. 223 (226) = 16 A.W.N. 43 (44); 104 P.L.R. 1906 = 48 P.R. 1906; 11 O.C. 144 (147).]

[N.B.—This is the same as 13 A. 189. But this case contains a fuller report of the case in 13 A. 189].

THE facts of this case are given in the referring order of Mahmood, J., of the 28th May 1889, which is as follows:—

MAHMOOD, J.—This appeal has arisen out of a suit for pre-emption in which the right was sought to be enforced in respect of a sale which took place on the 14th January 1886.

The suit was instituted on the 14th January 1887 and resulted in a decree in favour of the plaintiff passed by the Munsif who presided in the Court of first instance on the 28th April 1887. By the decree it was found that the real amount of the purchase money was Rs. 799, while the plaintiff had alleged that the real price was only Rs. 700. The time fixed for payment of such money was 15 days from the date of the decree.

From the decree of the Munsif the defendants did not appeal, but the plaintiff appealed only in respect of the sum of Rs. 99, that is to say, the excess over Rs. 700, which the plaintiff had alleged was the right amount of the consideration money. The plaintiff-appellant also complained in the grounds of appeal to the lower Appellate Court that the time fixed for payment of the consideration money was unreasonably short.

The appeal was presented on the 27th May 1887, and it was decided by the lower Appellate Court on the 2nd February 1888.

[377] In deciding the appeal, however, the learned Judge of the lower appellate Court has not gone into the merits of the case as to the amount of the purchase money which the plaintiff alleged was in excess of the real purchase money, but dismissed the appeal before him upon the ground that, the term within which the money was to be paid under the decree of the first Court having expired, the plaintiff had no right of appeal. This is practically what the learned Judged has held, and there is no finding in the case as to the sum of money, namely, Rs. 99, as to which the appeal had been preferred to him.

In disposing of the case the learned Judge has relied upon a ruling of my own in *Chhidda* v. *Imdad Husain* (1). To the views which I expressed in my judgment in that case I still adhere but I am of opinion that there is nothing in the judgment to have allowed the learned Judge to obviate the necessity of having to try the case upon the merits.

From the decree of the lower appellate Court this second appeal has been preferred, and Mr. *Jwala Prasad's* argument in support of the appeal seeks that the case should be remanded for trial upon the merits under s. 562 of the Code of Civil Procedure. The argument is, however, resisted by Mr. *Ram Prasad*, who, I think, is entirely within his rights when he relies upon two Division Bench rulings of this Court, one being *Mulu Singh* v. *Rahim Kuar* (2) in which the learned Chief Justice and my brother Brodhurst concurred, and also upon an unreported ruling of the learned Chief Justice and my brother Tyrrell, in first Appeal No. 25 of 1888, decided on the 8th May 1889. Both of these rulings support the contention of Mr. *Ram Prasad* because at the time when the learned Judge of the lower appellate Court had to decide the appeal before him and, indeed, because at the time when the appeal to him had been preferred.

(1) 8 A. W. N. (1888) 4.

(2) 8 A. W. N. (1888) 22.

the 15 days' period provided by the First Court for payment of the purchase money had expired, there could be no reason for the learned Judge to go into the merits of the case.

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FULL BENCH.

13 A. 376 (F.B.)

[378] Mr. *Jwala Prasad* for the appellant has argued that, though these cases are opposed to his case, he is prepared to argue the point *de novo*, if I should allow him to open the question, which would require my going behind the conclusions and judgments of the two rulings to which Mr. *Ram Prasad* has referred.

I do not think that I should, sitting here as a single Judge, reopen the question in connection with the two Division Bench rulings; but I feel some difficulty in accepting them, and I think the proper course is to refer the case to a Bench consisting of two Judges, with a further recommendation that the case be laid before the learned Chief Justice for orders as to whether or not, in view of the rulings that I have cited, it is a fit case to be considered by the Full Bench.

The case was accordingly laid before the Full Bench, and the following judgments were delivered :—

JUDGMENT.

STRAIGHT, J.—The learned Judge appears to have refused to enter into the question of price because, the Rs. 799 not having been paid within the time directed by the decree of the First Court, he was of opinion that there was no subsisting decree from which an appeal could be preferred. Strictly speaking, the exact decree which stood at the date of the plaintiff's filing his appeal was that of dismissal of his suit by reason of his having failed to deposit the Rs. 799 within 15 days, and had he appealed against it on that footing he might have raised questions as to the propriety of the First Court's finding on the matter of price and the time allowed him within which to pay the amount into Court. I think, therefore, in this case it must be taken that there was a decree from which an appeal could be entertained, and that the plaintiff was entitled to get a determination of the question of price, which when decided might properly guide the Judge's conclusions upon the further point as to whether the time allowed by the First Court was reasonable.

We in no way wish to depart from what was thrown out in the Full Bench ruling of this Court reported in the N. W. P. Reports for 1868, p. 54, and followed by Pearson and Spankie, JJ., in I.L.R. [379] 2 All. p. 744, that an appellate Court in its discretion may vary the decree of a first Court in the matter of time for payment, even though such time expired before the appeal was filed.

The effect of this view upon the present appeal is that it will be decreed and the appeal be remanded to the Court of the Judge of Gorakhpur for restoration to his file of pending appeals and disposal in ordinary course as an appeal upon the pleas, including that of time, taken by the plaintiff-appellant. Costs hitherto incurred will follow the result.

MAHMOOD, J.—This case has arisen out of a reference made by me, and the circumstances which gave rise to the reference are stated in my order of reference, dated the 28th May 1889, and I do not wish to repeat the circumstances of the case further than saying that my judgment in this case depends on, and refers to, that order and the facts stated therein for the consideration of the question of law which arises here. This being so, it is, I think, important for me specially, as the referring Judge in the case,

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to explain that my ruling in *Chhidda* v. *Imdad Husain* (1) is not inconsistent with the view expressed in the judgment which has just been delivered. That was not a case of a regular pre-emption decree which was the subject of appeal, but the appeal related to the execution of such a decree which fixed one month as the time for payment of price. That decree had become final by being affirmed by the appellate Court on the 15th January 1885, without any alteration as to the term of one month; but the deposit of the purchase-money was not made till the 16th February 1885, that is, after the fixed period of one month, even as calculated from the appellate decree of the 15th January 1885. The appellate Court in that case in passing its decree of the 15th January 1885, had, no doubt, power to decline to extend the period, as was held by the Full Bench in *Sheo Pershad Lall* v. *Thakoor Rai* (2), to which I referred, and, as a Court executing a decree, declined either to hold that the decree in fixing a period for payment of price was illegal or that the period of one month which it prescribed could be extended by the Court execut-[380]ing the decree. The argument that the period of one month should be calculated from the final appellate decree of the 15th January 1885 could not very well be pressed in that case (as indeed it was not pressed) in favour of the pre-emptor, decree-holder, because, as I have already said, even upon that calculation his deposit of the price on the 16th February 1885 was beyond time. The case is therefore distinguishable from the present case. The real difficulty in connection with pre-emption decrees, and specially with reference to the point which has given rise to this reference, arises in considering whether such decrees, which are usually passed, or which purport to be passed, under s. 214 of the Code of Civil Procedure, are decrees in the nature of decrees *nisi* or decrees absolute in the same manner as in any other class of cases where the decrees may, by force of equity, be subjected to considerations and limitations of amount or time as to payment of money as a condition precedent to the recovery of possession, or subjected to other restrictions which the Court may deem fit to impose. This is a matter which I had to bear in mind in *Rup Chand* v. *Shamsh-ul-Jehan* (3), and I dealt with the matter in a suit for pre-emption itself, dealing with it much upon the same principles as those governing other conditional decrees passed in suits where the possession of immoveable property is subjected to conditions. I think it is enough to say, in order not to delay or prolong my judgment, that, as I have already explained, between my ruling in *Chhidda* v. *Imdad Husain* (1), and the ruling in *Rup Chand* v. *Shamsh-ul-Jehan* (3) no distinction of principle really exists, and it is only because the learned Judge of the lower appellate Court misapplied the former ruling that he considered that the ruling relieved him of the duty of trying the suit upon the merits. I think the rule which was laid down in *Rup Chand* v. *Shamsh-ul-Jehan* (3) is a rule which should govern this case, consistent as it is with the principle of the Calcutta Court in *Noor Ali Chaudhuri* v. *Koni Meah* (4) and the Bombay Court ruling in *Daulat* and *Jagjivan* v. *Bhukadas Manekchand* (5) to both of which I referred in the case. I am also glad that the con-[381]clusions arrived at by me in this case are wholly consistent with those arrived at in the judgment which has just been delivered. I therefore agree in the order which has been made in the case by my brother Straight.

EDGE, C.J.—In concurring with the judgment which has been

(1) 8 A.W.N. (1888), 4. (2) N.W.P.H.C.R. (1868), 254. (3) 11 A. 346. (4) 13 C. 13. (5) 11 B. 172.

delivered by my brother Straight, I should say that I understand that judgment to be in no way based upon any cases referred to in the judgment just delivered by my brother Mahmood. As to those cases and the inferences to be drawn from them I decline to express any opinion. I am of the same opinion as my brother Straight.

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BRODHURST, J.—I concur with my brother Straight.

TYRRELL, J.—I also concur with my brother Straight without expressing any opinion on the cases just referred to in his judgment by my brother Mahmood.

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13 A. 381=11 A.W.N. (1891) 147.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BANSIDHAR AND ANOTHER (*Judgment-debtors*) *v.* SITA RAM (*Decree-holder*).* [22nd April, 1891.]

Second Appeal—Plea sought to be raised which was not taken in the memorandum of appeal—Civil Procedure Code, s. 542.

Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exerciseable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba* for the appellants.

Babu *Jogindro Nath Chaudhri* for the respondent.

JUDGMENT.

MAHMOOD, J.—This is a second appeal, and was admitted by my late Honorable collegaue Mr. Justice Brodhurst by his order, dated the 10th January 1890.

[382] The appeal is of the nature covered by the jurisdiction of the single Judges of this Court under rule 1 of the rules of the Court, and it is now before me for disposal.

The appellant is represented by Mr. *Ghulam Mujtaba*, holding the brief of Mr. *Madho Prasad*, and the respondent is represented by Mr. *Jogindro Nath Chaudhri.*

Upon the case being called for hearing, Mr. *Ghulam Mujtaba* has frankly admitted that both the grounds taken in the memorandum of appeal are unsustainable, but the learned pleader has asked me to consider matters other than those contained in the grounds of appeal. In making this prayer the learned pleader has relied upon s. 542 of the Code of Civil Procedure and the cases noted in the margin.

On the strength of these authorities the learned pleader has set forth in this argument matters wholly foreign to the circumstances mentioned in the memorandum of appeal, and has contended that I am bound to decide the appeal upon some grounds other than those mentioned in the memorandum of appeal.

(1) *Mahabir Tiwari v. Jhangur.*
(2) *Dharam Das v. Nand Lal Singh.*

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* Second Appeal, No. 36 of 1890, from a decree of A. Sells, Esq., District Judge of Meerut, dated the 26th November 1889, reversing a decree of Maulvi Ahmad Ali, Munsif of Bulandshahr, dated the 6th April 1889.

(1) 7 A.W.N. (1887) 213. (2) 9 A.W.N. (1889) 78.

1891 APRIL 22. — APPELLATE CIVIL. — 13 A. 381 = 11 A.W.N. (1891) 147.

To this Mr. *Jogindro Nath Chaudhri* objects, on the ground that no sufficient cause has been shown why the appellant should be heard on matters foreign to the grounds of appeal, and of which the respondent had no notice.

I am of opinion that Mr. *Jogindro Nath's* objection is right. Parties complaining of judgments and decrees must mention all the grounds of complaint in the memorandum of appeal, and the provisions of s. 542 of the Code of Civil Procedure are not meant to relieve them of such necessity.

The Legislature, as I understand s. 542 of the Code of Civil Procedure, meant to confer upon Courts the power to decide appeals upon grounds other than those set forth by the appellant in the memorandum of appeal, and that power is to be exercised by [383] the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice. Neither of the two rulings cited conflicts with this view.

The only two grounds taken in the memorandum of appeal having been abandoned, I have no alternative but to dismiss the appeal, and I do so with costs.

Appeal dismissed.

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13 A. 383 = 11 A.W.N. (1891) 138.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

KISHUN LAL (*Plaintiff*) *v.* MUHAMMAD SAFDAR ALI KHAN AND OTHERS (*Defendants*).* [28th April, 1891.]

Execution of decree—Sale in Execution—Sale set aside—Suit by purchaser for return of purchase-money—Civil Procedure Code, ss 295, 315.

Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under s. 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code.

Munna Singh v. *Gajadhar Singh* (1) followed.

[F., 5 C.W.N. 240; R., 23 A. 355; 12 C.P.L.R. 49 (51); 7 M.L.T. 232 = 6 Ind. Cas. 291.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sunder Lal*, for the appellant.

Mr. *W.M. Colvin*, for the respondents.

JUDGMENT.

EDGE, C.J., and KNOX, J.—This was a suit brought to recover purchase-money which was paid by the plaintiff, and which had been distributed after payment amongst certain creditors of the firm of Lachmi Narain. The defendant No. 1 was one of those creditors. Lachmi Narain's firm failed. There was a large number of decrees obtained by

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* First Appeal No. 157 of 1889, from a decree of Maulvi Muhammad Abdul Qaiyum, Subordinate Judge of Bareilly, dated the 21st June 1889.

(1) 5 A. 577.

1891 APRIL 28. — APPELLATE CIVIL. — 13 A. 383 = 11 A.W.N. (1891) 138.

creditors under which property of the firm was from time to time brought to sale and assets realized. On the 20th November 1885, a property of Lachmi Narain's firm was sold in [384] execution of a decree. On the 5th May 1886, that sale was set aside on the objection of the judgment-debtor. On the 20th September 1886, the purchasers at that sale filed their suit to have it declared that the sale was good. On the 7th March 1887, the Subordinate Judge, in whose Court that suit was, dismissed it. The purchasers appealed to this Court, and, on the 14th May 1888, this Court decreed the relief prayed for, holding that, as the defendants there had filed a confession of judgment, the plaintiffs, purchasers, were entitled to a decree. On the 10th Septemper 1888 those purchasers obtained possession. Now we come to the connection of the plaintiff here with the property. On the 20th September 1886 the same property was sold in execution of another decree which had been obtained against the firm of Lachmi Narain and was purchased by the plaintiff for Rs. 21,125 which included the charges in connection with the sale. On the 4th December 1886 the sale of the 20th September 1886 was confirmed. On the 20th September 1886 the plaintiff paid in one-fourth of the purchase-money. The sum paid on that day, Rs. 5,235, was paid into the treasury of Bareilly to the account of the Subordinate Judge of that place under the head of Civil Court's deposit. Money is not received in the treasury without the authority of the proper officer given for the payment of the money. On the 11th October 1886 the balance of the purchase-money was paid, and of that the sum of Rs. 15,843 was similarly paid into the treasury to the account of the Subordinate Judge. The authority for payment of the money out of those sums indicated the transactions out of which those payments arose. Those indications are merely indications for the purposes of the Subordinate Judge's Court. The defendant No. 1 here was entitled to a rateable proportion of the assets which were realized after the 7th July 1885. That is, in the case of each realization he became, under s. 295 of the Code of Civil Procedure, entitled to his rateable share. The total amount of the money due to him was Rs. 36,166. The total amount of his rateable shares came to Rs. 10,569-3-0, and this sum of Rs. 10,569-3-0, which represented his rateable shares in some 12 realizations, was paid to him out of the treasury on the orders of the Subordinate [385] Judge's Court. The money was paid out in two sums; one of Rs. 5,334-3-0 under voucher numbered 331, the other of Rs. 5,235 under voucher numbered 326. The last voucher carrying back a reference by numbers shows that in the book of the Court the sum of Rs. 5,235, which had been paid in on the 20th September 1886, was accounted for. As a matter of fact, that Rs. 5,235 did not represent the defendant's rateable share on the money which was realized by the sale to the plaintiff, but represented his share on that money plus, in part, his shares on the other realizations. The plaintiff here has sued the defendant to recover that sum of Rs, 2,235 and interest, on the ground that, owing to the decree of this Court having made valid the previous sale, there was no saleable interest of the judgment-debtors in the property which he bought. In the 8th paragraph of the plaint it is alleged that the judgment-debtor had no saleable interest in the village Saidpur, and that the plaintiff got nothing as consideration for the money paid by him. The written statement did not traverse that allegation, but raised certain defences, such as that the sale to the plaintiff was still subsisting. We must, consequently, on the pleadings, take it to be admitted that at the time of the sale of the 20th September 1886, there was no saleable interest of the judgment-debtors in

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the property. We must deal with this case on the basis that the judgment-debtors had, within the meaning of s. 315 of the Code of Civil Procedure, no saleable interest at the time of sale to the plaintiff.

It is contended, amongst other things, that the plaintiff's remedy, if any, was to obtain repayment of the purchase-money under s. 315 of the Code through the Court which had executed the decree. There is, in our opinion, a good deal to be said in support of that contention, but we are bound by the decision of the Full Bench of this Court *in re Munna Singh* v. *Gajadhar Singh* (1), in which it was distinctly held that in such a suit as this the purchaser can sue the decree-holder for recovery of the purchase-money, and that he is not limited to the procedure in the execution department mentioned in [386] s. 315. We were referred to the case of *Kunhi Moidin* v. *Tarayli Moidin* (2), in which the procedure was that the person who sought repayment of money proved in a suit that the judgment-debtor had no saleable interest, and, under s. 315, went to the proper Court to obtain redress of payment. The Subordinate Judge tried this case and dismissed the plaintiff's claim.

In our opinion, according to the Full Bench ruling to which we have above referred, we must give the plaintiff a decree for the rateable share received by the defendant of the Rs. 21,000, speaking roughly, that the plaintiff paid in respect of the purchase. We cannot give the plaintiff the full amount of Rs. 5,235 because, with exception of Rs. 1,016 the defendant received nothing out of the moneys paid by the plaintiff in respect of the purchase of the 20th September 1886. The Rs. 1,016 is accepted as representing the rateable share of the plaintiff's money which the defendant No. 1 received.

We reverse the decree below and give the plaintiff a decree for Rs. 1,016 with proportionate costs, dismissing his claim as to the balance with proportionate costs. We do not allow interest, as we think there was no real foundation for making a claim for the whole of money.

Appeal decreed.

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13 A. 386 = 11 A.W.N. (1891) 143.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAHABIR PRASAD MISR AND OTHERS (*Plaintiffs*) *v.* MAHADEO DAT MISR AND OTHERS (*Defendants*).*
[29th April, 1891.]

Act X of 1873 (*Oaths Act*), *ss.* 10 *and* 11—*Referee's depositions inadequate for decision of question referred—Appeal after death of referee—Practice.*

Where a cause had been decided under the provisions of ss. 10 and 11 of the Oaths Act (Act X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties,

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* First Appeal, No. 146 of 1889, from a decree of Maulvi Ahmad Hasan, Officiating Subordinate Judge of Gorakhpur, dated the 16th May 1889.

(1) 5 A. 577. (2) 8 M. 101.

[387] *Held*, that the case should be remanded to the lower Court for disposal according to the usual procedure.

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APPELLATE CIVIL.

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[R. 16 Ind, Cas. 733 (734).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *T. Conlan* and Mr. *W. M. Colvin*, for the appellants.

The Hon'ble Mr. *Spankie* and Munshi *Jwala Prasad*, for the respondents.

JUDGMENT.

STRAIGHT, J. (TYRRELL, J., concurring).—This is a somewhat peculiar case. It will be convenient to state a few facts by way of preliminary to the order I am about to make in this case. The suit was brought by the plaintiffs, appellants, against the defendants upon the ground that their fathers and the ancestor of the defendant Mahadeo Dat Misr had been members of a joint and undivided Hindu family in possession of joint and undivided immoveable property, that in 1881, in consequence of some misunderstanding, separation of food and residence had taken place; that subsequently the defendants had by their improper action deprived the plaintiffs of their share in the joint enjoyment of the joint family property; and they sought to have that joint possession and enjoyment restored to them as before.

It is not necessary to discuss the statements contained in the written statement of the defendants; it is enough to remark that, on the 27th March 1889, a petition was filed by the plaintiffs and the defendants in the Court of the Subordinate Judge of Gorakhpur, stating that they had mutually agreed to be bound by the deposition of Maharaja Udai Narain Mal, the owner of the *raj* of Manjholi in the manner contemplated by ss. 10 and 11 of the Oaths Act. A commission was issued for the examination of the Maharaja, and on two occasions, that is, on the 8th April 1889, and on the 29th April 1889, questions were put to him to which replies were given. Upon the strength of those depositions the Subordinate Judge of Gorakhpur passed a decree in favour of the defendants, holding that the answers given by the Raja precluded the claim of the plaintiffs and established the separate proprietary title of the defendants to the property in respect of which the suit had been brought for declara-[388]tion of the plaintiffs' joint interest therein. It is against this decree that this first appeal has been preferred, and the contention on the part of the appellants, *firstly*, was that a proper construction of the Raja's deposition showed that the plaintiffs had succeeded in establishing their joint title to the property in dispute. Mr. *Colvin*, who argued the case on behalf of the appellants, contended that the answers contained in these depositions were so hazy and ambiguous that they were wholly insufficient to justify the decision of the Court below. Mr. *Spankie* for the respondents strenuously urged that, at least as to some of the points, the statements of the Raja were specific enough, and that, according to the last answer given by him in his second deposition, it was clear that the defendants did acquire and were in sole proprietary possession of the property in suit. I cannot agree with this latter contention. Both my brother Tyrrell and myself have perused more than once the two depositions of the Raja, and we think that they do not convey to our minds any clear or precise expression or statement as to the nature of the rights of the several parties in the property in suit. It is at least abundantly clear that at the time the property in dispute came into possession of the parties,

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either by gift or purchase, they were members of a joint and undivided Hindu family. That being so, the presumption would be that the property so acquired would be the property of the jont and undivided Hindu family until the contrary was proved. Before passing such a decree as has been made in the present case, upon the strength of the statements of the Raja, it was essential that his statements should have been very clear and definite in respect of the specific title acquired by the respective parties as to the several properties in dispute. These depositions do not convey to our minds any such impression, and although I should always be strongly disinclined to assist a party to an agreement under the Oaths Act in getting out of it, yet I am bound to see that the object of the parties when they entered into it has been satisfactorily accomplished by the deposition of the referee, and, if that object has not been accomplished, then that a further deposition should be obtained or, if that is impossible, as is the case here, owing to the Raja's death, that the question should be tried in the ordinary way by the Court.

[389] We decree the appeal, reverse the decree of the Court below and remand the case to the Court of the Subordinate Judge of Gorakhpur for restoration to the file of pending cases and disposal according to law. Costs of the appeal and costs incurred in the Court below will follow the result of the suit.

Appeal decreed.

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13 A. 389 = 11 A.W.N. (1891) 139.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Mahmood.

GOBIND NATH TIWARI (*Plaintiff*) *v.* GAJRAJ MATI TAURAYAN AND OTHERS (*Defendants*).* [8th May, 1891.]

Suit for declaratory decree—Declaration sought that certain property was joint ancestral property and not liable to attachment in execution of a certain decree—Court fee payable on such suit.

"The plaintiffs specified in their plaint as the reliefs sught by them:—(1) That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendant No. 4, dated 4th December 1883, against the defendant No. 1. (2) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the amount of the decree and the value of the property at Rs. 6,000. (3) That any other relief which the Court may think the plaintiffs entitled to may also be granted."

Held, that the suit should be deemed a suit for one declaratory decree only, without consequential relief, and that a court-fee of Rs 10 was sufficient.

[R., 16 A. 308 (312) = 14 A.W.N. 109 (110); D., U.B.R. (1897—1901), Vol. II, 355 (359).]

THE plaintiffs brought their suit in the Court of the Subordinate Judge of Gorakhpur for a declaration that certain property was joint ancestral property and not liable to attachment under a decree to which certain of the defendants were parties. They paid on their plaint a court-fee of Rs. 10. The Subordinate Judge dismissed the plaintiffs' claim without going into the merits, on the ground that it was unmaintainable having regard, to the provisions of s. 42 of Act I of 1877 (Specific

* First Appeal, No. 138 of 1889 from a decree of Maulvi Ahmad Hasan, Subordinate Judge of Gorakhpur, dated the 25th June 1889.

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Relief Act). One of the plaintiffs then appealed to the High Court paying, as in the Court of first instance, a court-fee of Rs. 10. A preliminary objection was taken by the respondents that the court-fee in both Courts was insufficient, and, that being so, the appeal should be dismissed. Before deciding this objection, [390] however, the Court (Mahmood and Young, JJ.) called for a report from the Taxing Officer of the Court as to the sufficiency of the stamp. That officer's report was as follows :—

REPORT.

"In F. A. No. 138 of 1889, the suit was dismissed and the plaintiff is the appellant in this Court.

The relief he claims, as shown by the plaint, is "that the property is the joint ancestral property of the plaintiff and not liable to attachment, &c." under a certain decree.

He certainly does not seek consequential relief, and his case differs from that of the appellant in F. A. No. 199 of 1887, as in that case the lower Court had granted consequential relief, or, at least, what used until more recent rulings to be considered consequential relief.

The only question then is whether he seeks more than one declaration or not.

Certainly, the words of the plaint look as if two separate declarations were asked for :—(1) that the property is the plaintiff's, and (2) that it is not liable to attachment under a certain decree.

If the second part does not follow necessarily out of the first proposition I think that two declarations are asked for and that each should bear a Rs. 10 stamp, for cases are quite conceivable in which a declaration that the property belongs to the plaintiff might not connote the proposition that it was not liable to attachment in a certain case.

If, however, the latter proposition necessarily follows the former and a declaration that the property is the plaintiff's involves its freedom from liability to attachment under the decree, I think the fact of the Court Fees Act being of a fiscal nature and one to be construed strictly, and as far as possible in favour of the litigant, should be considered, and the two propositions deemed but one expressed in different manners, and that a Rs. 10 stamp would be sufficient."

The case then came with this report before Edge, C.J., and Mahmood, J., who made the following order :—

[391] Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan* and Munshi *Kashi Prasad*, for the respondents.

ORDER OF REMAND.

EDGE, C. J., and MAHMOOD, J.—On the report of the Taxing Officer of this Court the stamp is sufficient. The Court below must try the suit on the merits and decide on the evidence and the law as applicable to it whether or not the plaintiffs are entitled to the declaration they seek. We set aside the decree under appeal, and remand the case under s. 562 of the Code of Civil Procedure to be disposed of according to law. The costs here and hitherto will follow the result.

Cause remanded.

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13 A. 391=
11 A.W.N.
(1891) 141.

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APPELLATE CIVIL.

Before Sir John Edge., Kt., Chief Justice, and Mr. Justice Tyrrell.

KALI DAS (*Defendant*) *v.* BIJAI SHANKAR AND ANOTHER (*Plaintiffs*).*
[14th May, 1891.]

Hindu Law—Adoption by widow to deceased husband—Deed of adoption, construction of—Powers of adoptive mother.

The widow of a separated Hindu made an adoption to her deceased husband under a power to adopt conferred upon her by her husband's will. The deed by which the adoption, the validity of which was not disputed, was evidenced, contained, amongst others, the following conditions :—" that during my (*i e.*, the adoptive mother's) lifetime I shall be the owner and manager of the estate and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukarji born of me. "

Held that these words conferred upon the widow an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made, so far as her position as manager was concerned.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Babu *Jogindro Nath Chaudri*, for the appellant.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This appeal has been brought by one of the defendants in a suit which was for recovery of money due under notes of hand given by one Musammat Sri Matia Matangini Debia. She was the widow of one Babu Ishan Chandar [392] Mukarji, and after his death she executed, on the 24th February 1878, a deed of adoption which, so far as is material, was as follows :—

" I, Sri Matia Matangini Debia, widow and heir of Babu Ishan Chandar Mukarji, son of Babu Tarni Charan Mukarji, raise of the city of Koel, do hereby declare that my husband, Babu Ishan Chandar, on account of his being childless, had a desire to adopt some one for the perpetuation of his name and performance of religious ceremonies, and accordingly had it distinctly recorded in the *wajib-ul-arz* of each of his zemindari villages, that he, and after his death his wife, had authority to adopt (a son); that he had selected to adopt Kali Das, son of his own brother Santi Chandar, that the time for performing the ceremonies of adoption had not yet arrived, when he fell ill, and then he executed a will in the Bengali character under his own signature authorising me to adopt, and made it over to me ; that in execution of the will of my husband I have also selected the same lad as was chosen by my husband, and have accordingly adopted to-day the abovenamed lad in the presence of the members of the brotherhood, after performing all the ceremonies of adoption according to the custom of the caste, and that for its stability I execute this deed of adoption containing the following conditions :—

" That during my lifetime I shall be the owner and manager of the estate, and that after my death the adopted son should have the same

* First Appeal No. 28 of 1890 from a decree of Pandit Indar Narain, Subordinate Judge of Aligarh, dated the 8th November 1889.

rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukarji, born of me. I have therefore executed this deed of adoption that it may serve as evidence and be used when needed. Dated 24th February 1878, corresponding with Phagun Badi (Ashtimi) Sambat 1934, Sunday."

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It was signed by her and her signature was witnessed by the natural father of the defendant-appellant. The defendant-appellant was the boy whom she adopted, and is now, we are informed by his Counsel, 26 years old. The lady died in February 1888, whilst this suit was pending. The defendant-appellant on the 29th March 1887, filed his written statement, in which, although he [393] made several charges against the old lady, he alleged that the capacity of the Musammat was that of a manager of a Hindu family; he said she had no right to transfer any property; he alleges that she has incurred unlawfully debts and done acts to his detriment. The Subordinate Judge decreed the plaintiff's claim against the defendant-appellant. On his behalf it has been contended here that the notes of hand in question were given by her in carrying on an indigo factory, and that she had no power to incur any debts beyond those for which she alone could be made personally responsible; in other words, that she was the owner of the property and was not in the position of a Hindu widow of a separated sonless Hindu, but in the position of a person who had an estate for life, and that when it was provided in the deed of the 24th February 1878 that she should be owner and manager of the estate it was intended that she should be manager of the estate on her own behalf only and should not be in the position of the person who in a Hindu family acts and is known as the manager. Reading that deed in its natural sense, we are of opinion that it conferred upon her an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made so far as her position as manager is concerned. The defendant-appellant, by the third paragraph of his written statement, seems to have been of opinion that her capacity as manager was such a capacity as we think was contemplated by the deed. We have been referred to *Chitko Ragunath Rajadiksh* v. *Janaki* (1), *Ramasami Aiyan* v. *Venkatramaiyan* (2) as showing that in Bombay and Madras such an arrangement as is represented by the deed of the 24th February 1878, would be held valid, particularly as it is admitted that the defendant-appellant ratified that arrangement after he attained his majority. We have also been referred to *Bepin Behari Bundopadhya* v. *Brojonath Mookhopadhya* (3) which shows that the view of their Lordships of the Privy Council in the case above referred to from Madras would [394] be equally applicable to a Bengali, subject to the Hindu law of Lower Bengal. It is admitted that the defendant-appellant here is such a Bengali. It appears to us, under the above circumstances that the lady having given those notes of hand for the *bona fide* purpose of carrying on the indigo factory, which, as a matter of fact, had existed and had deen carried on by her deceased husband in her lifetime, the defendant-appellant is liable for the amount decreed against him in the Court below. The appeal is dismissed with costs.

Appeal dismissed.

(1) 11 B.H.C.R. 199. (2) 2 M. 91 = 6 I A. 196. (3) 8 C. 357.

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APPELLATE CIVIL.

13 A. 394 = 11 A.W.N. (1891) 148.

13 A. 394 = 11 A.W.N. (1891) 148.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

NOURANG RAI (*Decree-holder*) v. LATIF CHAUDHRI AND OTHERS (*Judgment-debtors*).* [26th May, 1891.]

Execution of decree—Decree to be executed where there has been an appeal.

Where the appellate Court has modified the decree of the Court below, the decree of the appellate Court supersedes entirely that of the lower Court, and is the only decree which can be executed *Shohrat Singh* v. *Bridgman* (1) *Gobardhan Das* v. *Gopal Ram* (2) and *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (3) referred to.

[R., 5 O.C. 373 (375).]

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represented.

JUDGMENT.

MAHMOOD, J.—On the 29th September 1885, the plaintiff-appellant's claim for possession of certain property together with future *mesne* profits was partly decreed by the first Court. From the decree thus made an appeal was presented only by the plaintiff, and on the 16th December 1885, his appeal was decreed and so much of the decree of the first Court as had been passed against him was modified.

[395] Under an application for execution made on the 22nd May 1886, possession of the property was delivered to the decree-holder, appellant, on the 8th July 1886, and he was also awarded his costs.

The second application for execution was made on the 15th December 1887, and it was struck off on the 24th November 1888.

The third application for execution, which was made on the 3rd January 1889, was struck off on the 14th August 1889, in default.

The present litigation began with an application for execution made on the 23rd August 1889, which application relates solely to the question of future *mesne* profits, and upon the application being made the judgment-debtors objected, but their objections were disallowed by the first Court; but, upon appeal, the learned Judge of the lower appellate Court, reversing the order of the first Court, allowed the objections of the judgment-debtors upon grounds which can best be expressed in his own words:—

"The decree to be executed is the decreee of the appellate Court and that decree, varying the decree of the Court of first instance makes no provision for future *mesne* profits, such profits therefore cannot be claimed in execution."

Now in deciding this second appeal it is necessary to consider the effect of the Full Bench ruling in *Shohrat Singh* v. *Bridgman* (1) as interpreted by the recent Full Bench ruling in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (3). It is also necessary to bear in mind the ruling in *Gobardhan Das* v. *Gopal Ram* (2).

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* Second Appeal No. 244 of 1890 from a decree of W. R. Burkitt, Esq., District Judge of Gorakhpur, dated the 5th December 1889, reversing a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 3rd August 1889.

(1) 4 A. 376. (2) 7 A. 366. (3) 11 A. 267.

I am of opinion that the effect of these rulings is that the only decree which can be put into execution is the appellate decree of the 16th December 1885, and that, inasmuch as it was not a simple decree of affirmance, but a decree modifying the terms of the first Court, therefore, unless in the decree of the 16th December 1885, there was an order as to future *mesne* profits, no future *mesne* profits could be made the subject of execution. But the decree of the 16th December 1885, was not a decree of simple [396] affirmance, but a decree modifying the original decree of the 29th September 1885, and this circumstance in my opinion distinguishes this case from the cases above referred to. After having fully heard the arguments, I am of opinion that the learned Judge has arrived at a correct conclusion, and I dismiss the appeal, but without any order as to costs, as the respondent is not represented.

1891 MAY 26.

APPELLATE CIVIL.

13 A. 394 = 11 A.W.N. (1891) 148.

Appeal dismissed.

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13 A. 396 = 11 A.W.N. (1891) 140.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

GAYA SINGH AND OTHERS (*Defendants*) *v.* UDIT SINGH (*Plaintiff*).*
[26th May, 1891.]

Ex-proprietary tenant—Relinquishment of ex-proprietary rights—Act XII of 1881 (North Western Provinces Rent Act), ss. 9, 31.

Though an ex-proprietary tenant cannot transfer his rights as such for a consideration, there is nothing to prevent his voluntarily relinquishing those rights.

[R., 10 O.C 235 (237); D., 20 A. 219 (232) = 18 A.W.N. 47 (51) = 33 A. 695 (699); 8 A. L.J. 826 (830) = 11 Ind. Cas. 17 (18).]

THE facts of this case are fully stated in the judgment of Straight, J.

Mr. *Niblett*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

STRAIGHT, J.—It is necessary in order to explain the conclusion at which I have arrived to state in detail the facts of this case. One Gaya Singh and his brother Kunj Behari and his son Baldeo were the owners of a certain *bighadam* zemindari interest in the Azamgarh district. Appurtenant to that *bighadam* interest was an interest in certain *sir* lands which were cultivated by Gaya Singh, his brother and his son. The present plaintiff-respondent, Udit Singh, brought a suit against Gaya Singh, and in execution of his decree sold the property and purchased it at auction Subsequently to that purchase Kunj Behari and Baldeo Singh, the brother and son of Gaya Singh, brought a suit to avoid that auction purchase, and made as parties thereto the present plaintiff, Udit Singh and Gaya Singh. That suit was dismissed by the first Court, and thereupon the plaintiffs appealed to the Court of [397] the District Judge. While that appeal was pending, the parties entered into a compromise, the effect of which was that the plaintiffs' suit was to be decreed to the extent of $\frac{2}{3}$ of the property and dismissed as to the residue. In that compromise to which all the parties to the suit

* Second Appeal No. 1508 of 1888 from a decree of E. Galbraith, Esq., District Judge of Azamgarh, dated the 5th June 1888, confirming a decree of Munshi Man Mohan Lal, Subordinate Judge of Azamgarh, dated the 30th November, 1887.

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were joined, Gaya Singh relinquished his rights in the ⅓ property in favour of the present plaintiff, Udit Singh, and he declared that he would not now or at any future time make any claim to the *sir* land or raise any claim to his ex-proprietary rights. Upon the basis of that compromise a decree was prepared on the 7th April 1885. By that decree ⅔ of the plaintiffs' claim was decreed and the rest of their claim was dismissed. On the 5th July 1887, the plaintiff Udit Singh came into Court with his present suit, and, to put it shortly, he alleged that, subsequntly to the decree of the 7th April 1885, having obtained possession of ⅓ of the *sir* appertaining to the ⅓ zemindari interest of Gaya Singh, namely, on the 26th of July 1885, and having cultivated the same, he was, upon the 6th December 1885 disturbed in the possession of that ⅓ *sir* the crops that he had planted removed, and up to the date of suit he had been kept out of possession, and therefore claimed a decree for joint possession of 6 bighas, 10 biswansis, 13½ dhurs out of 19 bighas, 12 dhurs, representing the ⅓ interest of Gaya Singh, and for damages in shape of profits of which he had been deprived amounting to Rs. 286-15-11. The first Court decreed the plaintiff's claim in part, though it negatived his allegation that he had obtained possession of the *sir*, and also gave him Rs. 103 6-4 as damages. The lower appellate Court, to which an appeal was preferred by the defendants, upheld that decision of the first Court, specifically holding that by the terms of the compromise and decree Gaya Singh had relinquished his ex-proprietary rights. It is contended, now, in second appeal on behalf of the defendants-appellants that what was done at the time of the compromise of 1885 amounted to a transfer by Gaya Singh of his ex-proprietary interest, and that in that case, such transfer, being prohibited by law, could not be recognised, and that, although the defendants had been **[398]** parties to that compromise, they were nevertheless entitled to maintain the plea they have now taken and to set up the illegality of the transaction to which they were parties. No doubt there is authority for that latter contention in the case of *Phalli* v. *Matabadal* (1) and I am not going to depart from what I said on that occasion, nor am I going to hold that the defendants cannot make the defence they have set up. But the question that arises to my mind is whether what was done at the time of the compromise amounted to a transfer of ex-proprietary rights. Now it would not be denied for a moment that if there had been a transfer for a consideration, either in money or in other respects, of that ex-proprietary holding it would have been prohibited by law and could not have been recognised by this Court. But in the Full Bench case of *Gulab Rai* v. *Indar Singh* (2) it was indicated that, although a transfer would be prohibited by law, yet that the question of a simple relinquishment might stand upon a different footing, and it left that point open for determination upon a subsequent occasion.

Now as I understand the Rent Act, and indeed I have expressed myself fully as to the meaning of s. 9 of the Rent Act in the Full Bench case last referred to, the law prohibits an occupancy-tenant not at fixed rate from transferring his holding; but it also provides within the four corners of the Act that he may relinquish his holding in such a way as to relieve himself from liability for the rent of the same, and the one mode in which that is to be done is provided in s. 31 and the following sections of the Act. If then, for the purpose of relieving himself from his liability to rent, a tenant may relinquish his holding, I cannot understand why

(1) 3 A.W.N. (1883) 7. (2) 3 A.W.N. (1883) 207.

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(1891) 140.

there should be any general prohibition, either on grounds of public policy or other grounds, to prevent a man saying:—"I no longer desire to cultivate this particular land, or to exercise this particular right of tenancy, or to remain in occupation of this particular piece of land." And unless I see that there is in the statute a very clear and distinct prohibition to his doing so, [399] I shall certainly not go to the length of holding that there is any such prohibition. It is not pretended that the ex-proprietary interest acquired by Gaya Singh upon the sale of his proprietary rights to the plaintiff was sold or transferred to the plaintiff for money consideration or the equivalent. What the compromise does say is that Gaya Singh undertakes never, now or at any future time, to make any claim to the *sir* land or to raise any claim to his ex-proprietary rights. I need not discuss the possible difficulty that might arise in regard to the other incidents of s. 9 of the Rent Act, namely, that which is concerned with the rights and interests of the parties interested in the cultivation with the occupancy-tenant, because in this particular case those parties joined in the compromise by which Gaya Singh made the relinquishment that he did.

Under these circumstances I am of opinion that the lower appellate Court took a right view and placed a proper construction upon what was done by Gaya Singh at the time of the compromise of 1885, and that the decree has been rightly given to the plaintiff by which he has been declared entitled to participation in the *sir* appertaining to the zemindari interest to the extent of a ⅓ interest in the *sir* enjoyed by Gaya Singh who relinquished all claims to that interest.

I dismiss the appeal with costs.

KNOX, J—I will not go over the facts of this case, as they have already been fully given by my learned brother Straight. I fully concur in what has been said and in the decree which he proposes to pass in this appeal. From a careful consideration of the facts of this case, and more especially from the terms in which the compromise is expressed, I am of opinion that Gaya Singh when he had executed the compromise then and there did not transfer, but voluntarily abandoned, his ex-proprietary rights in the *sir* land. The words used in the compromise which relate to the transfer of zemindari rights differ from those which relate to the abandonment of the ex-proprietary tenure. The words are these:—

[400] "Ek suls hissa par Udit Singh mudailah mai jumla hakuq zamindari mai ek suls haq sir sakit-ul-milkiyat va do suls hissa par mudai malikana va zamindarana kabiz va dakhil rahe aur ek suls haq kasht saikt-ul- milkiyat se musta'fi hain."

I see nothing in the Rent Act of 1881, by which any such voluntary vacation of tenure by a person who has acquired an ex-proprietary right is prohibited.

For these reasons I agree in the decree proposed.

Appeal dismissed.

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13 A. 400 = 11 A.W.N. (1890) 150.

13 A. 400 = 11 A.W.N. (1891) 150.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

RAM LAL DUBE AND OTHERS (*Judgment-debtors*) *v.* HAR NARAIN AND ANOTHER (*Decree-holders*).* [2nd June, 1891.]

Execution of decree—Decree conditional on payment of a certain sum within a fixed time—Payment after time specified in decree.

A Court having framed a decree conditioned on the payment by the plaintiff of a certain sum within a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) referred to.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Mr. *Niblett*, for the appellants.

Munshi *Jwala Prasad*, for the respondents.

JUDGMENT.

MAHMOOD, J.—The facts of this case as they have been put before me by Mr. *Niblett* for the appellants and Mr. *Jwala Prasad* for the respondents, may be stated to be the following:—

The decree-holders, respondents, are alleged to have executed a usufructuary mortgage with possession in favour of the judgment-debtors, appellants, about thirty years ago. Under the mortgage the mortgagees are admitted to have been placed in possession, and on the 2nd October 1888, the decree-holders, respondents, obtained [401] a decree for possession of the property by redemption on payment of Rs. 40, payable within 60 days from the date of the decree.

The terms of this decree, dated the 2nd October, 1888, are important because, in my opinion, the fate of this case turns upon the terms the decretal order which is as follows:—

یہہ ڈگری و حکم ہوا کہ دعوی مدعی واسطے انفکاک رہن اِس شرط
سے ڈگری ہو کہ مدعیان اندر ساٹھہ یوم کے آج کی تاریخ سے چالیس روپیہ
مدعاعلیہم کے واسطے عدالت میں جمع کریں بقیہ دعوی ڈسمس ہو - مدعیان
خرچہ اپنا اور مدعاعلیہم کا ادا کریں •

This may be translated into English in the following words almost literally:—

"It is ordered and decreed that the plaintiffs' claim for redemption of the mortgage be decreed, subject to the condition that the plaintiffs do deposit Rs. 40, in Court within 60 days from to-day for the defendants; the rest of the claim be dismissed, the plaintiffs paying their own costs and also the costs of the defendants."

I have quoted the exact terms of the decree in order to indicate the ground upon which my judgment will proceed, irrespective of the question

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* Second Appeal No. 35 of 1890 from a decree of E. J. Kitts, Esq., District Judge of Jaunpur, dated the 19th September, 1889, confirming a decree of Babu Promotho Nath Banerji, Munsiff of Jaunpure, dated the 15th July, 1889.

(1) 13 A. 300.

whether or not this decree was properly made or properly framed. The decree became final and its terms cannot be interfered with by the Court executing the decree.

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What happened next was that on the 21st May, 1889, the decree-holders, respondents, made an application for execution of the decree of the 2nd October 1888, depositing with their application the above-mentioned sum of Rs. 40. The said sum was apparently accepted by the Court and ordered to be deposited, but on the same day the office reported that the deposit was in contravention of the terms of the decree of the 2nd October 1888. But notwithstanding this, the Court executing the decree allowed the application to be registered by its order of the 22nd May 1889.

The application having thus been registered, objections were raised to it by the judgment-debtors (appellants before me) mainly upon the ground that, by the dint of the terms of **[402]** the decree itself, that decree ceased to be capable of execution, since the period for deposit had already elapsed.

These objections were disallowed by both the Courts below and this second appeal has been preferred against the order of the lower appellate Court confirming the decree of the Court of first instance.

Now it seems to me, in the first place, that the main ground upon which the judgment of the lower appellate Court proceeds is that under the second paragraph of s. 93 of the Transfer of Property Act (IV of 1882) the judgment-debtors, appellants, mortgagees, were bound to seek an order for foreclosure or sale of the property to which the decree of the 2nd October 1888, related. This seems to be an erroneous view of the law. A careful perusal of that paragraph indicates that an order for foreclosure or sale does not concern a mortgage such as that in this case, which is a usufructuary mortgage with possession. That paragraph has therefore no application, and I may say that the provisions of clause (*a*), s. 67 of the same enactment fortify the view that a usufructuary mortgagee is not entitled as such to have the right of bringing the mortgaged property to sale.

I need not dwell upon this aspect of the case because, the terms of the decree of the 2nd October, 1888, are themselves clear and specific, limiting the right of redemption to 60 days, and those terms, whether right or wrong, must be adhered to by the Court executing the decree.

In arguing the case, Mr. *Jwala Prasad* for the respondents has property conceded that no order was made by the Court extending the period mentioned in the decree for the payment of the mortgage-money, and the learned vakil also conceded that the mere circumstance of the deposit being received by the Court on the 21st May 1889, cannot amount to an order extending the period of 60 days which was prescribed by the decree.

The principle laid down by their Lordships of the Privy Council in a recent unreported case of * *Raja Har Narain Singh* v. **[403]** *Chaudhrain Bhagwant Kuar* (decided on the 27th January 1891), is that when a period is fixed, as in that case it was fixed, by order of the Court under s. 521 of the Code of Civil Precedure for delivery of an award, and that period has elapsed, a subsequent granting of another period cannot amount to an extention of time already elapsed.

Applying the principle of that ruling to the present case, I am of opinion that after the lapse of 60 days allowed by the decree of the 2nd October 1888, which decree became final, the decree-holders, respondents,

* Since reported, 13 A. 300.

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forfeited their right to execute the decree, and that the order of deposit made so late as 21st May 1889, by the Court executing the decree, could not cure the effect of the lapse of the period.

The proper order to be made in this case was that the application for execution should stand dismissed.

I make that order now by saying that I decree the appeal, and, reversing the decrees of both the lower Courts, direct that application for execution stand dismissed, and that the decree-holders, respondents, do pay the costs of this litigation in all the Courts to the judgment-debtors, appellants.

Appeal decreed.

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13 A. 403 = 11 A.W.N. (1891) 141.

APPELLATE CIVIL.

Before Mr. Justice Straight.

USUF KHAN AND OTHERS (*Defendants*) *v.* SARVAN AND OTHERS (*Plaintiffs*).* [15th June, 1891.]

Occupancy holding, transfer of—First and second mortgages of occupancy holding—Suit by second mortgagee to eject first mortgagee in possession.

Where an occupancy holding was mortgaged under two successive mortgage-deeds to different parties, and the mortgagees under the first mortgage having been put in possession, the mortgagees under the second mortgage sued to eject them—,

Held, that, both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants, who were in possession, had a right, as against the plaintiffs, to retain possession.

THE facts of this case are fully stated in the judgment of Straight, J.

[404] Mr. *Amir-ud-din*, for the appellants.

Babu *Durga Charan*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This appeal has reference to a suit brought by the plaintiffs-respondents upon a basis of a mortgage for a period of ten years of an occupancy holding of Musammat Sugra, dated the 30th September 1886.

Musammat Sugra apparently acquired the occupancy right of one Basawan on the 5th May 1874, and that person had, prior to the sale to her, mortgaged possessorily the occupancy holding under two mortgages. On the 10th March 1885, Musammat Sugra mortgaged the occupancy holding with possession to the defendants-appellants for the sum of Rs. 599-10-6, which amount included the sum of Rs. 85-10-6 paid in respect of one prior mortgage and Rs. 299 paid in respect of the other, and there was a present advance of Rs. 115 in cash. Now I have said that under the mortgage of the 10th March 1885, the defendants-appellants became entitled to possession of the occupancy holding, and we must take it from the form the decrees of the two lower Courts have taken that they were of opinion that the defendants got possesion and were in possession at the date of suit. This explains the alternative prayer of the plaintiffs to their claim

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* Second Appeal, No. 1557 of 1888, from a decree of Maulvi Sayyid Akbar Husain, Officiating Subordinate Judge of Ghazipur, dated the 16th July 1888, confirming a decree of Sayyid Zain-ul-Abdin, Munsif of Korantadih, dated the 28th April 1888.

for declaration of title, if in possession, namely, that if found to be out of possession their title be declared, and they be given possession. Both the Courts below have found for the plaintiffs and have given a decree for ejectment of the defendants. This appeal is preferred to this Court by the defendants, and the ground upon which it has been put, and which seems to me to be a substantial and sound ground, is that the plaintiffs on the one hand by a later document being transferees from an occupancy tenant, and the defendants on the other hand by an earlier document being transferees of an occupancy tenant and in possession of the occupancy holding, they cannot be disturbed by a party like the plaintiffs who have an infirmity in their title created by the provisions of s. 9 of the Rent Act; that is to say, if the plaintiff is a transferee of an occupancy tenant as prohibited by s. 9 of the Rent Act he has no title that he can sustain in a [405] Court of justice. Now I am committed to this view that a lessee for a term of years, as in this case, for a term of 10 years, is a transferee of the right of occupancy. I have already expressed the view that I take upon the point in *Wali Muhammad* v. *Raghubar* (1) and *Nugpal* v. *Sital Puri* (2) and also expressed my views in the Full Bench ruling in *Abadi Husain* v. *Jurawan Lal* (3) which views, I may remark in passing, were not given expression to without due advertence to s. 117 of the Transfer of Property Act. According to these rulings I am committed to the opinion that a lease of an occupancy holding of a term of years is a transfer, in other words, that, as contemplated by s. 9 of the Rent Act, it is a transfer of a right of occupancy, that is to say, of a right to occupy the land. Now s. 9 was, in my opinion, framed in the interests of the persons who were jointly interested in the cultivation with those who had the occupancy right, and it was intended to limit the transfer of the occupancy right within a certain circumscribed area of persons who are mentioned in the section. As I pointed out to the learned pleader for the plaintiffs-respondents, if a lease was made by an occupancy tenant for a period of 10 or 20 years, as the case might be, of an occupancy right, the interest of the persons who would be entitled upon the occupancy tenant's death to take the occupancy holding might be very seriously prejudiced. In the present case, a *pardanashin* lady was the occupancy tenant and it might well be that the party who would succeed upon her death would be a male who would wish for his personal advantage and profit to cultivate the occupancy holding with his own hand. I have heard nothing in the course of the discussion of the case which leads me to depart from the opinion that I have expressed in the two rulings to which I have referred. I think therefore that where there is a conflict between two wrongdoers, as the plaintiffs and the defendants are, the person who is in possession of the property is entitle to be maintained in possession, and that the plaintiffs in this case are not entitled to succeed. This being so, I [406] decree the appeal, reverse the decrees of both the Courts below, and dismiss the plaintiffs' suit with costs in all the Courts.

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KNOX, J.—As regards the facts of the case I will not recapitulate them, as I agree entirely with my brother Straight in the view that he has taken of them, and I only propose adding what I consider to be the state of the law as it now stands. As regards the question whether or not the right of occupancy which the law has conferred upon occupancy tenants is capable of transfer by way of lease or not, I hold that there can be no other interpretation of the word transfer than the one which includes

(1) 9 A. W.N. (1889) 115. (2) 10 A.W.N. (1890) 3. (3) 7 A. 866.

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the process whereby one person conveys to another for consideration the right to cultivate the land, whether the right be so conveyed for one or more years. Under Act XII of 1881, s. 9, it is expressly stated that "The right of tenants at fixed rates may devolve by succession or be transferred. No other right of occupancy shall be transferable in execution of a decree, or otherwise that by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein."

I do not intend now to discuss what was the object in view of those who framed the law. I have to deal with the words of the Act as they stand, and I can find nothing in the Act which entitles me to construe the word transfer otherwise than it is generally accepted in all statues so far as I know. It is contended that the chapter relating to leases contained in Act IV of 1882, so far as these provinces are concerned, is not applicable to agricultural leases, and the contention is that the definition of lease contained in s. 105 is therefore not applicable to agricultural leases; but I do not see how this alters the question. Granted that the definition contained in s. 105 is not to be applied to agricultural leases, we are driven back to the construction of the words transfer and transferable in the way such words are ordinarily interpreted. I also concur in holding that in the case of two wrongdoers the person in possession is entitled to be maintained in possession.

For these reasons I entirely concur in the order made by my learned brother.

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13 A. 407=11 A.W.N. (1891) 46.

[407] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RUSTAM ALI KHAN (*Defendant*) *v.* ABBASI BEGUM (*Plaintiff*).*
[25th June, 1891.]

Wajib-ul-arz, effect of as evidence of village custom—Wajib-ul-arz not signed by lambardar or co-sharers—Construction of wajib-ul-arz.

Where a *wajib ul-arz* was not signed by the lambardar or by any of the co-sharers of the village for which it was framed, but was found to have been in existence without having been questioned by any of the parties who might have been affected thereby for a period of some thirteen years: *Held* that the *wajib-ul-arz* might be taken as *prima facie* evidence of the custom of the village for which it was framed.

The said *wajib-ul-arz* contained a clause relative to pre-emptive rights to the following effect:—" When any *muafidar* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it, and if he does not take it, then another man who desires to take it, takes it." *Held* that this clause was declaratory of the village custom and that it was not intended thereby to adopt the Muhammadan law of pre-emption.

THE plaintiff-respondent sued (on the 9th November 1889) to enforce her right of pre-emption in respect of certain land sold by two of the defendants to the third, alleging that she was a sharer in the land sold and, as such, entitled to pre-empt under the terms of a certain *wajib-ul-arz* prepared in 1874, and that, immediately on hearing of the sale, she had

* Second Appeal, No. 1375 of 1888, from a decree of W.H. Hudson, Esq., District Judge of Farakhabad, dated the 26th May 1888, confirming a decree of Babu Madan Mohan Lal, Munsif of Farakhabad, dated the 12th December 1887.

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tendered the price to the defendants. The defendant-vendee alone appeared and pleaded that the plaintiff was not a co-sharer; that the land was *muafi* and no *wajib-ul-arz* was recorded in respect thereof; and he also traversed the plaintiff's allegation of tender of price. The *wajib-ul-arz* in question was not signed by any of the co-sharers but was prepared by the Settlement Officer and attested by the patwari. The Court of first instance (the Munsif of Farakhabad), holding the *wajib-ul-arz* on which the plaintiff's claim was based to have been prepared in accordance with law, decreed the claim. The defendant-vendee appealed to the District Judge, who upheld the decision of the Munsif and dismissed the appeal. The defendant thereupon appealed to the High Court.

[408] Mr. *C. H. Hill* and Pandit *Ajudhia Nath*, for the appellant.

The Hon'ble Mr. *Spankie*, for the respondent.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This is a seccond appeal arising out of a suit for pre-emption brought upon a *wajib-ul-arz*. The appellant before us is the defendant. The *wajib-ul-arz* in question was framed in May 1874. It was not executed by any *lambardar* or any of the co-sharers. It has not been shown that any person interested in the *mahal* took any steps to challenge the correctness of the *wajib-ul-arz* before the settlement was confrmed by the Local Government, or indeed until the legality of the *wajib-ul-arz* was challenged by the defendant in this suit. Although, no doubt, it would have been better if the *wajib-ul-arz* had been attested by the *lambardar* or *lambardars* if any, and by the co-sharers, or some of them, we cannot, at this distance of time, and having regard to the fact that the correctness of the *wajib-ul-arz* remained all these years unchallenged, hold that it is not *prima facie* evidence of the village rights and customs recorded in it.

The next question is, what is the meaning of the particular clause which relates to pre-emption? That clause is as follows:—"When any *muafidar* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it; and if he does not take it, then another man who desires to take it takes it." We cannot construe the clauses in a *wajib-ul-arz* as if they had been carefully prepared by a conveyancing counsel. We must try to find what was probably meant, so far as we can. Now, we think this clause shows that there was a local village custom of pre-emption, and that by that custom any shareholder in the *patti* was entitled to buy in preference to an outsider; and that the custom was not the custom of the Muhammadan law, pure and simple, but partook of the character ordinarily found in *wajib-ul-arzes*, and that it was the duty of the shareholder desiring to transfer to give a co-sharer an opportunity of purchasing. Every *wajib-ul-arz* has to be construed, so far as is possible, on its own wording. Few *wajib-ul-arzes* [409] which have come before us are worded precisely alike. This *wajib-ul-arz* in question was anterior to the issue of the rules to settlement officers of 1875. We accordingly, holding the views we do, dismiss this appeal with costs.

Appeal dismissed.

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APPEL-LATE CIVIL.

13 A. 409 = 11 A.W.N. (1891) 159.

13 A. 409=11 A.W.N. (1891) 159.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

ANGAN LAL (*Defendant*) *v.* MUHAMMAD HUSAIN AND OTHERS (*Plaintiffs*).* [15th May, 1891.]

Construction of document—Deed—Sale deed or deed-of-gift.

A deed which puported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—"Hath * * * nawasia pneki bai katai karke zar-i-samman tamam wo kamal wasul paker bakhsh diya aur hiba kardiya."

The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was apparently no evidence external to the deed that any consideration had passed between the parties.

Held by EDGE, C.J., and TYRRELL and KNOX, JJ., that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale.

Per MAHMOOD, J., *contra*.—The lower appellate Court having found that no consideration had passed, the deed must be considered as a deed-of-gift, though wearing the appearance of a sale-deed, and, possession not having been given, under Muhammadan Law, the gift was invalid.

THE facts of this case sufficiently appear from the judgments of Edge, C.J., and Mahmood, J.

Mr. *T. Conlan* and the Hon'ble Mr. *Spankie*, for the appellant.

The respondents were not represented.

JUDGMENTS.

MAHMOOD, J.—This is an appeal preferred from the judgment of the late Mr. Justice Brodhurst as to the interpretation of a deed to which reference will be made by me presently.

The case out of which the appeal arises was a second appeal, and it came before my brother Straight and the late Mr. Justice Brodhurst, and they dissented in opinion and the decree passed by Mr. Justice Brodhurst was that the appeal should stand dismissed. [410] The judgment of my brother Straight was that the appeal stand decreed and the plaintiff's claim should also stand decreed.

This is the state of things under which this appeal has been preferred as an appeal under s. 10 of the Letters Patent. What I have to consider is, whether the appeal should or should not prevail, and, in doing so, it is important to state the facts which require consideration for the purpose of deciding the point of law which arises in the case. Those facts are these:—

On the 3rd June, 1878, Musammat Wilaiti Begam executed a document in favour of her daughter's daughter, Ilahi Begam, purporting to be a deed of sale in lieu of Rs. 700, and that document was duly registered. Matters stood thus when, on the 1st August, 1884, Ilahi Begam, the vendee of the deed of the 3rd June, 1878, executed a document purporting to be a deed of sale in favour of Angan Lal, present plaintiff-appellant, for a sum of Rs. 1,000, and this document was also registered. This happened as any other documents of this description may be executed, and naturally

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* Appeal No. 26 of 1889 under section 10 of the Letters Patent.

as too often occurs in India, such documents are questioned as to their validity. **1891 MAY 15.**

The plaintiff came into Court claiming possession of property which he alleged that he had purchased from Ilahi Begam under sale-deed of the 1st August, 1884, that is to say, such rights as she, Ilahi Begam, possessed under the earlier deed of 3rd June, 1878. **APPELLATE CIVIL.**

The suit was resisted upon the ground of a total denial of title in the plaintiff, either under the deed of the 3rd June, 1878, or the deed of the 1st August, 1884, and it is clear that under these circumstances it was for the plaintiff to prove, and not for the defendants to disprove, that the plaintiff had full title under either of those deeds. **13 A. 409 = 11 A.W.N. (1891) 159.**

Now this being so, it is important in the first place to consider the terms of the deed of the 3rd June, 1878. The document need not be read fully, though it is necessary before I interpret it to say that I have read the whole of it. It is necessary also to site some [411] parts of the document upon which Mr. *Conlan* has relied. The words of the document are these:—

هاتهه نواسي اپني کے بیع قطعي کر کے زر ثمن تمام و کمال وصول پاکر
بخش دیا اور هبه کر دیا اور شی مبیعه مذکوره کو اپنے قبضه سے نکالکر بیچ
قبضه مشتریه مذکوره دیدیا اور مشتریه مذکوره شی مبیعه مذکوره پر مثل ذات
مجهه بائع قابض اور دخیل هووے بعد وقت بیع سے شی مذکوره میں کچهه
حق و حصه مجهه بائع باقي نهیں رها اب مجهکو اور میرے ورثاء کو صحت
اِس بیعنامه و بخشش زر ثمن میں کچهه قیام عذر و اطراف نهیں هی اور
نه هوگا لهذا یهه چند باتیں بطور بیعنامه و بخشش زر ثمن کے لکهه دي هی
که سند هو اور وقت حاجت کے کام آویں فقط تحریر ۳ جون سنه ۱۸۷۸ ع*

Now these words or words of which the meaning requires specific determination, because, indeed, if they mean that the document was a deed of sale, then, undoubtedly, the conclusion is right that Angan Lal is entitled to his decree.

Reading these words as I have done, they leave no doubt in my mind that it was not a deed of sale, though it was a pretended deed of sale, as apparent from the deed itself; and it was, as has been held by the Courts below and by Mr. Justice Brodhurst in this Court, simply a deed of gift. It is therefore important to consider whether or not there should have been delivery of possession under the deed.

Now upon this point there has been some doubt as to whether or not the Muhammadan law applies to such a case. A Full Bench of this Court has decided the question in the affirmative in cases of pre-emption (*Musammat Chandu* v. *Hakim Alimuddin*) (1), the same principle has been applied also to questions of gift (*Nizamuddin* v. *Zabeda Bibi*) (2), and so far as the interpretation of the document now in question is concerned, the Muhammadan law is the law which governs the adjudication of the case; not only because this may be required by section 37 of the Civil Courts Act (XII of 1887), but also, because, even if there is no specific statute law, I think it has been held by their Lordships of the Privy Council that in such cases respecting transactions between [412] Muhammadans

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(1) N.W.P.H.C.R. (1874), 28. (2) 6 N.W.P.H.C.R. 338.

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it is only administering the rules of justice, equity and good conscience to bear in mind what rules that law requires.

This being so, I have in the first place to determine whether the deed, as I have read it, is a deed of sale or a deed of gift. Mr. *Conlan* has referred us to the case of *Rahim Bakhsh* v. *Muhammad Hasan* (1); the learned Counsel has argued with such ability that the judgment does in some parts of it give colour to the contention which is necessary for his case. The matter, however, is clear from the judgment in that case that, before a deed can be interpreted to be a deed of gift, or *Hiba-bil-aiwaz* or a deed of sale, it must be known what the conditions were under which the deed was executed, what its terms were, and what the consideration was upon which the contractual relation created by the engagement was established. So considered, the ruling does not support the learned Counsel. The question then is, is the deed of the 3rd June, 1878, a deed of gift or not? I have no hesitation in holding that when property is conveyed by what is merely called a gift, but is in exchange of property which is taken in consideration, that consideration being of a pecuniary character, the transaction is one called *Hiba-bil-aiwaz*, which stands upon the same footing as sale under the Muhammadan law. Equally am I certain that when there is only a pretension of such a state of things having occurred, and there is no proof that such things did occur, and when the document itself shows that such things did not occur, the transaction is neither a *Hiba-bil-aiwaz* nor a sale.

This, I understand, is what the learned Judge of the first Court held. Also I understand this interpretation of the deed was upheld by the lower appellate Court. I also understand that Mr. Justice Brodhurst, dealing with the findings of the Court below, held, to use his own words :—

"Whatever the intention of Musammat Wilaiti Begam in executing the deed may have been, I am quite satisfied, from her never having caused mutation of names in the Government records nor transferred possession up to the present time, that she had no [413] intention to relinquish possession of the property during her lifetime. Considering the near relationship that existed between the alleged vendor and vendee, the fact that the whole of the consideration money is said to have been immediately returned by the vendor to the vendee, and the other circumstances that have been above referred to, I think the learned Subordinate Judge has correctly found that the deed of the 3rd June, 1878, is in reality nothing more than a deed of gift, and that it is void owing to possession not having been given."

In this finding I entirely concur. Upon a full consideration of the deed, and also upon the judgments which have been delivered in the Courts below, my own view is that the finding is one which must be accepted by us in second appeal, because it is a finding of fact, not so far as the question of the interpretation of the deed is concerned, but certainly so far as the non-delivery of possession under the deed of the 3rd June, 1878 is concerned. In saying so, the Privy Council ruling in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2) is helpful to explain how far Courts in second appeal can interfere with findings of fact. I suppose after this finding it will not be denied that no possession whatever was given by the so-called vendor to the so-called vendee under the deed of the 3rd June, 1878, up to the date of the suit, which was the 12th January, 1886, for this is a finding which cannot be questioned in second appeal. I have no doubt that the deed is not a deed of sale, because though it pretends to be a deed of sale, it

(1) 11 A. 1.

(2) 18 C. 23.

contains in itself a statement that the consideration for such sale had been gifted away or relinquished or excused. This being so, I cannot hold it to be other than a simple deed of gift, as the Courts below have held, and, holding so, possession was absolutely necessary under the Muhammadan law which governs such a case. And it follows that the doctrine of notice applicable to *bona fide* transfers for value has no application to this case, there being no possession or ostensible ownership in the donee under whom the plaintiff claims.

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[414] As to the necessity for possession for completing the right under a simple gift, the Legislature has had to consider this position in defining the meaning of gift in s. 122 of the Transfer of Property Act (IV of 1882); but while making this definition and, indeed, when framing the whole of the Act, they were careful, and for good reasons, to frame s. 129, which runs as follows:—

"Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by s. 123, any rule of Hindu or Buddhist law."

In the present case the findings of both the Courts below are, and the deed itself stated, that there was no passing of consideration and that there was no evidence to show that such consideration had passed. I think Mr. Justice Brodhurst was right in holding upon these findings that it was simply a deed of gift or *Hiba* under the Muhammadan law, and not *Hiba-bil-aiwaz*, that is to say, a contract which approximates a contract of sale.

This is an appeal under the Letters Patent, and I think, therefore, after what I have said, that this appeal should stand dismissed, but that, as no one appears for the respondents, no order as to costs is necessary.

EDGE, C. J.—This appeal has arisen out of a suit which was brought by the plaintiff against one Wilaiti Begam, her grand-daughter, Ilahi Begam, and certain other persons, and in that suit the plaintiff claimed possession and a decree to eject the defendants. The plaintiff alleged his title to be by a purchase for valuable consideration under a deed of the 1st August 1884 from Ilahi Begam, and under a deed of sale of the 3rd June 1878 made by Wilaiti Begam in favour of Ilahi Begam. The plaintiff's title was denied by Wilaiti Begam. The other defendants did not dispute his title. It has been found by the Courts below that the plaintiff paid the Rs. 1,000 consideration of the sale-deed for the sale of the property to him by the deed of the 1st August 1884. It has been found also that the alleged consideration, Rs. 700, mentioned in the deed of the 3rd June 1878, was not paid; and it has also been found [415] that possession had never been given by Wilaiti Begam to Ilahi Begam, or any one representing Ilahi Begam. The Courts below came to this conclusion and found that the deed of the 3rd June 1878 was not in fact a deed of sale but was a deed of gift, and on these findings the first Court dismissed the plaintiffs suit and the second Court dismissed his appeal. The appeal in this Court came on to be heard before my brother Straight and the late Mr. Justice Brodhurst. Mr. Justice Brodhurst accepting the finding that no possession had been given, and that no consideration had passed under the deed of the 3rd June 1878, and misinterpreting some passages in the judgment of one of the Courts below, which he read as a finding that the sale of the 1st August 1884 was collusive and fraudulent, delivered judgment dismissing the appeal. My brother Straight, on the other hand, held that the question of fraud and collusion did not arise

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in the case, as indeed it did not; and that there was no evidence to show that the consideration for the deed of the 3rd June 1878 had not been paid. He came consequently to the conclusion that the appeal to this Court should be allowed. Under the circumstance of this difference of opinion the appeal to this Court stood dismissed.

This appeal has been brought under s. 10 of the Letters Patent. In order to clear the ground, I may say that no one suggests that the finding of fact that possession never was given under the deed of the 3rd June 1878 should or could be questioned in second appeal. No one disputes the fact that, if the document of the 3rd June 1878 was a deed of gift, the Muhammadan law would apply, and, there having been no possession, the gift would fail. But the point which has been argued before us is simply this. It is contended, and, I think, rightly, that a finding of fact where there is absolutely no evidence to support it can be questioned in second appeal, because it is then a question of law. It is beyond doubt in this case that there has been no evidence given on the one side or the other to show either that the consideration mentioned in the deed of the 3rd June 1878 was paid or that it was not paid, beyond the evidence which the deed affords on the face of it. In this [416] light we have to construe to the best of our ability the deed in question; and on this part of the case I may say that I speak with very considerable diffidence, knowing little or nothing of the vernacular, and sitting beside my brother Mahmood, who is a master of his own language. However, I have to give my opinion for what it may be worth. Now there is one thing that is quite clear, that the deed professes to be on the face of it a sale-deed. It bears the stamp which was required for a sale-deed, in respect of such consideration as was mentioned in it. The stamp would have been insufficient if the deed had been a deed of gift. This is only a slight indication to my mind as to what the parties intended the deed in question to be. Then we come to the actual words of the deed. In express terms it states that the consideration had been received. This is beyond doubt. But, following these words, are the words which have raised a doubt in this case. My brother Mahmood kindly placed before me two different dictionaries as authority, and in each of those dictionaries I find that the words *bakhsh dena* bear the meaning 'to give, to grant, or to forgive.' There are other words which follow them and which bear the meaning, so far as I can ascertain from the dictionaries, of granting or conferring. Then the question is, do the words to which I have referred mean, read with the context, that the consideration was foregone, in the sense that it had never been received, or is the meaning, whether it represents the truth or not, that the consideration had been received and had been given back or returned. Beyond the wording of the deed there is no evidence as to what the transaction was. It appears to me, forming the best judgment I can, that whether the parties were in fact carrying out a transaction of sale or a transaction of gift' the passage read as a whole is evidence that a sale at a fixed price was made and the consideration having been paid was returned to the vendee. That is my interpretation of the particular document. One may suspect, looking at the document, that it may have been in truth merely a transaction of gift. On the other hand, against such an impression being well-founded, there is the stamp, and there is the fact which has been found by the Courts below, that Wilaiti Begam executed two almost precisely similar documents at about the same [417] time in favour of other members of the family, and that those members of her family

made use of them as sale-deeds and sold the property to others. In this case it appears to me that the *onus* of proving that there was no consideation paid for the deed of the 3rd June 1878, and that it was a deed of gift and not a deed of sale, was upon Wilaiti Begam. It is quite true, as my brother Mahmood has said, that a plaintiff coming into Court in a suit for ejectment is bound to prove his title, but in this case as part of the proof of title against the only person who disputed it the plaintiff put in evidence the deed which had been executed by Wilaiti Begam on the 3rd June 1878, and which on the face of it, truthfully or not, stated most distinctly that she had received the Rs. 700 as consideration. It was, in my judgment, under these circumstances for Wilaiti Begam to show that the statement in the deed under her hand was incorrect and that no consideration had ever been paid, and until she established that by evidence, I think a Court of law was bound on the document to find, as against her, that the consideration had passed, she having stated the fact in the deed under her own hand. There is only one other matter to which I need refer, and it is this. Undoubtedly in cases where we may apply the rules of justice, equity and good conscience, we are bound to apply them, and if it be the fact that the deed is ambiguous on the face of it, and that it may be considered by one person as a deed of gift and by another as a regluar deed of sale, in my opinion, according to justice, equity and good conscience, we should hold against the person who executed the deed that it was a deed of sale, and so protect the interests of the innocent purchaser who treated the deed as a deed of sale, and, acting upon it as such, paid Rs. 1,000 consideration for the transfer of the property to him. For these reasons I would allow the appeal and decree the plaintiff's suit for possessions with costs in all the Court.

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TYRRELL, J.—I entirely agree with everything that has fallen from that learned Chief Justice, and I would only add a few words on the terms of the deed in question. Looking to the phraseology of the deed, I am of opinion that my brother Straight was right in [418] regarding it as a sale-deed. The terms seem to me to indicate explicity that Musammat Wilaiti Begam made an absolute sale of certain property for Rs. 700 to Ilahi Begam, and, "having received the sale consideration in full," granted that money to her vendee. She further stated in the deed that "I, the vendor, have no share or right in the sold property since the time of the sale. Now I and my heirs neither have nor shall have any objection to the validity of the sale and of the gift of the sale consideration. Therefore I have executed these few words by way of a deed of sale and gift of sale consideration." The vernacular runs as follows :—

"Hath * * * nawasi apneki bai katai karke zar-i-samman tamam wa kamal wasul pakar bakhsh diyaaur hiba kardiya." Again, "lihaza yih chand batain bataur bainamah wa bakhshish zar-i-samman ki likhh din," and again, "Sihat is bainamah wa bakhshish zar-i-samman men * * * "

The first sentence avers that the "sale was complete or absolute (bai katai) ; that the price had passed (wasul pakar), and was afterwards given and presented to the vendee." It was suggested that "bakush" in this passage should be read in its secondary sense of "excused or forgiven ;" but here it is coupled with the words "aur hiba kardiya," which can only mean "I have given," and I must therefore interpret these words "Bakhsh diya" as also meaning "I have given." The second phrase distinctly defines the deed as an instrument of double import, first, of sale to the

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vendee, and secondly, of gift to her of the consideration money; and the third paragraph binds the vendor not to question this "sale-deed" and "gift of the price." After execution, this instrument was registered as a sale-deed, and I find that, while it contains all the constituents of a "sale" as defined in sec. 54 of the Transfer of Property Act, it does not fall under the definition of a gift as given in s. 122 of the same Act. It is, of course, true that s. 129 of the Act forbids me to apply any of the sections 122 to 128 so as to affect any rule of Muhammadan law; but I am not using s. 122 for any such purpose, but as a guide only to the proper definition of a gift, and I look similarly to s. 54 for that of a sale, there being no limitation to latter section such as is found in s. 129 in regard to gift. The [419] deed in my judgment is in terms and effect a deed of sale, and I have no materials for forming an opinion whether any, or what, occult meaning or design may underlie these terms. I therefore concur in the order of the learned Chief Justice.

KNOX, J.—I entirely concur with all that has been said by the learned Chief Justice with reference to the interpretation that should be put upon the document and upon the consequences which should follow from that interpretation. I need not allude to the language in which the document is couched, because it has been given in full by my brother Tyrrell, and I agree with him in the interpretation which he has placed upon the words of the document. Whatever may have been the real nature of the transaction, I am of opinion that it was intended by the executants of the document that it should bear to the word the face of a deed of sale and not that of a deed of gift. It was, under the law then current and directing what stamp such deed should bear, stamped as a deed of sale and not as a deed of gift. It was registered, and it seems to me that any person who sought to know under what liabilities the property stood, or to ascertain who was entitled to it, would have had no means of knowing the nature of the transaction except from the deed now before us, and, on this ground, as well as on the grounds already stated, I think it would be most inexpedient to put upon it any interpretation other than that of a deed of sale. I therefore concur in the order which the learned Chief Justice and my brother Tyrrell propose to pass in the case.

Appeal decreed.

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13 A. 419 (F.B.)

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

JANGU AND OTHERS (*Defendants*) *v.* AHAMD ULLAH AND OTHERS (*Plaintiffs*). [4th November, 1889.]

Muhammadan Law—Public mosque—Right of all Muhammadans without distinction of sect to use such mosque for the purposes of worship—Right to say "amin" loudly during worship.

Where a mosque is a public mosque open to the use of all Muhammadans without distinction of sect, a Muhammadan who, in the *bona fide* exercise of his [420] religious duties in such mosque, pronounces the word "*amin*" in a loud tone of voice, according to the tenets of his sect, does nothing which is contrary to the Muhammadan ecclesiastical law or which is either an offence or civil wrong, though he may by such conduct cause annoyance to his fellow-wroshippers in the mosque. But any person, Muhammadan or otherwise, who goes into a mosque

not *bona fide* for religious purposes, but *mala fide* to create a disturbance there and interferes with the devotion of the ordinary frequenters of the mosque, will render himself criminally liable.

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[R., 35 M. 681 (683)=18 Ind. Cas. 195 (196)=15 P.R. 1902 (F.B.) Cr.=104 P.L.R. 1902.]

THE plaintiffs in this case, members of a sect of Muhammadans calling themselves *Mowahhids* or *Gair Mokallids*, sued the defendants, who were of another sect, called *Hanafis* or *Mokallids* for a declaration that they were entitled to worship in a certain mosque, and, in the course of prayers in such mosque, to pronounce the word '*amin*' audibly. The defendants pleaded that the suit was not cognizable by a Civil Court; that the plaintiffs had no concern with the mosque, which had been built by Hanafis, and in which they, as Hanafis, had a right to worship to the exclusion of other sects. The Court of first instance (the Munsif of Meerut) found that the suit was cognizable by a Civil Court, and gave the plaintiffs a decree in the following terms :—"It is therefore ordered that the plaintiffs are entitled to say the word '*amin*' loudly, but not at the top of their voice, nor so as to trouble the ears of a fellow-worshipper."

On appeal by the defendants, the Subordinate Judge, agreeing with the Court of first instance that the suit was cognizable by a Civil Court, found that the mosque was a public mosque, built about 400 years ago by a person whose sect was unknown, and that neither party had established an exclusive right, by prescription or in any other way, to worship in it; but that both parties as members of the Muhammadan community had an equal right to perform their prayers and worship there according to the rites and ceremonies of their respective sects. The Subordinate Judge accordingly modified the decree of the Munsiff in so far as that decree restricted the tone of voice in which the plaintiffs were entitled to say '*amin*' and gave the plaintiffs the decree which they prayed for: also granting an injunction against the defendants restraining them from interfering with the plaintiffs going into the mosque, and worshipping there according to the usages of their sect. The defendants then appealed to the High Court.

[421] The appeal came on for hearing before Mahmood and Brodhurst, JJ., who, by their order of the 8th June 1887, referred it to the Full Bench for disposal.

Pandit *Sundar Lal* for the appellants.

The Hon'ble Mr. *Conlan* and Mr. *Amir-ud-din*, for the respondents.

JUDGMENT.

EDGE, C.J.—This was a suit which originated in an order passed by the Magistrate of Meerut in 1884, by which he bound the parties before him over to keep the peace, and prohibited the plaintiffs from repeating aloud, in a certain mosque, the word '*amin*' at the end of the prayer.

The plaintiffs brought this suit for a declaration of their right to repeat the word aloud in the mosque, and to restrain the defendants from interfering with them in the performance of their religious duties. There was another question, namely, as to raising the hands, which does not arise in the appeal before us. The plaintiffs succeeded in the Munsif's Court, which decided that they were entitled to say the word '*amin*' loudly, but not at the top of their voice, nor so as to trouble the ears of their fellow-worshippers—a decision probably right enough in intention, but so vague as to leave the parties very much where they were before; beyond giving the plaintiffs a right to repeat the word '*amin*' aloud. There was an appeal by the defendants

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from the decree of the Munsif, and objections were filed to the portion of the Munsif's decree which limited apparently the tone of voice in which the word '*amin*' might be repeated. In first appeal the Subordinate Judge of Meerut found as a fact that the mosque in question was public mosque, in which all the Muhammadans were entitled to say their prayers. The defendants here contend that the mosque was one the use of which had been restricted to those Muhammadans who followed doctrines of ritual of Imam Abu Hanifa. The finding of the Subordinate Judge disposed of this contention, and that finding is in the following terms :—

"The conclusion I arrived at is that mosque was originally built some 400 years ago by some Muhammadan, whose name no [422] one is able to give, nor is it known to which particular sect he hebonged, and that it has been since used as a public place of worship without distinction by all the Muhammadans who cared to go there."

Now this is a finding that it is a public Muhammadan mosque ; as I read the written statement of the defendants, it is not suggested that the plaintiffs *mala fide* repeated aloud during their devotion the word "*amin.*" It is only alleged that the plaintiffs dissented from the ritual which had been observed. It is found as a fact that the plaintiffs are Muhammadans, and it is not found that they either did or desired to do anything in the mosque which was contrary to the Muhammadan ecclesiastical law. I am of opinion, therefore, that the appeal must fail. There can be no doubt that a Muhammadan or any one else who went into a mosque not *bona fide* for religious purposes, but *mala fide* to create disturbance there, and interfered with the devotion of the ordinary frequenters of the mosque, would bring himself within the reach of the criminal law. The only order which we pass here is that the appeal be dismissed with costs.

Straight, Brodhurst, and Tyrrell, JJ., concurred.

MAHMOOD, J.—I entirely agree in what has fallen from the learned Chief Justice, and should not have added anything but for the circumstances that I was a party to the order of reference and also because the case relates to a subject upon which, on a former occasion, I was unfortunately unable to agree with the late learned Chief Justice of this Court and his honorable colleagues, who delivered their judgments in *Queen-Empress* v. *Ramzan* (1) without having had an opportunity of considering the views which I expressed in my judgment in the same case. I have referred to that case, though it came before this Court in its Criminal Jurisdiction, because the point there raised was identical with the one which has arisen here in the form of a civil suit, and which we in the Full Bench are now called upon to determine. The principle of deciding the question must, however, be the same in both cases.

[423] The main object of the suit is to obtain a declaration that the plaintiffs are entitled to worship in the mosque pronouncing the word '*amin*' audibly in the course of the prayers, and also an injunction restraining the defendants from obstructing the plaintiffs in performing worship in the mosque according to their tenets.

The suit was resisted by the defendants mainly upon the ground that the suit was not cognizable by the Civil Court, that the plaintiffs were heretics and were not entitled to say '*amin*' aloud in the mosque.

The controversy thus raised between the parties is exactly of the same nature as that which I had to consider in the case of *Queen-Empress* v. *Ramzan* (1); but the original Arabic authorities which I quoted in delivering my judgment in that case are not to be found in the published

(1) 7 A. 461.

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report. The original judgment, however, is now before me, with the original authorities, and I wish to repeat them here, with such introductory passages from my judgment as are equally pertinent to this case. In introducing those texts, I said (at p. 470) that the word *amin* is of Semetic origin, being used both in Arabic and Hebrew, and has been adopted in prayers by Muhammadans as much as by Christians.

The word does not occur in the *Kuran*, but, in conformity with the "*Sunna*," or the practice of the Prophet, it is regarded by Muhammadans as an essential part of the prayers, as a word representing earnestness in devotion. The word is pronounced at the end of the first chapter of the *Kuran*, which consists of the following prayers.—

"Praise be to God, the Lord of all creatures; the most merciful; the king of the day of judgment. Thee do we worship, and of thee do we beg assistance. Direct us in the right way, in the way of those to whom Thou hast been gracious, not of those against whom Thou art incensed, nor of those who go astray."

I then went on to point out that the *Sunnis*, or followers of the Prophet's traditions, recognize as great exponents of the orthodox doctrines four principal *Imams* or founders of the schools of juris-[424] prudence, namely, *Abu Hanifa*, *Shafai*. *Malik*, and *Hanbal*, all of whom flourished within the first two centuries of the Muhammadan era, and whose doctrines have been accepted by the bulk of the Muhammadan population of the world.

The doctrines of those *Imams* proceed upon the same principles, and the differences of opinion are limited only to matters of detail, such as the form or manner of the performance of religious rituals.

In the case of *Queen-Empress* v. *Ramzan* (1) (see p. 471) I held, what I hold now, that it is an indisputable matter of the Muhammadan ecclesiastical law that the word '*amin*' should be pronounced in prayers after the *Sura-i-Fàteha* or the first chapter of the *Kuran*, and that the only difference of opinion amongst the four *Imams* is, whether it should be pronounced aloud or in a low voice. The *Hedaya*, which is the most celebrated text-book of the Hanafi school of law, lays down the rule in the following terms:—

"When the *Imam* (leader in prayers) has said 'nor of those who go astray,' he should say "*amim*," and so should those who are following him in the prayers, because the Prophet has said that when the *Imam* says '*amin*' you must say '*amin*' too. But this saying of the Prophet does not support *Malik* as to the distinction (between saying '*amin*' aloud and saying it in a low voice) because the Prophet after saying 'when the *Imam* says—*nor of those who go astray*—you should say '*amin*,' also added that the *Imam* should pronounce it; and they (*i.e.*, followers in the prayers) should repeat it inaudibly. Such is the tradition which has been related by *Ibn-i-Masud*; and, moreover, the word is a prayer, and should therefore be pronounced in a low voice."*

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* إذا قال الامام ولا الضالين قال آمين و يقولها المؤتم لقوله عم اذا امن
الامام فامنوا ولا متمسك لمالك في قوله عم إذا قال الامام ولا الضالين فقولوا
آمين من حيث القسمة لانه قال في آخره فان الامام يقولها و يخفونها
لما روينا من حديث ابن مسعود و لانه دعاء فيكون مبناه على الاخفاء .
(هدايه جلد اول)

(1) 7 A. 461.

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[425] That this doctrine is the result of weighing the authority of conflicting traditions is apparent from the commentary of *Ibn-i-Human*, a celebrated author of the *Hanafi* school, on the passage of the *Hedaya* which I have quoted above, and I wish to quote the commentary also in order to show the manner in which such questions are dealt with in the Muhammadan ecclesiastical law. The commentary runs as follows:—

"He (author of the *Hedaya*) says that the followers in the prayer should also say it (*i.e., amin*): this doctrine is common to prayers which are repeated aloud and prayers which are repeated in a low voice when audible; but as to the latter class of prayers some have maintained that it (*amin*) should not be said, since loudness of voice is not applicable to them."*

The commentator then mentions the names of various traditionists who have differed as to whether the word *amin* should be pronounced aloud, and finally points out that the author of the *Hedaya* has only preferred the tradition as to its being pronounced in a low voice. He does not, however, say that the other traditions are untrustworthy or should be absolutely rejected. Indeed he could not say so, as these traditions are to be found in the most authoritative and celebrated collections of traditions (*Siha*) of *Bukhari* and *Muslim*, both equally acknowledged as accurate traditionists by all the schools of *Sunni* Muhammadans. The former of these in the chapter relating to the pronouncing of *amin* has the following:—

"*Ata* has said that *amin* is a prayer, and it was pronounced by *Ibn-i-zubair* and those who were behind him (in prayers), so much so that the mosque resounded. *Abu Huraira* used to ask the *Imam* aloud not to forsake him in pronouncing '*amin*.' *Nafe* has said that *Ibn-i-Umar* never omitted '*amin*;' and used to induce [426] others to say it, and that he had heard favourably about it from him as to its being beneficial (1)."

Sahib Muslim has the following tradition in regard to saying *amin*:—

Harmala bin Yhaya related to us that it was related to him by *Ibn-i-Wahab*, who said that he had been informed by *Amru*, that he had been told by *Abu Yunus*, who had heard from *Abu Huraira*, that the Prophet has said: 'Whenever any one among you says '*amin*' in prayers whilst the angels in heaven are saying it, and the two coincide with each other, then his past sins will be forgiven."—(2)

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* قوله يقولها المؤتم هذا إعم من كونه في السرية إذا سمعه أو في الجهرية و في السرية منهم من قال لا لان الجهر لاعبرته به (إبن همام حاشيه هدايه جلد اول)

(1) باب جهر الامام بالتامين قال عطاء أمين دعاء امن إبن الزبير و من ورائه حتى إن للمسجد لتحية و كان ابوهريره ينادي الامام لاتفتنى بآمين و قال نافع كان إبن عمر لا يدعه و يحضهم و سمعت منه في ذلك خيرا (صحيح بخاري)

(2) حدثني حرملة بن يحيى قال حدثنى إبن وهب قال اخبرنى عمرو ان ابا يونس حدثه عن ابي هريرة إن رسول الله ص قال إذا قال احدكم في الصلواة آمين والملائكة فى السماء آمين فوافق احديها الاخرى غفر له ما تقدم من ذنبه

(صحيح مسلم جلد اول)

This passage of *Sahib Muslim* is fully explained in his celebrated commentary of *Nawawi*, which deserves quotation here, as it explains exactly how the Muhammadan ecclesiastical law stands as to the pronouncing of *amin* in prayers :—

"In these traditions (*hadis*) is enjoined the pronouncing of '*amin*' after the *Sura-i-Fateha* (first chapter of the *Kuran*) both for the leader in prayer as well as those who follow him and also for him who may be praying singly. It is proper that the pronouncing of '*amin*' by the followers should be simultaneous with that of the leader in prayer, that is, neither before nor after, because the Prophet has said :—'When he (*Imam* says—*nor of those who go astray*—you should say *amin*. By saying when the *Imam* says '*amin*' you should also say it, is meant when he is [427] about to say it. It is the *Sunna* or the Prophet's precept both for the *Imam* and the person praying singly to say '*amin*' loud, and the same applies to the follower in prayer according to the correct doctrine. This is an explanation of our doctrine; and there is a general consensus of opinion among the faithful that for the person praying singly, as well as for the *Imam* and the followers in prayer which are repeated in a low voice, the word '*amin*' should be pronounced; and a vast number have maintained that the same is the rule for prayers which are repeated aloud. There is a statement of the opinion of *Malik* that the *Imam* should not say '*amin*' in prayers which are repeated aloud. *Abu Hanifa* and the *Kufis* and *Malik* in one of his statements of opinion maintain that '*amin*' should not be pronounced aloud: but there is a vast number who hold that it should be pronounced in a loud voice." *

This commentary on the *Sahib Muslim* is according to the *Shafai* school; but none the less is it considered orthodox and authoritative by all *Sunni* Muhammadans, which the parties to this suit are. The defendants state themselves as belonging to the *Hanafi* school, and it is only upon this ground that they obstruct the plaintiffs from worshipping in the mosque.

It is therefore necessary to consider whether they have any real or just cause of complaint against the plaintiffs. Upon this point I may repeat what I said in *Queen-Empress* v. *Ramzan* (1), as the [428] observations which I then made are equally applicable to the circumstances of the present case. In that case I said :—

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* في هذه الاحاديث إستحباب التامين عقب الفاتحة للامام والماموم والمنفرد و إنه ينبغي ان يكون تامين الماموم مع تامين الامام لا قبله ولا بعده بقوله ص إذا قال ولا الضالين فقولوا آمين و اما روايته اذا امن فامنوا اذ معناها إذا اراد التامين و يسن للامام والمنفرد الجهر بالتامين و كذا للماموم على المذهب الصحيح هذا تفصيل من هونا و قد اجمعت الامة على ان المنفرد يومن و كذلك الامام والماموم في الصلاة السرية و كذلك قال الجمهور في الجهرية و قال مالك في روايته لا يومن الامام في الجهرية و قال ابو حنيفة والكوفيون و مالك في روايته لا يجهر بالتامين و قال الاكثرون يجهر (نواوی شرح مسلم جلد اول)

(1) 7 A. 461.

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"The prosecutor states himself and the founder of the mosque to be *Hanafis*, that is the followers of *Imam Abu Hanifa's* doctrines. One of the highest authorities of that school is the *Durr-i-Mukhtar*, in which the strongest text is to be found against saying *'amin'* aloud; but the text itself falls far short of substantiating the rule of ecclesiastical law, upon establishing which the case for the prosecution in my opinion depends. The text is as follows: 'It is in accord with the practice of the Prophet to say *'amin'* in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment.'* Even this passage only relates to the efficacy or validity of the prayer of the person who says *'amin'* aloud or in a low tone. There is absolutely no authority in the *Hanafia* or any other of the three orthodox schools of Muhammadan ecclesiastical law, which goes to maintain the proposition that if any person in the congregation says the word *'amin'* aloud at the end of the *Sura-i-Fateha* utterance of the word causes smallest injury, in the religious sense, to the prayers of any other person in the congregation, who, according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries like Turkey, Egypt and Arabia itself, *Hanafis* and *Shafais* go to the same mosque, and form members of the same congregation, and, whilst the *Hanafis* say the word *'amin'* in a low voice, the *Shafais* pronounce it aloud. To say that the utterance of the word *'amin'* aloud after the *Imam* has recited the *Sura-i-Fateha*, causes the distrubance in the prayers of a congregation, some or many of whom say the word in a low tone, is to contradict the express provisions of the Muhammadan ecclesiastical law as explained by all the four orthodox *Imam*. I now pass to the next step in the case, namely, whether the accused in this case had the legal right to [429] enter into and worship in the mosque with the congregation according to their own tenets. There is absolutely no evidence in the case to substantiate the accusation brought by the prosecutor against them that they are 'no longer Muhammadans.' They call themselves 'Muhammadi,' which is the Arabic for 'Muhammadan,' and although the prosecutor brands them as '*Wahabis*,' there is nothing to prove that they belong to any heterodox sect. Indeed, the only tangible ground upon which the prosecutor objects to their worshipping in the mosque, and calls them '*Wahabis*,' is their saying the '*amin*' aloud, a practice which, as I said before, is commended by three out of the four orthodox *Imams* of the *Sunni* persuasion and which, according to the doctrine of *Imam Abu Hanifa* himself, does not vitiate the prayers. Now, it is the fundamental principle of the Muhammadan law of *wakf*, too well known to require the citation of authorities, that when a mosque as built and consecrated by public worship, it ceases to be the property of the builder and vests in God (to use the language of the *Hedaya*) 'in such a manner as subjects it to the rules of Divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures." A mosque once so consecrated cannot in any case revert to the founder, and every Muhammadan has the legal right to enter it, and perform devotions

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* سنها التامين سرّا ترک السنة لا يوجب فسادا ولا سهوا بل اسائته –
(در مختار)

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according to his own tenets, so long as the form of worship is in accord with the recognized rules of Muhammadan ecclesiastical law. The defendants therefore were fully justified by law in entering the mosque in question and in joining the congregation, and they were strictly within their legal rights, according to the orthodox rule of the Muhammadan ecclesiastical law, in saying the word the '*amin*' aloud."

Viewing the authorities which I have quoted and referred to, I have no doubt that under the Muhammadan law of *wakf*, and the Muhammadan ecclesiastical law, which we are bound to administer in such cases under s. 24 of the Civil Courts Act (VI of 1871), the provisions of which have been reproduced in s. 37 of Act XII of 1887, a mosque when public is not the property of any [430] particular individual or even a body or corporation or any other human organization which in law has a personality. In the eye of the Muhammadan law a mosque is the property of God, it must be recognised as such, and subject only to such limitations as the Muhammadan ecclesiastical law itself provides, it is public property being the property of God for the use of his servants, and every human being is entitled to go and worship there so long as he conforms to the rules of the Muhammadan ecclesiastical ritual of worship.

This being so, the plaintiffs in the case, who are obviously Muhammadans, and as to whom even Pandit *Sundar Lal* for the appellants, has foregone the contention that they are not *Musalmans*, have a right to enter the mosque and to use it for Divine worship and to say the words '*amin*' aloud or in a low voice in their prayers, since the Muhammadan ecclesiastical law permits them to have their choice as to the tone of voice in which the word is to be pronounced.

I am anxious to point out that the question as to the exact vocal scale or notes of the octave of the human voice is nowhere dwelt with in the Muhammadan law of ecclesiastical ritual, and Pandit *Sundar Lal* for the appellants has conceded that no definition or statement in this respect is to be found in the sacred traditions *Hadis* or authoritative legal texts, and it follows that the matter must necessarily be left to the ear of the person who pronounces the word '*amin*' aloud, and the powers of hearing which those who may be close or at a distance from him may happen to possess.

There is, however, as the learned Chief Justice has mentioned, a statement in the judgment of the Court of first instance, to the effect that the decree which was to follow upon that judgment was a decree requiring that the plaintiffs should pronounce the word '*amin*' loudly, but not at the top of their voices, nor in such a manner as to trouble the ears of the fellow-worshippers in the congregation. But this is a matter which depends upon the powers of hearing possessed by the fellow-worshippers, and cannot form the subject of a restriction or limitation of the right decreed.

[431] This being so, I expected that some argument wou'd be addressed to us in opposition to what I said in the case of *Queen-Empress* v. *Ramzan* (1), that according to the tenets of *Imam Azam*, that is, *Imam Abu Hanifa* himself, there is no such rule in the Muhammadan ecclesiastical law as would render it illegal to pronounce the word '*amin*,' at the top of the voice or in any other note in the octave of the human voice. I was anxious to hear some such argument, because if it were true that according to the doctrines of *Imam Abu Hanifa* the pronouncing of the word '*amin*' in a voice audible to any of the fellow-worshippers is a matter which, in the spiritual or religious sense, not only vitiates the

(1) 7 A. 461.

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prayers of the person who pronounces it aloud, but also of those who hear it, I should have been inclined to hold that some such limited decree should be passed as that passed by the Court of first instance. But, as I have shown, no such limitations as to the tone or note of the voice are required by the Muhammadan ecclesiastical law of ritual, and I am glad to find that this view recommends itself to the approval of the learned Chief Justice and my learned brethren.

I only wish to add that, on the opening of the case, I felt that it might possibly be a difficult question whether the action was maintainable or not; but Pundit *Sunder Lal*, on behalf of the appellants, has expressly relinquished all arguments upon the point, and I think that he was right in doing so.

I agree with the learned Chief Justice in passing the decree which he has pronounced.

Appeal dismissed.

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13 A. 432 (F.B.)

[432] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

MATA DIN KASODHAN (*Plaintiff*) v. KAZIM HUSAIN AND ANOTHER (*Defendants*).* [25th July, 1891.]

Mortgage—Rights of prior and subsequent incumbrancers inter se*—Rights of mortgagee purchasing equity of redemption—Right of sale of mortgaged property—Suit to bring mortgaged property to sale, who necessary parties to—"Property," meaning of the term in Act IV of 1882—Act IV of 1882 (Transfer of Property Act), ss. 3 and 6, Chap. IV* passim*—Act I of 1868 (General Clauses Act), s. 2, cls. (5) and (6).*

A and B jointly mortgaged certain immoveable property to X by a simple mortgage-deed on the 10th September 1882. They again mortgaged the same property to X on the 23rd February 1884. On the 6th August 1885, A mortgaged a portion of the said property to Y. On the 12th August 1885, B mortgaged a portion of the same property to X. On the 21st August 1885, A mortgaged a portion of the same property to Z. On the 20th September 1886, A and B sold to X the property mortgaged to him and with the proceeds of that sale X's three mortgages were paid off. On the 8th January 1887, Y sued A, B and X for cancelment of the deed of sale of the 20th September 1886, and for sale of the property mortgaged to him under his deed of the 6th August 1885. Y did not make Z a party to this suit. He did not ask for redemption of X's mortgages nor for foreclosure of Z's mortgage.

Upon the facts it was *held* by EDGE, C.J., STRAIGHT, TYRRELL and KNOX, JJ.:—MAHMOOD, J., *dissentiente*.

(1) That X not having exhibited any intention of foregoing altogether his rights in respect of the mortgages of the 10th September 1882 and the 23rd February 1884, was entitled to keep those securities alive and to use them as a shield against the claim of Y, the subsequent mortgagee, to the extent of the amount which was due under them on the 20th September 1886. *Gokuldoss Gopaldoss* v. *Rambux Sheochand* (1); *Gaya Prasad* v. *Salik Prasad* (2); *Mul Chunder Kuber* v. *Lallu Trikam* (3); *Shantapa* v. *Balapa* (4); *Ramu Naikan* v. *Subbaraya Mudali* (5); *Sirbadh Rai* v. *Raghunath Prasad* (6); *Janki Prasad* v. *Sri Matra Mautangui Debia* (7); and *Gangadhara* v. *Sivarama* (8) referred to.

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* Second Appeal, No. 1210 of 1888, from a decree of W.R. Burkitt, Esq., District Judge of Gorakhpur, dated the 30th May 1888, confirming a decree of Maulvi Ahmadullah Khan, Subordinate Judge of Gorakhpur, dated the 24th August 1887.

(1) 11 I.A. 126=10 C. 1035. (2) 3 A. 682. (3) 6 B. 404. (4) 6 B. 561. (5) 7 M.H.C.R. 229. (6) 7 A. 568. (7) 7 A. 577. (8) 8 M. 246.

(2) That Y as subsequent mortgagee could not bring to sale under his mortgage-deed the property mortgaged to him without first redeeming X's two prior mortgages. [433] *Syud Wajed Hosein* v. *Hafez Ahmed Rezah* (1); *Khub Chand* v. *Kalian Das* (2); *Kasum-un-nisa Bibi* v. *Nilratna Bose* (3); *Har Prasad* v. *Bhagwan Das* (4); *Muhammad Ibrahim* v. *Tek Chand* (5); *Ali Hasan* v. *Dhirja* (6); *Zalim Gir* v. *Ram Charan Singh* (7) and *Umes Chunder Sircar* v. *Zadur Fatima* (8) referred to, in addition to the case cited above. *Raghunath Prasad* v. *Jurawan Rai* (9) distinguished. *Vencatachella Kandian* v. *Panjanadien* (10); *Gangadharah* v. *Sivarama* (11) and the judgments of Mahmood, J., in *Sirbadh Rai* v. *Raghunath Prasad* (12) and in *Janki Prasad* v. *Sir Matra Mautangui Debia* (13) dissented from.

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(3) That Z's mortgage of the 21st August 1885 having been registered, Y must be taken to have had notice of it, and, having had notice thereof, was bound to make Z a party to the suit for sale under his (Y's) mortgage.

Damodar Dev Chand v. *Naro Mahadev Kelkar* (14) and *Dullabhdas Dev Chand* v. *Lakshmondas Sarup* (15), referred to.

(4) That the term " property as used in Chapter IV of Act of 1882 means an actual physical object and does not include mere rights relating to physical objects.

Held by the FULL BENCH.

That the Transfer of Property Act (Act IV of 1882), so far as the question of reliefs and procedure is concerned, applies to mortgages executed before the coming into force of the Act. *Ganga Sahai* v. *Kishen Sahai* (16); and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (17) referred to.

MAHMOOD, J., *contra* :—

Inasmuch as a mortgagee cannot bring the mortgaged property to sale without the intervention of a Court, a private purchase by the mortgagee of the rights remaining to the mortgagor in such property, though it may be valid as against the mortgagor, can have no effect in defeating the rights of puisne and mesne incumbrancers. Moreover, where a second mortgage to a third party intervenes between the mortgage to and the purchase by the prior mortgagee of the rights of the mortgagor, such intermediate mortgage prevents the merger of the rights of the prior mortgagee as such with those which he might acquire by his purchase.

The right of sale is an essential incident of a simple mortgage, and inheres as will in puisne and mesne as in prior mortgagees subject to the rights of the prior mortgagees. The puisne or mesne mortgagee is not bound by the terms of the prior mortgage, or mortgages, but is entitled to bring the property mortgaged to sale subject to such prior mortgage or mortgages.

[434] The provisions of s. 85 of Act IV of 1882 are not absolutely imperative, and though thereunder a subsequent incumbrancer ought to be made a party to a suit by a prior mortgagee on his mortgage, the non-joinder of such subsequent incumbrancer is not a fatal defect in the suit. Registration of a subsequent mortgage is not necessarily any notice to a prior mortgagee of the existence of such subsequent mortgage; it being no part of a mortgagee's duty to be on the watch for incumbrances subsequent to his own.

The term " property " throughout Act IV of 1882 is used in its most generic sense and will include the right known as an " equity of redemption.".

[Diss., 29 A. 385 (F.B.)=A. W. N. (1907) 97=4 A. L. J. 273=2 M. L. T. 248; 33 C. 425=3 C.L.J. 205; 1 O.C. 53; N.F., 22 C. 33; 20 M. 35; 1 O.C. 105; 5 O.C. 335; 7 O.C. 330; F., 18 A. 83; 22 B. 701; R., 13 A. 581; 17 A. 537; 18 A. 109; 19 A. 379; 19 A. 543; 20 A. 110 (F.B.); 20 A. 322; 24 A. 549; 25 A. 46; 27 A. 472=A. W. N. (1905) 58=2 A.L.J. 162; 31 A. 352=6 A.L.J 426 (431)=2 Ind. Cas 460; 34 A. 63 (64)=11 M. L. T. 6=16 C. W. N. 97=(1912) M.W.N. 32=15 C.L.J. 68=14 Bom. L.R. 1; 34 A. 323 (328)=9 A.L.J. 323=14 Ind. Cas. 674 (676); 30 B. 156=7 Bom. L. R. 811; 23 C. 795; 29 C. 1 (F.B.) 25 M. 108=11 M.L.J. 373; 22 A.W.N. 216; A.W.N. (1907), 85=4 A.L.J. 349; A. W.N. (1907) 286=4 A.L.J. 765; 1 C.L.J. 337; 14 C.L.J. 530 (534); 11 C.P.L.R. 75; 12 C.P.L.R. 70; 12 C.P.L.R. 86; 14 C.P.L.R. 177; 7 Ind. Cas. 11 (13);

(1) 17 W.R. C.R. 480.
(2) 1 A. 240.
(3) 8 C. 79.
(4) 4 A. 196.
(5) 2 A.W.N. (1882) 59.
(6) 4 A. 518.
(7) 10 A. 629.
(8) 17 A. 201=18 C. 164.
(9) 8 A. 105.
(10) 4 M. 213.
(11) 8 M. 246.
(12) 7 A. 568.
(13) 7 A. 577.
(14) 6 B. 11.
(15) 10 B. 88.
(16) 6 A. 262.
(17) 12 C. 583.

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7 Ind. Cas. 36 (37) ; 9 Ind. Cas. 513 (517)=(1911) 1 M.W.N. 165 (177); 21 M.L.J. 213=9 M.L.T. 431 ; 12. Ind. Cas. 155 (157) ; 1 L.B.R. 210 ; 8 N.L.R. 156=8 Ind. Cas. 1121 (1122) ; 10 O. C. 145 ; 14 O. C. 217 (219)=9 Ind. Cas. 403 ; 132 P.W.R. (1908)=64 P.R. (1908) ; 1 S.L.R. 68 ; D., 22 A. 377 ; 23 A. 25 ; 29 A. 205=A.W.N. (1907) 18=3 A.L.J. 848 ; 109 P.W.R. 1911=30 P.L.R. 1911=15 P.R. 1911=9 Ind. Cas. 549.]

THE facts of this case are fully stated in the judgment of Mahmood, J.

Mr. *C. Dillon*, Munshi *Jwala Prasad* and Babu *Jogindro Nath Chaudhri* for the appellant.

Pandit *Sundar Lal* for the respondent Hari Prasad. The other respondent was not represented.

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

EDGE, C.J.—This is a Second Appeal, and is brought by the plaintiff in the suit from the decree of the late District Judge of Gorakupur of the 30th of May 1888, which dismissed the plaintiff's appeal below, and confirmed the decree of the Subordinate Judge of Gorakhpur dismissing the plaintiff's suit so far as it related to his prayer for a decree for sale of a 4-anna share in mauza Barwa Kutwa in enforcement of an hypothecation lien.

On the 10th of September 1882, two brothers, named Kazim Hasan and Nadir Hasan, in consideration of Rs. 2,901 advanced to them by Hari Prasad, one of the defendants respondents before us, executed a simple mortgage in his favour, and thereby hypothecated an 8-anna share in mauza Barwa Kutwa and a 5-anna share in mauza Biswa Kutiya.

On the 23rd of February 1884, Hari Prasad advanced a further sum of Rs. 2,799 to Kazim Hasan and Nadir Hasan, and in consideration of that advance they on that date executed a simple mortgage in favour of Hari Prasad, by which they hypothecated the same 8-annas share in mauza Barwa Kotwa and 4-annas of the 5-annas share of Biswa Kutiya hypothecated by the deed of the 10th of September 1882, and in addition certain shares in Mauzas Cap-[435]tainganj, Rudhauli, Jamgal, Banki, Purasrampur and Bharpurwa.

On the 6th of August 1885, Kazim Hasan borrowed Rs. 1,000 from Mata Din Kasodhan, who is the plaintiff-appellant, and on that day, and in consideration of that advance, Kazim Hasan executed in favour of the plaintiff-appellant a simple mortgage, hypothecating his 4 annas of the 8 annas of Burwa Kutwa, 2 annas of Biswa Kutiya, and some small shares in Captainganj and Bharpurwa.

On the 12th of August 1885, Nadir Hasan borrowed Rs. 1,999 from Hari Prasad, and in consideration of that advance executed on that date a deed in favour of Hari Prasad, by which he hypothecated his 4 annas of the 8 annas share in Barwa Kutwa, and 2½ annas share in Biswa Kutiya, and certain shares in Captainganji and Bharpurwa.

On the 21st of August 1885, Kazim Hasan borrowed Rs. 999 from Mata Prasad, and in consideration of that advance executed a simple mortgage in favour of Mata Prasad, by which he hypothecated his 4 annas of the 8-annas share in Barwa Kutwa, 2 annas in Biswa Kutiya and certain shares in Captainganj and Bharpurwa.

On the 20th of September 1886 Kazim Hasan and Nadir Hasan, by a sale-deed of that date, sold to Hari Prasad the 8-annas share in mauza Barwa Kutwa for Rs. 14,530, and with that sum Hari Prasad's mortgages of the 10th of September 1882, the 23rd of February 1884, and the 12th

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of August 1885, were paid off. It was to pay off those mortgages that the sale of the 20th of September 1886 was made.

On the 8th of January 1887, Mata Din brought his suit in the Court of the Subordinate Judge of Gorakhpur against Kazim Hasan and Hari Prasad. So far as is material for the consideration of this appeal, he sought by his suit a decree setting aside the sale-deed of the 20th of September 1886, and decreeing a sale of the 4-annas share in Barwa Kutwa in enforcement of his lien under the deed of the 6th of August 1885.

[436] The plaintiff did not ask for redemption of the mortgages of the 10th of September 1882 and the 23rd of February 1884, nor did he seek foreclosure of the mortgage of the 21st of August 1885.

Kazim Hasan did not defend the suit. Mata Prasad was not made a party to the suit.

The Subordinate Judge dismissed Mata Din's claim to have the sale-deed of the 20th of September 1886 set aside, and to have the 4-annas share in Barwa Kutwa brought to sale.

Mata Din appealed. The District Judge on appeal found that Hari Prasad, when he purchased on the 20th of September 1886, intended to keep alive as shields for his protection the securities of the 10th of September 1882 and the 23rd of February 1884.

The Distrct Judge also found that Mata Din had never tendered payment to Hari Prasad of the amount which had been due under Hari Prasad's prior incumbrances, and had not offered to bring the money into Court, and dismissed the appeal with costs.

The questions which we have to consider in this Second Appeal are what, on the findings of fact of the lower appellate Court, are the respective rights of Mata Din and Hari Prasad, and what is the decree which we should pass in appeal in this case.

It has been contended on behalf of Mata Din that Hari Prasad is not entitled to use as shields the mortgages of the 10th of September 1882 and the 23rd of February 1884; that Mata Din was not bound to ask for redemption of either of those mortgages; that Mata Prasad is not a necessary party to the suit; that Mata Din was not bound to seek foreclosure so far as Mata Prasad's mortgage is concerned, and that Mata Din is entitled to a decree for sale of the 4 annas in mauza Barwa Kutwa freed of any incumbrance of Hari Prasad, or at least to a decree for sale of those 4 annas, subject to the mortgages of the 10th of September 1882 and the 23rd February 1884, or to a decree for sale of the rights and interest of Mata Din and Kasim Hasan in those 4 annas.

[437] I hold without the slightest doubt on the authority of *Gokuldoss Gopaldoss* v. *Rambux Seochand* (1); *Gaya Prasad* v. *Salik Prasad* (2); *Mul Chand Kuber* v. *Lallu Trikam* (3); *Shantapa* v. *Balapa* (4); *Rama Naikan* v. *Subbaraya Mudali* (5); *Sirbadh Rai* v. *Raghunath Prasad* (6); *Janki Prasad* v. *Sri Matra Mautangui Debia* (7) and *Gungadhara* v. *Sivarama* (8), as applied to the facts found by the lower appellate Court in this case, that Hari Prasad is entitled to use the mortgages of the 10th of September 1882 and the 23rd of February 1884 to the extent of the amount which was due under them on the 20th of September 1886 as shields against the plaintiff's claim to bring the 4 annas of mauza Barwa Kutwa to sale. Having regard to the view expressed by their Lordships of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (9), I am of

(1) 11 I.A. 126=10 C. 1035. (2) 3 A. 682. (3) 6 B. 404. (4) 6 B. 561.
(5) 7 M.H.C.R. 229. (6) 7 A. 568. (7) 7 A. 577. (8) 8 M. 246.
(9) 17 I.A. 201=18 C. 164.

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opinion that as Hari Prasad has, since the 20th of September 1886, been in possession of the 8-annas share of mauza Barwa Kutwa, which he practically took as representing the amounts due under the mortgages of the 10th of September 1882, the 23rd of February 1884, and the 12th of August 1885, the interest which would otherwise be payable under the mortgages of the 10th of September 1882, and the 23rd of February 1884, subsequent to the 20th September 1886, should, if an account be directed to be taken, be treated as satisfied by the rents and profits received by Hari Prasad from the 8 annas of mauza Barwa Kutwa since the 20th of September 1886.

Although all the mortgages in this case were made subsequently to the coming into force on the 1st of July 1882 of the Transfer of Property Act, 1882 (Act IV of 1882), and the rights of the parties are consequently governed by that Act, still as that Act was passed "to define and amend certain parts of the law relating to the Transfer of Property by Act of parties;" and as there has been in the course of the arguments in this case much contention as to [438] what, prior to the coming into force of Act IV of 1882, was the law in British India relating to the rights and liabilities of mortgagors, first mortgagees and subsequent mortgagees *inter se*, and as to how far the law in that respect has been defined and amended by Act IV of 1882, I propose before attempting to construe Act IV of 1882 to refer as shortly as possible to such of the decisions of the Courts in India, and of their Lordships of the Privy Council, which I have been able to find as throwing any light on the contention of the parties before us. Undoubtedly before the coming into force of Act IV of 1882, and also, as I have had reason to know, since the coming into force of that Act, first mortgagees and also second and subsequent mortgagees have, in suits on their mortgagors, obtained decrees for sale of mortgaged or hypothecated immoveable property without having redeemed or foreclosed the other mortgages or made the other mortgagees parties to their suits.

Such suits and decrees throw no light upon the questions I propose to consider, except in so far as they were the causes of subsequent litigation as to the rights of mortgagees who were not parties to them.

Most of the decisions which throw any light on the contentions of the parties here have been decisions in suits which were subsequently brought by such decree-holders for declarations that they were entitled to bring the property to sale under such decrees or in suits brought by other mortgagees either against such decree-holders or the purchasers at sales under such decrees for possession, for declarations of their rights as mortgagees, for declarations that such decree-holder could not under such decrees bring the property to sale without giving such other mortgagees an opportunity to redeem or without redeeming their mortgages, as the case might be, or for similar reliefs.

With the exception of *Raghunath Prasad* v. *Jurawan Rai* (1), to which I shall refer later on, I am not aware of any case in which a second or subsequent mortgagee suing on his mortgage for a decree for sale of the mortgaged property and having made the prior [439] mortgagee or mortgagees party or parties to his suit and obtained on appeal otherwise from any High Court in India a decree for sale of the mortgaged property or of any interest of his own or of the mortgagors in it except on his redeeming the prior mortagagee or mortgagees.

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(1) 8 A. 105.

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I shall now proceed to refer to the cases of which I am aware, taking them, as far as possible, in the order of date of the final decisions. In *Syud Wajed Hossein* v. *Hafez Amhed Rezah* (1) the plaintiffs sued for possessions as purchaser at a sale held in execution of a decree upon a mortgage of the 11th of October 1859. The defendants resisted the suit on the ground that they had on the 15th of May 1868 by bill of sale purchased the property, the consideration of that bill-of-sale having been money advanced by them to pay off mortgages prior in date to that of the 11th of October 1859. In that case Loch and Ainslie, JJ., in 1872, gave the plaintiffs a decree for possession, conditional on their paying to the defendants all sums for principal and interest paid by them on account of the mortgages existing previous to the mortgage of the 11th of October 1859, and remitted the suit to the Court below that the amount so payable to the defendants might be ascertained and embodied in the decree.

In *Ramu Naikan* v. *Subbaraya Mudali* (2), the plaintiff sued to recover the amount due under a mortgage of 1869 by means of the mortgaged property, as the report says, which I understand to mean that the plaintiff sought a decree for sale on his mortgage. The suit was resisted by the second defendant on the ground that he was a prior mortgagee of the particular lands, and, as such, had a right to have the lands held liable for his debt first. The facts, so far as they are material, appear to have been that the second defendant having obtained a simple money decree on certain mortgage-bonds made between 1861 and 1870, by which the property in question had been hypothecated to him, brought the property to sale under his decree, and purchased it for a sum considerably less than the amount which had been due under his mortgage-bonds. I infer from the report [440] that the District Munsif had given the plaintiff a decree for sale, that on appeal the Civil Judge of Chittur had reversed so much of the District Munsif's decree as related to the particular lands, that is, that the Civil Judge had dismissed the plaintiff's suit to that extent, and that on appeal to the High Court of Madras, Holloway, Officiating C. J., and Kindersley, J., in 1873, affirmed the decision of the Civil Judge. In their judgment in that case they are reported to have said that "Dernburg justly observes that the subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the prior mortgage."

That passage shows that those learned Judges were of opinion that a second mortgagee who had not redeemed could not maintain a suit for the sale of the mortgaged property or of any interest in it.

The decision of the Madras High Court in *Ramu Naikan* v. *Subbaraya Mudali* was referred to apparently with approval by their Lordships of the Privy Council in *Gokuldoss Gopaldoss* v. *Rambux Seo Chand* (3). Their Lordships did not suggest that in *Ramu Naikan* v. *Subbaraya Mudali* the Madras High Court had misapplied the principle of the shield.

In *Vencata Chella Kandian* v. *Panjanadien* (4), Turner, C. J., in September 1881, threw some doubts on the correctness of the decision in *Ramu Naikan* v. *Subbaraya Mudali*, and in reference to that decision said that "when a second mortgage is created in favour of a person who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that dictates the preservation of the right created by the first charge, I am

(1) 17. W.R.C.R. 480.
(2) 7 M.H.C.R. 229.
(3) 11 I.A. 126 (at p. 133).
(4) 4 M. 213.

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unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the right of the first mortgagee. If the first mortgagee had not acquired the rights remaining in the [441] owner it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale), then a sale should have been ordered of the property to discharge both mortgages, and the proceeds should have been applied to their satisfaction in order of priority; but I believe the course which would have best fulfilled the contracts and secured the right of the parties would have been to allow a sale subject to the first incumbrance."

The first comment to be made on those observations of Turner, C. J., is that from the point of view from which he regarded the case then before him they were entirely *obiter*. The second comment is that although Turner, C. J., was of opinion that "when a second mortgage is created in favour of a person who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge," he does not explain how, if the first mortgage was an usufructuary mortgage with possession, the usufruct to be applied to the discharge of the principal and interest, the second mortgagee could have a right to redeem until the principal and interest had been satisfied by the usufruct or how, in any other case, a second mortgagee could have a right to redeem a first mortgage the time for the redemption of which, as fixed by the mortgage contract, had not arrived, or, in other words, how a second mortgagee in such cases could by a transaction to which the first mortgagee was no party, have acquired a right as against him which their mortgagor did not possess.

The third comment, is that Turner, C. J., referred to no authority in support of his view of the rights of a first and second mortgagee respectively. It would have enabled us to judge of the soundness or otherwise of those *obiter dicta*, if Turner, C. J., has referred to [442] the authority, if any, which was present to his mind, or had given some indication as to whether he thought that the views which he was enunciating without any doubt or hesitation were consistent with the principles of law or equity which had before then been applied in India or in England. Those *obiter dicta* are the first judicial suggestions which I have been able to find that the rights of a second mortgagee as against a first mortgagee included a right to bring the mortgaged property or an interest in it to sale without even an offer to redeem the prior mortgage having been made.

In 1876 in the case of *Khub Chand* v. *Kalian Das* (1) Turner, J., had defined the rights as they then appeared to him of a second mortgagee. He is there reported to have said :—" In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property pledged, aliened it in part by the creation of a subsequent incumbrance in the nature of a conditional mortgage. He

(1) A. 240 (at p. 247).

thereby conferred on the conditional mortgagee the right to redeem the first mortgagor, at whatever time it could have been redeemed by the mortgagor, and the right, in the event of default being made in payment of the debt due to him, to foreclose and hold the property subject to the first incumbrance." The first incumbrance in that case was a simple mortgage. It does not appear whether Turner, J., then considered that a right to hold included a right to sell the mortgaged property subject to the first incumbrance.

In *Gaya Prasad* v. *Salik Prasad* (1) Stuart, C. J., Oldfied and Straight, JJ., in April 1881, held that a person who had been prior incumbrancer, and who subsequently to a mortgage of the same property to another person purchased the property intending to keep alive his prior incumbrance as a shield for his protection, could defeat a suit by the puisne incumbrancer to bring the property to sale. Although Pearson, J., dissented in that case, he apparently dissented on the ground that in his opinion the pre-existing lien of the prior incumbrancer had been extinguished by his purchase.

[443] In *Kasum-un-nissa Bibee* v. *Nilratna Bose* (2) Pontifex and Field, JJ., in May 1881 held that a patnidar should have been made a party to a mortgage suit relating to the property, and gave the patnidar a decree for redemption.

In *Damodar Dev Chand* v. *Naro Mahadev Kelkar* (3) Westropp, C. J., and Pinhey, J., in September 1881, held that a second mortgagee was entitled to be made a party to a suit by the first mortgagee on his mortgage, in order that he might have an opportunity of redeeming the first mortgage, and not having been a party to that suit, could not be deprived of that right by proceedings to which he was not a party. In the suit of the first mortgagee a decree for sale had been made, and the property had been sold and purchased *benami* for the first mortgagee. In the suit of the second mortgagee a decree for redemption was made in his favour.

In *Har Prasad* v. *Bhagwan Das* (4) Oldfied and Brodhurst, JJ., in January 1882, followed the decision of the majority of this Court in *Gaya Prasad* v. *Salik Prasad* and held that the person who was entitled to the protection of a prior mortgage was, until his mortgage debt was satisfied, entitled to have a suit by a puisne incumbrancer to bring the mortgaged property to sale dismissed.

In *Muhammad Ibrahim* v. *Tek Chand* (5) Stuart, C. J., and Oldfield, J., in March 1882, following *Gaya Prasad* v. *Salik Prasad*, dismissed a suit for sale brought by a puisne incumbrancer against a prior mortgagee.

In *Mul Chand Kuber* v. *Lallu Trikam* (6), the facts were that a house was mortgaged to the father of the defendant, was subsequently mortgaged by the same mortgagor to the plaintiff, and was still later purchased from the mortgagor by the father of the defendant, who in purchasing intended to keep his mortgage alive as a shield for the protection of his interest. The plaintiff having obtained a decree upon his mortgage attached the property. The attachment was successfully resisted by the defendant. Upon which [444] the plaintiff brought a suit to establish his right to levy, by sale of the house, the amount due under his mortgage. Melvill, West and Pinhey, JJ.,

(1) 3 A. 682. (2) 8 C. 79. (3) 6 B. 11. (4) 4 A. 196.
(5) 2 A.W.N. (1882) 59. (6) 6 B. 404.

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in March 1882, held that the defendant might properly require the redemption of his mortgage as the condition of the plaintiff's enforcing his decree upon his mortgage against the property. That case had been referred to the Full Bench by Westropp, C. J., and Nanabhi Hari Das, J. By their referring order it appears that they were of opinion that the fair course was to permit the plaintiff to redeem the defendant's mortgage.

In *Shantapa* v. *Balapa* (1), Melvill and Pinhey, JJ., followed the decision in *Mul Chand Kuber* v. *Lallu Trikam.*

In *Ali Hasan* v. *Dhirja* (2) an usufructuary mortgage of a 2-annas 6-pies share was in 1874 made to the plaintiff who was put in possession. In 1875 a portion of the same property was again mortgaged to the plaintiff. In July, 1877, the 2-annas 6-pies share less 2 pies was mortgaged to one Niamat, who took with notice of the previous incumbrances. In October, 1877, the 2-annas 4-pies share, which had, in July 1877, been mortgaged to Niamat, was again mortgaged to the plaintiff. In September 1879, Niamat obtained a decree for sale of the 2-annas 4-pies share in enforcement of his lien under his mortgage of July 1877. The plaintiff was not a party to that suit. On the 2nd of October 1879, the plaintiff purchased from one of the mortgagors—what had become of the other mortgagor I do not know—2 annas of the 2-annas 6-pies share mortgaged to him in 1874. Part of the consideration for that purchase was the principal and interest due under the mortgages of 1874 and 1875. On the 20th of November 1880, the defendants at an auction sale, held under Niamat's decree, purchased the 2-annas 4-pies share. Thereupon the plaintiff brought his suit for a declaration that he was entitled to the proprietary right in, and possession of, the 2-annas share purchased by him. The above are the facts, so far as they are material, on the question before us. In June, 1882, Tyrrell and Mahmood, JJ., held that the plaintiff was entitled to insist upon his prior charges being [445] paid off before the defendants could either oust him or be entitled to absolute proprietary right in the property. At page 529 of the Report, Mahmood, J., is reported to have said "under this view, which in my judgment is consistent with the opinion of the Full Bench of this Court in *Gaya Prasad* v. *Salik Prasad*, I hold that all that the plaintiff was entitled to in this litigation was a declaration that as holder of the prior mortgages of 7th July 1874 and 17th July 1875, respectively, he is entitled to continue in possession by virtue of his said liens that the rights purchased by the defendants-appellants are subject to these liens, and cannot be enforced as against the plaintiff till full payment of the moneys due to him under the mortgage-deeds abovementioned."

In *Parsi* v. *Girand Singh* (3) the plaintiffs in 1879 had purchased property over which they had held mortgages of the 28th of February 1876 and the 23rd of February 1877, part of the consideration for the purchase being set off against the money due under their two mortgages. On the 13th of May, 1877, the mortgagor mortgaged the property to the defendant. In 1880 the defendant sued the mortgagor alone to enforce his hypothecation by sale of the property, and on the 11th of August of that year obtained a decree. On the defendant applying for attachment and sale the plaintiffs objected. Their objection was disallowed, and they brought their suit tc have he attachment removed. Oldfield and Tyrrell, JJ. in April 1885, held that the plaintiffs by purchasing the property on which they had a prior charge had not lost the benefit

(1) 6 B. 561. (2) 4 A. 518. (3) 5 A. W. N. (1885), 155.

of their charge, and that they were entitled to resist the sale of the property by the defendant, subsequent mortgagee, until their prior charge was satisfied. The amount of that prior charge had been ascertained to be Rs. 1,296-6-7, and those learned Judges decreed that the defendant could only bring the property or any part of it to sale on first paying to the plaintiff that sum.

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In *Gangadhara* v. *Sivarama* (1) the plaintiff in February 1878, in a suit against Sivarama Mudali, obtained a decree on a [446] compromise providing for payment of the judgment-debt and declaring certain lands, five plots, hypothecated as security for the payment in accordance with the terms arranged. That decree was registered. Of those lands plots Nos. 1, 2 and 3 had been mortgaged in 1866 by Sivarama Mudali to Pushpavanalingam Mudali, who, in October 1877, obtained a decree for the enforcement of his mortgage. On the 23rd of May 1878 Sivarama Mudali borrowed Rs. 3,500 from the defendants Nos. 2, 3 and 4, and mortgaged to them the five plots of land. Of that sum Rs. 1,900 were paid to Pushpavanalingam Mudali, who in consideration of that payment, released his lien on plots Nos. 1, 2 and 3. The plaintiff subsequently attached plots Nos. 1, 2 and 3 under his decree of February 1871; but on the objections filed by the defendants Nos. 2, 3 and 4, the properties were released from attachment, and thereupon the plaintiff brought his suit to have it declared that plots Nos. 1, 2 and 3 were liable to be sold in execution of his decree of February 1878, free from the incumbrance held by the defendants Nos. 2, 3 and 4. Turner, C. J., and Muttusami Ayyar, J., in 1884, holding that the plaintiff was entitled to sell plots Nos. 1, 2 and 3 under his decree of February 1878, made a declaration that such sale must be made subject to the lien of the defendants Nos. 2, 3 and 4 for the Rs. 1,900 paid to Pushpavanalingam Mudali.

In *Sirbadh Rai* v. *Raghunath Prasad* (2) Jurawan Singh and Daulat Kuar in 1866 mortgaged by an usufructuary mortgage three bighas of land to one Lachman Rai, and in 1874 mortgaged their 4-annas share, which included the three bighas, to the plaintiff. In 1878 the mortgagors for the purpose of paying off the mortgage of 1866, executed in favour of the defendants a deed of sale of the three bighas of land. Part of the purchase-money was applied to paying off the mortgage of 1866. The plaintiff in November 1882 brought his suit to bring the 4-annas share to sale by enforcement of his lien under his mortgage of 1874. That case came before a Division Bench of this Court in March 1885, when Oldfield, J., held that the mortgage of 1866 had not been extinguished, and that it afforded [447] a defence to the plaintiff's suit to bring the three bighas to sale. Mahmood, J., held that the defendants were entitled to the benefits of the mortgage of 1866, which they had paid off. He was, however, of opinion that the plaintiff was entitled to bring the three bighas to sale, but that such sale would be subject to the mortgage of 1866, to the benefit of which the defendants were entitled. The case went on appeal before the Full Bench of this Court in January 1866, (3) (*Raghunath Prasad* v. *Jurawan Rai*) at which time Mahmood, J., was not a member of the Court. The three bighas had been referred to in the proceedings in the Courts below as "land No. 111." The Munsif had decreed that "land No. 111 be exempted from the hypothecation lien." That decree was varied by the Full Bench in June 1886, by adding the words "in that property the interest of the plaintiff as second

(1) 8 M. 246. (2) 7 A. 568. (3) 8 A. 105.

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mortgagee only to be sold." That form of variation was proposed by Petheram, C.J., and was agreed to by Straight, Oldfield, Brodhurst and Tyrrell, JJ.

It is to be observed that the mortgage of 1866 was an usufructuary mortgage with possession, which, if it inured with all its benefits to the defendants, was one which the plaintiff when he brought his suit was not entitled to redeem. Under such circumstances it would be difficult to see what interest, if any, in the three bighas the plaintiff could sell beyond the right to possession on the determination of the mortgage of 1866 by the principal and interest being satisfied by the usufruct.

The effect of the decree of the Full Bench was to deprive the plaintiff of a lien on the three bighas if he ever had one. No authorities were referred to in any of the judgments in the Full Bench. It does not appear whether the fact that the mortgage of 1866 was an usufructuary mortgage with possession distinguished, in the opinion of the Full Bench, that case from one in which the prior incumbrance was a simple mortgage ripe for redemption. Indeed it seems to me very doubtful whether the case was argued at all before the Full Bench, it having been assumed that the difference [448] of opinion between Oldfiled, J., and Mahmood, J., had arisen from some misapprehension as to the facts of the case.

In the case of *Janki Prasad* v. *Sri Matra Mautangui Debia* (1) the facts so far as they are material, were that in 1872 Ungan and others by deed mortgaged certain property to the plaintiff. That deed was not registered, nor did it require to be registered under the Registration Act applicable to it. The mortgagors in 1880 executed another deed of mortgage in respect of the same property in favour of one Sundar Lal. That deed was registered. The mortgagees executed in 1881 another deed of mortgage in favour of Sundar Lal over the same property. That deed was not registered nor did it require registration. In a suit on the deed of 1881 Sundar Lal got a decree, and under that decree Sundar Lal had the property attached and sold. It was purchased by the defendant Janki Das, who subsequently paid off the registered mortgage of 1880, and received the mortgage-deed of that date. The plaintiff subsequently brought his suit to recover by sale of the property the money due to him under his mortgage of 1872, and made Janki Das and the mortgagors defendants. The suit came in appeal before Oldfield and Mahmood, JJ., in March 1885. In the opinion of Oldfiled, J., the question turned on the priority of the registered over the unregistered mortgage, and holding that there was such priority, he held that the suit should be dismissed. Mahmood, J., also held that the registered mortgage took priority over the unregistered mortgage, and that Janki Das having paid off the registered mortgage, was entitled to the benefits of it; but he held that the plaintiff was entitled to have the property sold under his unregistered mortgage of 1872 subject to the rights of priority which Janki Das had acquired by reason of his having paid off the registered mortgage of 1880.

In *Dullabhdas Devchand* v. *Lakshmandas Sarup Chand* (2) in which the plaintiff sued to recover possession of land, the facts were as follows:—In 1870 Sambhu and his two sons mortgaged the lands in question to Har Lal without possession. In 1871 the [449] mortgagors mortgaged the lands without possession to the defendant. On the 10th of June 1873 the mortgagors mortgaged the lands again to Har Lal. That mortgage purported to give Har Lal possession, and to have been given as security

(1) 7 A. 577. (2) 10 B. 88.

for the principal and interest due under the mortgage of 1870, the interest then due being treated as principal, and for interest. On the 12th of June 1873, the mortgagors again mortgaged the lands to the defendant. The mortgage-deed purported to give possession to the defendant. The consideration for that mortgage of the 12th June 1873 was the principal and interest due under the mortgage of 1871 the interest then due being converted into principal. In 1877 Har Lal obtained a decree for sale upon his mortgage of the 10th of June 1873. The defendant was not a party to that decree. At the sale held under that decree the plaintiff purchased, and, having in his attempt to obtain possession of the lands been obstructed by the defendant, contended that he was entitled to possession as he was not a party to Har Lal's decree, and offered to pay the plaintiff the amount of his purchase-money or to vacate the lands on satisfaction of his own mortgage lien. In August 1885 Sargent, C.J., and Birdwood, J., being of opinion that there was nothing to show an intention to forego the benefit of the security created by the mortgage-deed of 1870, held that the decree of 1877 conferred an absolute title on the purchaser (the plaintiff) at the auction sale, free from all incumbrances created by the mortgagors subsequent to the mortgage of 1870; but that the defendant not having been made a party to Har Lal's suit had not lost his right of redemption, which was still open; and although the plaintiff's suit was not one for foreclosure, they decreed that "the defendant to deliver possession to the plaintiff, but that he be at liberty to redeem by payment to the plaintiff, within six months, of the amount which would be due on the mortgage of the 15th July 1870, if the same had remained unaffected by the mortgage of 1873, or, in default, should remain for ever foreclosed. The defendant to pay plaintiff his costs throughout."

That is a most important decision, as it not only indicates, in the opinion of those learned Judges, who should have been parties [450] to the suit on the mortgages, but what the decree should have been if the proper parties had been parties to that suit.

The case of *Mohan Manor* v. *Toku Uka* (1) which was decided by Sargent, C.J., and Birdwood, J., is an authority that a prior mortgagee who purchased the mortgage property at a sale in execution of a decree obtained by him on the 26th of January 1876, on his mortgage, to which decree the second mortgagee was not a party, did not lose the benefit of the security created by the first mortgage, and could use it as weapon of attack in his suit against the second mortgagee for possession, who, in that case, was allowed six months within which to redeem on payment of what was due on the first mortgage. The Court directed that the account of the mortgage-debt should be taken on the basis of what was due on or by the decree of the 26th January 1876.

In *Zalim Gir* v. *Ram Charan Singh* (2) Bhairo Singh, in 1871, executed a mortgage-deed in favour of Panna Lal in consideration of an advance, and as security for such advance hypothecated his zemindari property. In 1872 Bhairo Singh executed a similar deed in favour of Panna Lal, the consideration being a further advance. In 1874 Bhairo Singh mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zemindari to Zalim Gir, the defendant. In 1877, Bhairo Singh made a conditional sale of his zemindari to Ram Charan Singh, the plaintiff, the consideration being Rs. 4,700, which was required for, and applied to the paying off, of the mortgages

(1) 10 B. 224. (2) 10 A. 629.

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of 1871 and 1872, held by Panna Lal. In 1887, Bhairo Singh made another mortgage to Zalim Gir of the property mortgaged by the bond of 1874. Zalim Gir having brought a suit against Bhairo Singh upon the bonds of 1874 and 1878, obtained on the 9th of November 1881, a decree for Rs. 2,064-14. Zalim Gir proceeded to execute that decree on the property mortgaged to him, and the sale was advertised for the 20th of November 1883. Ram Charan Singh having taken proceedings under the deed of 1877 the sale to him was, on the 19th March, 1883, foreclosed. On the 19th of November 1883, Ram Charan Singh brought his suit [451] against Zalim Gir to have it declared that Zalim Gir was not entitled to bring the property to sale. Straight and Tyrrell, JJ., in July 1888, being of opinion that Ram Charan Singh was entitled to pay the securities of 1871 and 1872 in aid as prior incumbrances, made a decree declaring that Zalim Gir should only be permitted to bring the property to sale under his decree in respect of his mortgage of 1874, when he had satisfied the mortgage bonds of 1871 and 1872, then in the possession of Ram Charan Singh.

In *Umes Chunder Sircar* v. *Zahur Fatima* (1) the facts and transactions were somewhat complicated, but so far as is material for the consideration of the question before us they appear to have been shortly as follows:—

The plaintiff was a puisne mortgagee of 12 annas of mauza Sindilia in the Gaya district. He had also obtained transfers of other mortgages upon the same estate, and had at judicial sales bought fractional parts of it. The defendants had also acquired mortgage interests in the mauza—some prior and some susbequent to the plaintiff's. They were sued by the plaintiff who sought to redeem the prior incumbrances so as to make his own charges the first on the property. In the alternative the plaintiff claimed to have a direction made for the sale of the property, and an order that out of the proceeds the mortgage-money due to all the parties should be paid according to their several priorities. The first Court decided the plaintiff was entitled to redeem; but, being of opinion that the usual practice was to decree a sale when the mortgagor did not appear to pay off incumbrances, the natt proceeds of the sale being ordered to be divided among the mortgagees according to their priority, instead of giving a decree for redemption, made a decree for sale on the plaintiff's alternative prayer for relief, and gave certain directions to be observed in the taking of the accounts. The first Court by its decree of 17th of September 1883, directed, so far as is material for our consideration here, a sale of the entire estate, free from all incumbrances, the upset price to be fixed at a sum equal to the aggregate amounts of the purchase-money paid [452] by the defendants Fazl-ul-Bari and Zahur Fatima, being the value of their proprietary right and mortgage liens, but without interest, they having been in possession of their shares, *plus* costs of suit and costs of sale, both parties to have liberty to buy at the sale, of which the proceeds were to be applied in discharge of the incumbrances found by the accounts in order of their priority, and any surplus to go to the propietors in proportion of their shares. On appeal, Prinsep and Grant, JJ., dismissed the suit as to certain portions of the property (17 dhurs and a 2-annas share) holding that as to those portions of the property the plaintiff had not established title; but in other respects affirmed the decree for sale of the first Court. On appeal to Her Majesty in Council, their Lordships of

(1) 17 I.A. 201 = 18 C. 164.

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the Privy Council differing from the High Court, held that the 17 dhurs and the 2-annas share were liable to be sold at the suit of the plaintiff. Their Lordships gave certain directions as to the interest which was to be allowed in taking the accounts. Their Lordships discharged the order of the High Court, and instead made an order declaring the plaintiff's right to redeem Zahur's prior incumbrance; and in the event of his exercising such right to redeem, they declared the rights of Zahur in respect of her previous incumbrance to redeem the plaintiff.

They directed the Court to make such enquiries and take such accounts as were proper for carrying their declarations into effect, and to fix reasonable periods of time within which the plaintiff and Zahur should exercise the rights of redemption declared to belong to them. Their Lordships also declared that if the plaintiff and Zahur, respectively, did not exercise their rights of redemption within such time as the Court by its final order in that behalf might direct, they should respectively be foreclosed and debarred from all right of redemption, and in all other respects they affirmed the decree of the first Court of the 17th of September 1883.

Excepting the decision in *Raghunath Prasad* v. *Jurawan Rai* (1), possibly the judgment of Turner, J., in *Khub Chand* v. *Kalian Das* (2), his judgment in *Vencata Chella Kandian* v. *Panjanadien* [453] (3), the decision in *Gangadhara* v. *Sivarama* (4), the judgment of Mahmood, J., in *Sirbadh Rai* v. *Raghunath Prasad* (5), and his judgment in *Janki Prasad* v. *Sri Matra Mautangni Debia* (6), the decisions to which I have referred show, and I think rightly, that as well before as since Act IV of 1882 come into force a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, were necessary parties; and further that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immoveable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property. I may, I think, fairly assume that those of the decisions to which I have referred which were prior to 1882 were considered by the Legislature and its advisers before the Legislature passed Act IV of 1882, the Preamble of which is as follows:—"Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties, it is hereby enacted as follows:" I now propose to consider Act IV of 1882, so far as it bears on the questions before us, I shall also refer to section 25 of the English Statute 44 and 45 Vic., c. 41, which has been pressed upon our attention, and which, it was contended, was followed by the Indian Legislature in Chapter IV of Act IV of 1882. The Transfer of Property Act, 1882 (Act IV of 1882), received the assent of the Governor-General on the 17th of February 1882, and came into force on the 1st of July 1882. The history of that Act is to be found at the close of the Introduction to the Act in Dr. Whitley Stokes' Anglo-Indian Codes. The Transfer of Property Act, 1882, differs in many important particulars with regard to mortgages from the Conveyancing and Law of Property Act, 1881 (44 and 45 Vic., c. 41), which having received the Royal assent on the 22nd of August 1881, came into force on the 31st of December 1881.

(1) 8 A. 105. (2) 1 A. 247. (3) 4 M. 213. (4) 8 M. 246.
(5) 7 A. 568. (6) 7 A. 577.

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We may [454] fairly assume that the Legislature and its advisers, before the Transfer of Property Act, 1882, was passed, were aware of the provisions contained in the 44 and 45 Vic. c, 41. A comparison of section 25 of that Statute with some of the sections in Chapter IV of Act IV of 1882 will show how dissimilar in many important respects are the provisions contained in the latter sections to the provisions contained in section 25 of 44 and 45 Vic., c. 41. Many of the provisions contained in section 25 of the 44 and 45 Vic., c. 41, appear to me to be more or less dissimilar to the provisions contained in sections 67, 74, 86, 87, 88, 89, 90, 92, 93, 96, and 97 of Act IV of 1882. Under sub-section 1 of section 25 of 44 and 45 Vic., c. 41, any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative. Under Act IV of 1882, section 60, a mortgagor has, after the principal money has become payable, a right of suit for redemption. Under section 75 every second or subsequent mortgagee as against a prior mortgagee or mortgagees has a right of suit for redemption if his mortgagor has a right of suit for redemption against such prior mortgagee or mortgagees, but not otherwise. Section 91 gives certain other persons a right of suit for redemption. I do not suppose that it could be contended that any of the persons mentioned in section 91 could maintain a suit against a prior incumbrancer, unless such person derives title through or from a person who had, prior to the suit, a right of suit for redemption against such prior incumbrancer, or in other words, that any of the persons referred to in section 91 could be in a better position to maintain a suit for redemption against a prior incumbrancer than would a second or subsequent mortgagee under section 75. In a suit for redemption under sections 92 and 93 an order of sale cannot be made without giving the plaintiff an opportunity, after accounts have been taken or the amount due has been declared, of redeeming, and if the plaintiff makes default in paying such amount, it is on the application of the defendant that the Court can make final order for sale. Under sub-section 2 of section 25 of the 44 and 45 Vic., [455] c. 41, in any action whether for foreclosure, or for redemption, or for sale, the Court, on the request of the mortgagee or of any person interested either in the mortgage money or in the right of redemption, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgage property on such terms as it thinks fit, including if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure performance of the terms. Under that section, Fry, J., in *Woolley* v. *Colman* (1), held that a reserved price large enough to cover what was due to mortgagees who opposed the sale must be fixed; that the plaintiff should give security for the costs of the sale, the conduct of which was given to him, and which was directed to take place out of Court; and that the proceeds of the sale should be brought into the Court.

The rights of a mortgagee as against the mortgagor, so far as the right to maintain a suit for foreclosure or sale are concerned, are defined by section 67 of Act IV of 1882. Section 75 of that Act gives, by declaration of the law, a second or subsequent mortgagee, so far as regards redemption, foreclosure and sale of the mortgage property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against

(1) L.R. 21 Ch. D. 169.

such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees, if any, as he has against his mortgagor. Whether the suit be for foreclosure under sections 86 and 87 or for sale under sections 88 and 89, an opportunity must be allowed the defendant, after accounts have been taken, or the amount due has been declared, of paying the amount due before final forclosure or final order for sale.

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I think it is from the sections to which I have referred apparent that the Legislature in passing Act IV of 1882, did not in Chapter IV follow sections 25 of 44 and 45 Vic., c. 41.

Before proceeding further to consider Chapter IV of Act IV of 1882, I shall refer to section 2 of that Act. By section 2 of Act IV of 1882, it is enacted that nothing in the Act contained [456] shall be deemed to affect "(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability; or (d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction." The procedure by which a right or liability may be determined or enforced or a relief may be obtained is not a right, liabilility or relief within the meaning of saving clause (c) of section 2. On that point *Ganga Sahai* v. *Kishen Sahai* (1) and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (2) are authorities. As was said by James, L. J., in *Warner* v. *Murdoch* (3) "no one has a vested right in any particular form of procedure."

I have referred to saving clause (c) of section 2 of Act IV of 1882, as it has been arranged that we should in our judgment in this appeal express our opinions as well on the general principles relating to the rights, liabilities and reliefs of the parties to this appeal, as on the general principles relating to the rights, liabilities and reliefs of the parties to another appeal which has been argued, the mortgages in which were made prior to the coming into force of Act IV of 1882. In my opinion the rights, liabilities and reliefs of mortgagors and mortgagees, including second and subsequent mortgagees, so far as redemption, foreclosure and sale are concerned, were in British India before Act IV of 1882 came into force what Chapter IV of that Act has defined and declared such rights, liabilities and reliefs to be. The procedure by which such rights and liabilities were allowed to be determined and enforced, and by which such reliefs were allowed to be obtained, was not always the same and was in some respects inconsistent with the provisions of Chapter IV of Act IV of 1882.

It has been contended that sections 96 and 97 of Act IV of 1882 indicate that under Chapter IV of that Act a Court may, at the suit of a second mortgagee, order the mortgaged property to be sold subject to the prior mortgage, that is, order that the [457] property be sold without the prior mortgage being redeemed, and without the consent of the prior mortgagee to the property being sold freed from the prior mortgage being given. Section 96 is not happily worded: but I cannot find in Chapter IV any provision enabling a Court to make such an order or protecting the interests of the prior mortgagee. If such an order could be made certainly section 97 would not protect his interests. I regard the words "subject to a prior mortgage" in section 96 as mere words of description. If section 96 were intended to have the meaning which it has been contended it has, it ought to have been—"If any property the sale of which is directed under this chapter in order to be sold subject to a

(1) 6 A. 262. (2) 12 C. 583. (3) L.R. 4 Ch. D. 752.

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prior mortgage, the Court may, etc." It has been contended that as section 295 of the Code of Civil Procedure contemplates a judgment-creditor bringing to sale in execution of an ordinary money-decree mortgaged property, and selling it subject to a mortgage or charge, and also contemplates immoveable property being sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, we should construe Chapter IV of Act IV of 1882 so as to give to a second mortgagee the same rights which a judgment-creditor would have under his ordinary money-decree. That, in my opinion, cannot be done. We must construe each Act on its own wording and in accordance with its own context. Besides the cases are not similar. In the one case, the second mortgagee has the rights and reliefs which Act IV of 1882 declares he has under the mortgage contract which he accepted. They are the creation of a mortgage contract controlled by the law relating to mortgage contracts. In the other case, the judgment-creditor's decree may have been obtained in a suit brought upon any one of a great variety of causes of action in no way dependent on, or relating to a mortgage contract. Although such judgment-creditor would, under section 91 of Act IV of 1882, when he had attached the mortgagor's interest in the property, be a person entitled to redeem and to institute a suit for redemption, he would not, unless he were a mortgagee of the property which he sought to sell, be compelled by section 99, in order to bring the property to sale, to [458] bring a suit under section 67 of that Act. The case of immoveable property being sold in execution of a decree ordering its sale for the discharge of an incumbrance referred to in clause (*c*) of section 295 of the Code of Civil Procedure must of necessity, if the suit was instituted after the 1st of July, 1882, be a case in which the order for sale had been made under Chap. IV of Act IV of 1882.

The plaintiff's mortgage of the 6th of August 1885 is a simple mortgage. This suit was instituted after the mortgage money had become payable to him. No decree had been made for redemption, nor had the mortgage-money been paid or deposited. If that mortgage had been the first and only mortgage, it is clear that under sections 67 and 88 of the Transfer of Property Act, 1882, the plaintiff would have been entitled to a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that in default of the mortgagor paying as therein mentioned the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what would be found due to the plaintiff in account, and that the balance if any, be paid to the mortgagor-defendant or other persons entitled to receive the same. Does the fact that the plaintiff is not a sole, but a second mortgagee, and that there is a subsequent mortgage, namely, that of the 21st August 1885, alter the rights which he would have had under sections 67 and 88 if he had been the sole mortgagee? The answer to that question must in my opinion, depend on a consideration of other sections of the Transfer of Property Act, 1882. In considering those sections, and in endeavouring to ascertain what was the intention of the Legislature, we must bear in mind that the property which a Court is, under section 88 to order to be sold, is the "mortgaged property or a sufficient part thereof."

The plaintiff, in order to bring the mortgaged property to sale, was compelled by section 99 to bring his suit under section 67 of the Act. The plaintiff having had notice of Hari Prasad's [459] mortgages was bound by section 85 to join Hari Prasad as a party to the suit.

What is the effect on his suit of his not having joined Mata Prasad, I will consider later on. 1891 JULY 25. FULL BENCH. 13 A. 432, (F.B.).

The object of section 85 must be to give to all the parties thereby required to be joined as parties to the suit an opportunity of protecting their own interests, and to enable the Court to determine the respective rights of all such parties, and to pass a decree and order which would be consistent with, and not in violation of, such rights, and thus to prevent opportunities for harassing and complicated subsequent litigation arising.

The rights of a second or subsequent mortgagee, so far as regards redemption, foreclosure and sale of the mortgaged property are, by reference, declared and defined by section 75. Those rights, as I have pointed out, are as against the prior mortgagee or mortgagees the same rights as his mortgagor has against such prior mortgagee or mortgagees, and no more, and as against subsequent mortgagees, if any, the same rights which he has against his mortgagor and no more.

Now what are the rights which the mortgagor has against a mortgagee, so far as redemption or sale are concerned?

Those rights of the mortgagor, so far as mortgages other than usufructuary mortgages are concerned, are declared, and defined by sections 60 and 61. The right of the mortgagor under section 60 is a right to redeem, which is to be enforced by a suit for redemption. The right to redeem does not, under section 67, arise until the principal money has become payable. As the right of the second or subsequent mortgagee as against a prior mortgagee is confined to the right which the mortgagor has against such prior mortgagee, let us see what is the decree which a mortgagor can, in a properly framed suit on a mortgage other than an usufructuary mortgage obtain against his first mortgagee. That decree is a decree under section 92 "ordering that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him on the day next hereinafter referred to, or declaring the amount so due at the date of [460] the decree; that upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him; or, when the defendant claims by derived title, by those under whom he claims and shall, if necessary, put the plaintiff into possession of the mortgaged property; and that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary), be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold."

It is obvious from section 93 that in case of default by the plaintiff in paying the amount due, it is the defendant, and not the plaintiff, who can obtain in one case an order that the plaintiff be debarred of all right to redeem, and in the other that the mortgaged property be sold.

In case of an order for sale under sections 92 and 93, the order must be that "such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court, and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same."

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Section 93 further enacts that "on the passing of any order under this section the plaintiff's right to redeem, and the security, shall, as regards the property affected by the order, both be extinguished."

As I read the sections of the Transfer of Property Act, 1882, relating to the rights and liabilities of mortgagors and mortgagees the word "property" is used throughout those sections as meaning the actual immoveable property mortgaged, and not as meaning merely particular rights and interests in such property as dis-[461]tinguished and separated from the actual immoveable property itself. In other words, the word ,property' is, in my opinion, used throughout Chapter IV of the Transfer of Property Act, 1882, in the same sense and with the same meaning as that word is used in section 58, where a mortgage is defined as "the transfer of an interest in *specific immoveable property* for the purpose of securing the payment,&c." If, as has been contended, the Legislature had intended that a bare right to redeem, as apart and distinguished from the immoveable property, should be treated and considered as "property," as that word is used throughout Chapter IV of Act IV of 1882, the Legislature could have so enacted ; but in my opinion it has not. The property to be sold within the meaning of section 67 must mean the immoveable property. "The mortgaged property or a sufficient part thereof" in section 88 must mean the mortgaged immoveable property or a part of it, and in neither section can the word "property" mean merely, the bare rights and interests of a mortgagor, although the sale of the immoveable mortgaged property under a decree for sale in a properly framed suit would carry with it such rights and interests.

In a suit for foreclosure the defendant in one event is to be put into possession of the property, and in the other possession of the property is to be delivered to the plaintiff. In a suit for redemption the plaintiff is in one event to be put into possession of the mortgaged property, and in the other possession of the property is to be delivered to the defendant. By secion 91 the right which (*a*) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon the property, or (*b*) any person having any interest in, or charge upon the right to redeem the property, or (*f*) the judgment-creditor of the mortgagor, when he has obtained executien by attachment of the mortgagor's-interest in the property, has, is a right to redeem or to institute a suit for redemption of the "mortgaged property." It is, in my opinion, obvious that in section 91 an "interest" in the property is not synonymous with the "mortgaged property." In section 95 actual possession of the [462] mortgaged property, and not the possession of an interest in the mortgaged property,or a right to the possession of the mortgaged property, must be the possession referred to.

To construe the word "property" as it is used in Chapter IV of Act IV of 1882 otherwise than as I construe it, would, it appears to me, necessarily lead to the conclusion that under that chapter a bare right which is known in England as an equity of redemption can be brought to sale and sold.

It has been contended that "immoveable property" as defined in clause (5) of section 2 of the General Clauses Act, 1868 (Act I of 1868) includes the rights and interests of a mortgagor or of a mortgagee, and, for example, of a second mortgagee in mortgaged property. Whether or not that contention be well founded, it would, in my opinion, be repugnant to the context to hold that the word "property," as it is used in Chapter IV of Act IV of 1882, means rights and interest in mortgaged

property as distinct from the actual immovable property, as for instance, land itself. The law in England or works on Equity or Jurisprudence can, in my opinion, no more help us to a construction of the word "property" in Chapter IV than can Webster's Dictionary.

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Now let us see whether it could possibly have been the intention of the Legislature that a second mortgagee should, without redeeming a prior mortgage, be entitled to bring the mortgaged property, or any part of it, to sale under the Transfer of Property Act; and having regard to s. 99, it is only by a suit under that Act that he could, if at all, bring such property or any part of it to sale. It could not have been the intention of the Legislature to give to a second mortgagee as against the prior mortgagee more extensive rights than the mortgagor had against such prior mortgagee. If the prior mortgage was an usufructuary mortgage, under which the mortgagee was authorised to pay himself the mortgage-money from the rents and profits of the property, the mortgagor's right was to recover possession of the property when such money was paid. The mortgagor could not, either before or since the Transfer of Property Act, 1882, came [463] into force, redeem or get possession of or bring to sale such property or any part of it until the usufruct had satisfied the mortgage-money. I fail to see on what principle the second mortgagee could redeem that property or bring it or any part of it to sale, or how he by a subsequent contract to which the prior mortgagee was not a party could deprive that prior mortgagee of any of the benefits of his prior contract.

Let us take another case, namely, that of a prior simple mortgage, the time for payment of the principal money of which had not arrived. In that case the mortgagor could not, either before or since the Transfer of Property Act, 1882, came into force, redeem or bring to sale the hypothecated property. On what principle could the second mortgagee redeem or bring that property to sale, or how could he under his subsequent contract obtain the right to deprive the prior mortgagee of the benefits of his prior contract by redeeming or bringing to sale before the due date of that prior mortgage the property or any part of it which had been hypothecated as security for the repayment of the mortgage-money of the first mortgage?

It has been contended that, if my construction of Act IV of 1882 be the correct one, cases of great hardship would occur, and as an instance, a case has been supposed in which there are two mortgages of the same property, the first of which was made on the 1st of January 1890, the 1st of January 1900 being the date when, according to the mortgage contract, the principal money might be repaid and the mortgage be redeemed; and the second mortgage made on the 1st of February 1891, the 1st of February 1893 being the date when, according to the mortgage contract, the principal money should become due and repayable. It has been contended that in such a case it would be hard and unjust to prevent the second mortgagee from instituting and successfully maintaining a suit to obtain repayment of his mortgage-money by sale of the mortgaged property until the 2nd of January 1900, when his mortgage contract made the money repayable on the 1st of February 1893.

[464] I can see no injustice in such a case; and as to hardship, if there were any, the second mortgagee brought it upon himself. If the second mortgagee had, before he advanced his money on the second mortgage, notice in fact of the first mortgage, he advanced his mortgage money with his eyes open. If the first mortgage was registered, the second mortgagee could by a search in the Registry have ascertained the nature of the security which he was taking. If the first mortgage was not

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one which, in order to make it available against the immoveable property comprised in it, it was necessary to register under the Registration Act of 1877 (Act III of 1877), and was not in fact registered, the second mortgagee could obtain priority for his second mortgage by registering it, provided he had not had notice of the first mortgage.

On the other hand, it appears to me that it would be grossly unjust and inequitable to deprive a first mortgagee of any of the benefits of his mortgage contract for the advantage of the second mortgagee, to whose contract the first mortgagee was not a party and who had not been induced to enter into that contract by any representations of the first mortgagee such as would entitle the second mortgagee to relief against the first mortgagee.

Having regard to section 89, and particularly to the latter half of it, I am of opinion that the suit for sale under section 88 can only be brought by a person entitled to foreclose against a person having a right to redeem. As I construe Act IV of 1882 a second mortgagee, if he desires to bring the mortgaged property or any part of it to sale, must bring his suit under that Act; and that suit, so far as it is a suit against the mortgagor, must be one for sale; so far as it is a suit against the prior mortgagee, it must be a suit under sections 92 and 93, in which case without redemption he could not get an order for sale of the mortgaged property or any part of it under section 88 against the mortgagor, and his suit so far as it is a suit against the subsequent mortgagees, must be a suit for foreclosure of sale. The suit before us in appeal is not such a suit. I would be disposed even at this stage of the suit to allow the plaintiff to amend in order that such relief as he might be [465] entitled to might be granted to him, if in other respects the suit was one in compliance with Act IV of 1882. But it is not. Mata Prasad, the mortgagee of the 21st of August 1885, was not joined as a party to this suit. Mata Prasad's mortgage was a registered mortgage, and Mata Prasad's suit on his mortgage was instituted in the Court of the Subordinat Judge of Gorakhpur on the same day, the 7th January 1877, on which the present plaintiff's suit was instituted in the same Court—Mata Prasad's suit being entered in the Court Register of original suits as No. 2 of 1887 and the plaintiff's as No. 3 of 1887. The two suits were heard together by the Subordinate Judge.

Having regard to those facts, and to section 3 of Act IV of 1882, which enacts, so far as is material, that "a person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it,"—I am bound to hold that the plaintiff had, within the meaning of section 85 of Act IV of 1882, notice of the interest of Mata Prasad in the property comprised in the plaintiff.s mortgage here in suit, and that not having joined Mata Prasad as a party to this suit, the plaintiff has failed to comply with the imperative condition of section 85 of Act IV of 1882. If the plaintiff had through an oversight omitted, in the first instance, to join Mata Prasad, he could have applied under section 32 of the Code of Civil Procedure to have Mata Prasad made a defendant. He never did so. Notwithstanding section 34 of that Code, I am of opinion that we must act upon the imperative words in section 85 of Act IV of 1882. At this stage of the suit I think we ought not to exercise the discretionary power vested in a Court under section 32 of the Code of Civil Procedure, particularly as the suit is not one which, without other amendments involving practically a fresh trial

could be maintained. It is necessary that litigants should be made to know and feel that the Statute Law, when it affects their rights of suit, must be complied with, and that in such a case as this Chapter IV of Act IV of 1882 must not be ignored and treated as a dead [466] letter. Section 85 was advisedly, and with the object of preventing multiplicity of suits, introduced into Act IV of 1882, and we must give effect to it by dismissing, as I would on that ground alone if there were no other, this appeal with costs, and confirming the dismissal of the suit so far as it has been dismissed below with costs.

MAHMOOD, J.—This case is so closely connected with S. A. No. 1213 of 1888 that both these cases were disposed of together by the two Courts below, and I think it will be convenient to dispose of them here in one and the same judgment.

Dealing with these two cases together, the facts, although clearly stated in the judgment of the learned Judge of the lower appellate Court, may be recapitulated here, since the points of law which they raise are important and have been referred to a Full Bench consisting of all the members of this Court.

The facts are these. Two brothers Kazim Husain and Nadir Husain owned shares in various villages and they have dealt with those shares by various deeds of transfer which, so far as these two cases are concerned, require mention only of the following transactions :—

(1) Both Kazim Husain and Nadir Husain executed a simple mortgage in favour of the defendant Hari Prasad, hypothecating their 8 annas share in mauza Barwa Kutwa and their 5 annas and 4 pies share in mauza Bhisia Kattiya, covenanting that they would repay the amount of money due on the mortgage in the course of one year, that till such payment they would not alienate the hypothecated property, and that in default of such payment, the money should be recoverable by sale of the hypothecated property in due course of the law. The amount for which this hypothecation was made is represented in the deed to be Rs. 2,901, and the deed is dated the 10 September 1882.

(2) On the 23rd February 1884, the same mortgagors, namely Kazim Husain and Nadir Husain, took a further advance from the same mortgagee, *viz.*, Hari Prasad, of a sum of Rs. 2,799 and executed a simple mortgage hypothecating again their 8-annas share [467] in the above-mentioned mauza Barwa Kutwa and only a 4 annas share in mauza Bhisia Kattiya together with other shares in five other villages of which express mention is not necessary for the purposes of this case. I may mention, however, that the deed contains a covenant to the effect, that the money due upon the bond would be repaid within a year, that till such payment the mortgagors would not alienate the hypothecated property, and that in default of payment, the mortgagee would be entitled to recover the money due upon the mortgage by enforcement of the mortgage.

(3) On the 6th August, 1885, a third transaction took place to which the aforesaid mortgagee Hari Prasad was no party. This transaction was a simple mortgage executed by the above-mentioned Kazim Husain alone in favour of the plaintiff Mata Din Kasodhan in lieu of Rs. 1,000 hypothecating the mortgagor's 4-anna share in mauza Barwa Kutwa and 2-annas share in mauza Bhisia Kattiya together with certain small shares in two other villages. The money thus borrowed was promised to be repaid within three months, and in default of such payment it was covenanted *inter alia* that the properties hypothecated were to be held as security for

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repayment of the loan and that till such repayment had taken place, the hypothecated properties could not be alienated by the mortgagor. The terms of the covenants contained in this hypothecation deed are of special importance because the suit from which this appeal has arisen is based upon this document. In view of this circumstance and with reference to what may follow in this judgment it is necessary to point out that the 4-annas share of mouza Barwa Kutwa, which formed part of the property hypothecated in this bond by the mortgagor Kazim Husain (defendant) is the same 4-annas shares as that which, he, conjointly with his brother Nadir Husain, had already hypothecated to Hari Prasad by the two earlier deeds which I have mentioned, namely, the simple mortgage-deeds of the 10th September, 1882, and the 23rd February, 1884.

(4) The fourth transaction is a simple mortgage executed by Nadir Husain alone on the 12th August, 1885, whereby in lieu of Rs. 1,999 he hypothecated his very same 4-annas share of mauza [468] Barwa Kutwa to Hari Prasad, defendant, along with other property of which specific mention is not necessary. It is also needless to say that Hari Prasad, the mortgagee (defendant), already held this 4-annas share of Nadir Husain in mortgage under his two earlier deeds of the 10th September, 1882, and the 23rd February, 1884. But I may mention here that the deed of the 12th August, 1885, contains a covenant to the effect that the money was to be repaid within one year, and that till such repayment, the mortgagor would not alienate the mortgaged property.

(5) The fifth transaction is another simple mortgage executed by Kazim Husain alone in favour of Mata Prasad, *alias* Chingan Ram, who is plaintiff in the suit out of which the connected S. A. No. 1213 of 1888, has arisen. The deed is dated the 21st August, 1885, and the amount for which it was executed is Rs. 999 and as a security for the repayment of the money the same 4-annas share in mauza Barwa Kutwa, as that which was covered by the abovementioned mortgages of the 10th September, 1882, the 23rd February, 1884, in favour of Hari Prasad, and the 6th August, 1885, in favour of Mata Din Kasodhan, was given as mortgage security along with some other property. The term for repayment of this loan was fixed to be three months, and the deed whilst containing the ordinary covenants in a hypothecation bond also covenants that till repayment of the loan the hypothecated property could not be alienated by the mortgagor. This deed is the basis of the suit out of which the connected S.A. No. 1213 of 1888 has arisen.

(6) Then comes the most important transaction which affects these two connected suits and which indeed is probably the main reason why this case has been required to be considered by a bench consisting of all the members of the Court. The transaction is a deed of sale executed by the abovementioned brothers Kazim Husain and Nadir Husain jointly on the 20th September, 1886, in favour of the abovementioned Hari Prasad (defendant), whereby they in lieu of Rs. 14,530, stated in the deed to be the amount then due to the abovementioned mortgagee Hari Prasad under the abovementioned hypothecation bonds of the 10th September, [469] 1882, the 23rd February, 1884, and the 12th August, 1885, sold their rights and interests in the 8-annas share of mauza Barwa Kotwa which already stood mortgaged not only to Hari Prasad, the vendee under the hypothecation deeds mentioned, but also to Mata Din Kasodhan under Kasim Husain's deed of 6th August, 1885, and to Mata Prasad under the deed of 21st August, 1885, so far as the 4-annas share of Kazim Husain was concerned. And for the sake of clearness I may say here in passing

that so far as Nadir Husain's 4-annas share in mauza Barwa Kotwa is concerned, the transactions which I have mentioned only show that under the mortgages of the 10th September, 1882, the 23rd February, 1884, and the 12th August, 1885, and the sale-deed of the 20th September, 1886, the defendant Hari Prasad *alone* is concerned both as mortgagee and as vendee and neither of the plaintiffs in these connected suits has any interest in that 4-annas share.

From the transactions which I have just described two suits have arisen, namely, the following :—

(1) A suit instituted by Mata Din Kasodhan on the hypothecation deed of the 6th August, 1885, and the object of the suit, as represented in the prayer contained in the plaint, is that the property covered in that bond should be brought to sale by enforcement of hypothecation lien, and that so far as the sale-deed of the 20th September, 1886, can be considered in defeasance of the plaintiff's title, it should be set aside.

(2) The second suit is one filed by Mata Prasad on his hypothecation bond of the 21st August, 1885, of which the terms have already been mentioned by me, seeking recovery of money by sale of the property included in his hypthecation bond by enforcement of lien.

In the Court of the Subordinate Judge which was the Court of first instance, the parties arrayed as defendants in the suit of Mata Din Kasodhan, plaintiff, were Kazim Husain, the executant of the hypothecation deed of the 6th August, 1885, upon which the suit was based, and also Hari Prasad, the mortgagee of the 10th September 1882, and the 23rd February, 1884, and vendee of the 4-annas [470] share in mauza Barwa Kotwa included in the sale-deed of the 20th September, 1886.

Similarly in the suit by Mata Prasad, the parties impleaded as defendants were the same Kazim Husain and the same Hari Prasad, and both these persons were impleaded as defendants for the same reason.

From what I have already stated it will be clear that both these suits were suits of an ordinary character seeking to recover money advanced upon a simple mortgage by sale of the properties covered and hypothecated in the deeds upon which the suits respectively proceeded, that is to say, in the case of Mata Din Kasodhan, plaintiff, the properties mentioned in the hypothecation deed of the 6th August 1885 (S. A. No. 1210 of 1888) and in the case of Mata Prasad (S. A. No. 1213 of 1888) the hypothecation deed of the 21st August, 1885.

The suits being thus arrayed and the reliefs prayed for in them being thus similar, Kazim Husain, the mortgagor, did not appear to defend either of them, but naturally Hari Prasad, whose interests in the 4-annas share of Kazim Husain in mauza Barwa Kotwa has already been described by me (with reference to the hypothecation deeds of the 10th September, 1882, and the 23rd February, 1884, and also the sale-deed of the 20th September, 1886), appeared to resist both actions relying upon his mortgages of the 10th September, 1882, and the 23rd February 1884, and also on his sale-deed of the 20th September, 1886.

The Court of first instance decreed the claim of Mata Din Kasodhan, plaintiff so far as the mortgagor Kazim Husain (defendant) was concerned in respect of the hypothecated properties other than the 4-annas share in mauza Barwa Kotwa, but dismissed the suit so far as it sought to bring to sale the share abovementioned and which had been purchased by the defendant Hari Prasad under the sale-deed of the 20th September, 1886.

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For similar reasons that Court passed a similar decree in the suit of Mata Prasad, which is the subject of the connected appeal (S. A. No. 1213 of 1888).

[471] From the decrees passed by the Court of first instance in these two connected suits, the plaintiff Mata Din Kasodhan appealed to the lower appellate Court upon grounds similar to those upon which in the connected case the plaintiff Mata Prasad appealed.

Both these appeals were before the learned Judge of the lower appellate Court and he has dealt with them in one and the same judgment, with the result that he upheld the decrees of the Court of first instance and dismissed both the appeals.

From the decrees thus passed both Mata Din Kasodhan plaintiff, appellant in the case, and Mata Prasad, plaintiff, appellant in the connected case (S.A. No. 1213 of 1888), have appealed to this Court, and these two appeals have been considered together by the Full Bench.

Upon the facts of the case as I have stated them taken with the pleading of the parties, and the arguments which have been addressed to us in the Full Bench, the following questions of principle as to the law of mortgage as prevailing in this part of the British India have to be considered :—

(1) What are the legal incidents of a simple mortgage or hypothecation as understood in the law governing this part of the country ?

(2) Does the mere fact of the existence of a prior simple mortgage or hypothecation debar a puisne mortgagee or hypothecatee from enforcing his lien by bringing the property to sale under order of the Court irrespective of the desire or willingness of the prior mortgagee ?

(3) When a purchaser of the equity of redemption being himself a first mortgagee takes the purchase in payment of his first mortgage, does such payment defeat the puisne and mesne incumbrancer's rights in the same property or otherwise affect them ?

(4) In a suit such as this has the plaintiff a right to claim a decree for the sale of the hypothecated property without rendering himself liable to pay up the prior incumbrances or to any other [472] qualification as to the prayer contained in his plaint for a decree for sale ?

Before dealing with these questions, I wish to observe that I have had the great advantage of perusing the judgment which the learned Chief Justice has prepared in this case, and I may say at once that I entirely agree with him in thinking that the principle of the Full Bench ruling of this Court in *Ganga Sahai* v. *Kishen Sahai* (1), and of the Full Bench ruling of the Calcutta High Court in *Bhobo Sundari Debi* v. *Rakkal Chunder Bose* (2) renders the Transfer of Property Act (IV of 1882) applicable, so far as the question of reliefs and procedure is concerned, to mortgages executed before that Act came into force. In the present case all the transfers were made subsequent to the enforcement of the Transfer of Property Act, but I have made this observation with reference to another appeal which has been argued before the Full Bench and to which the learned Chief Justice has alluded in his judgment. I may also premise here that upon the points above enunciated by me, numerous rulings were cited in the course of the argument. All those cases have been dealt with by the learned Chief Justice in his judgment so exhaustively that it relieves me of the necessity of having to refer to them all in my judgment. I shall therefore refer only to such cases as are required for the purposes

(1) 6 A. 262.

(2) 12 C, 583.

of explaining my views upon the questions of law which have to be decided as already enunciated by me. 1891 JULY 25.

Dealing with this case in this manner, I think in considering the first question, it is necessary to express my views as to the exact meaning of the word "*Property*" as it occurs in the preamble of the Transfer of Propety Act (IV of 1882) and throughout that enactment. This is a question of interpretation, pure and simple, which must necessarily be guided by the context of the enactment in which the word is employed. I take it as a general rule of interpretation that words when employed in a statute must be understood in their most generic sense unless a restricted meaning is indicated by some provision in the same statute or in any other governing former [473] statute. The rule is too well known to require any citation of authorities, and I have thus to resort to statute law for the purpose of ascertaining whether or not the word "*Property*" has been used in its most generic and comprehensive legal sense in the Transfer of Property Act (IV of 1882). Unfortunately that enactment contains no scientific or comprehensive definition of the term; but that enactment must be read subject to the interpretation required by the "*General Clauses Act*" (I of 1868). In clauses (5) and (6) of section (2) of that enactment, definitions of immoveable and moveable property have been attempted though in an incomprehensive manner. In the Transfer of Property Act itself in section 3, the phrase immoveable property is not fully explained any more than the word "*property*" itself. But I think that section 6 of that enactment in making exceptions to the capability of transfer of property must be understood to use the term *property* in its widest and most generic legal sense, for otherwise the exceptions would be wholly unnecessary. That sense is, I think, well represented in the meaning assigned to the word in Wharton's Law Lexicon where it is represented to mean: "the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which does not depend on another's courtesy, property is of three sorts: absolute, qualified, and possessory."

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And I may say that, so far as questions of possession are dealt with in the Act, it appears to me that "*possession*" in those provisions is not to be restricted merely to actual physical possession but should be understood to mean such possession as the nature of the property is susceptible of, for otherwise many classes of transfer, resting for their validity upon possession, would become invalid, a view consistent with the principle of *Palani* v. *Selambara* (1) and what was said by Prinsep, J., in *Narain Chunder Chukerbutty* v. *Dataram Roy* (2) as to zemindari estates of which the land is in actual possession of tenants.

Therefore such indications as s. 6 of the Transfer of Property Act affords, induce me to hold that the phrase "*transfer of* [474] *property*" as it occurs in s. 5 and the phrase "*an interest in specific immoveable property*" as it occurs in s. 58 of the Transfer of Property Act include what is known to the English Law as the "*Equity of redemption,*" that is to say, such rights and interests as still remain to the owner of the property after he has executed a mortgage of any kind. It is a misfortune that the phrase "*Equity of redemption*" was ever introduced into the Mufassil Courts of British India, for that phrase is an extremely technical phrase of the English Law of real property, and owes its origin and has reference to the various procedures which at one time drew a hard-and-fast distinction between the procedure of the Courts of Common Law and

(1) 9 M. 267. (2) 8 C. 597 (611).

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of the Courts of Chancery in England. The phrase also has reference to the peculiarities of the English system of mortgages, vastly different from the Indian system of the mortgages, and I think it has been wisely avoided in the Transfer of Property Act. Now, I will not go to the original text-books of the English Law of mortgages for showing what a mortgage means there, because the definition of an English mortgage as contained in clause (*e*) of s. 58 of the Transfer of Property Act helps me with a specific definition of what I understand by an English mortgage. The clause runs as follows :—

"Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."

Now, although this kind of mortgage may resemble, in some respects, the Indian *baibilwafa* or mortgage by conditional sale as defined in clause (*c*) of s. 58 of the Transfer of Property Act, one thing is certain, *viz.*, that an Indian mortgage of *any kind* does not mean the conveyance of "*property absolutely to the mortgagee*" so that even if the English technical phrases "*legal estate*" as distinguished from "*equitable estate*" were to be imported into the Indian Law of mortgages, it must be held that notwithstanding the execution of a mortgage of any kind, the "*legal estate*" vests not in the mortgagee but remains in the hands of the mortgagor, for [475] he continues to be the owner of the property, entitled to deal with it as he likes, subject, of course, to the incidents of the mortgage which he has already executed. If any authority is necessary for sustaining the proposition I willingly go back as far as the 30th April, 1858, when three Judges of the Calcutta Sudder Diwani Adalat in the case of *Sadat Ali Khan and others* v. *The Callector of Sarun and others* (1), concurred in saying that :—

"It is quite clear that, under the *Mufassil* Law of mortgages, the right of ownership in the mortgaged property does not pass to the mortgagee, leaving *only* the equity of redemption in the mortgagor; the right of ownership together with the right of redemption remain with the mortgagor and until the property be actually foreclosed, and the sale become absolute, the right of ownership does not pass. This doctrine holds equally applicable to conditional sales or usufructuary mortgages; it follows, that the mortgagee in the present suit, who, whatever the nature of the mortgage, were in possession, were simply usufructuaries, and as such, they enjoy no right of ownership."

I have cited this authority in order to make a marked distinction between the English Law of mortgages and the Indian Law, not only over the question of legal and equitable estates but also over the doctrine of tacking to which I shall have to refer later on.

Leaving that question alone for a while, it is important for me in considering the first question, as enunciated by me, to realize the exact legal incidents of a simple mortgage or hypothecation, as understood in our law. And I am afraid, since this is a Full Bench case, I must repeat what I said in my dissentient judgment in another Full Bench case *Gopal Pandey* v. *Parsotam Das* (2) where I had to consider the same question, without having the benefit of knowing whether my views as to the nature of simple mortgage or hypothecation were approved by the majority of the Court. At the risk of prolixity and in order to avoid re-writing the same

(1) Calcutta S. D. A (1858), 840 (at p. 844). (2) 5 A. 121 (pp. 137-140.)

views in other words I quote the following passages from my judgment [476] in the above mentioned case. There I said referring to simple mortgages :— 1891 JULY 25.

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"Now the word "*transfer*" has long been recognised to be a technical term of law in all countries where English is the language of the Legislature and of the Courts of Justice. It is often used as a convertible term with "*alienation*," "*conveyance*" and *assignment*." Whether any distinction exists between the technical meanings of these expressions, and if so, what that distinction is—it is not necessary exactly to determine. But it may be safely taken that the word "transfer" is used in law in the most generic signification, comprehending all the species of contract which pass real rights in property from one person to another.

"In considering the question immediately before us, it seems to me necessary to bear in mind that we are not at present concerned with transfers which take place by judicial process, but with such transfers only as take place between living parties by virtue of their own act. In this signification the term cannot be defined better than by saying that it means an act by which a living person conveys the whole or part of the right of ownership of property in present or future, to one or more other living persons. This being my view, the next question to consider is the exact nature of Indian mortgages in general. Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in s. 58 of the Transfer of Property Act (IV of 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books on Indian mortgages. Every word of the definition is borne out by the decisions of the Indian Courts of Justice as fully explained in Macpherson's celebrated work on Indian mortgages.

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A mortgage, then, is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give [477] rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee. Now, hypothecation is only a species of mortgage. It has in India been used in the sense of a pledge, and the proper term for it is simple mortgage.

"What, then, is the nature of a simple mortgage? I again borrow the definition from the Transfer of Property Act, solely for the sake of convenience, and wholly irrespective of its legislative authority. Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees expressly or impliedly that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage.

"Now, it is quite clear to my mind that the most essential of the elements which constitute the simple mortgage is *the right to cause the property to be sold*—a right without which the transaction, whatever else it may be, certainly cannot be called a hypothecation, pledge, or simple mortgage. This right does not come into existence when the actual sale takes place by virtue thereof, but it comes into existence at the time when the mortgage is made: it subsists in the property ever afterwards so long

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as the mortgage-money remains unpaid: it limits the interests of the mortgagor as they were at the time of the mortgage. Jurisprudence recognises it as one of the various species of *Jura in re aliena*, or estates carved out of the full ownership of property. It may happen that the right, though not apparently, but in reality, is tantamount to absolute transfer in its virtual effect. For instance, when land of the value of Rs. 100 is pledged by hypothecation in lieu of a debt amounting to Rs. 101, the mortgagor is simply a nominal owner, and his *nuda proprietas* is worth less than zero. I am, therefore, of opinion that the rights created by hypothecation in this country amount to nothing more or less than a transfer of an estate amounting to a transfer of immoveable property [478] *though of course not an absolute transfer*. The feature which distinguishes hypothecation from other forms of mortgage consists in the fact that it does not entitle the mortgagee to enjoy the physical qualities of the subject of the mortgage. That this distinction does not alter the nature of the transaction so as to take it out of the category of *transfer* is clear to me from the manner in which the right is treated by jurisprudence. The reason of the juristic view is well described by a modern writer on jurisprudence. 'The *right of sale* is one of the component rights of ownership and may be parted with *separately* in order thus to add security to a personal obligation. When so parted with it is a right of pledge, which may be defined as a right *in rem* realizable by sale, given to a creditor by way of accessory security to a right *in personam*.

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"The objects aimed by a pledge ere obviously, on the one hand to give the creditor a security on the value of which he can rely, which he can *readily turn into money*, and which he can follow even in the hands of third parties; on the other hand to leave the enjoyment of the thing in the meantime to *its owner*, and to give him every facility for disincumbering it when the debt for which it is security shall have been paid." (Holland, p. 152.)

"Such being the very nature and essence of the rights created by hypothecation, it follows that if *hypothecation is valid and legal*, the incidents which flow from it must necessarily be held to be valid and legal too, on the principle that when the law permits a thing, it also permits that which is essential to its accomplishment. *The most essential incident of hypothecation is the eventual sale by order of Court*—a sale which in the ordinary course of law must be held by public auction, at which *ex necessitate rei* any person may bid and which must be concluded in favour of the highest bidder. *If hypothecation does not carry with it this right of sale at the instance of the mortgagee, and without any restrictions as to the class of bidders or purchasers it cannot be called hypothecation at all.* For if any such restrictions are attached to the rigt of sale, they are essentially repugnant to the very nature of the right [479] conveyed, and must end in defeating the entire object of the pledge."

These views were expressed by me so long ago as the 13th June, 1882, in the Full Bench case of *Gopal Pandey* v. *Parsotam Das* (1) and to those views I still adhere so far as they explain the legal incidents of a simply mortgage or hypothecation as understood in the Indian Law. But because these observations were made in a dissentient judgment, it was argued before me in a later case—*Kishan Lal* v. *Ganga Ram* (2)—

(1) 5 A. 121.

(2) 13 A. 28 (pp. 49 and 50).

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that this view of the nature of a simple mortgage was disapproved by the majority of the Court in the Full Bench case. In delivering my judgment I took occasion to explain why such was not the case, and that explanation justified me in the later case to abide by what I have all along understood to be the legal incidents of hypothecation or simple mortgage as understood in the Indian Law.

I think I have said enough to indicate what I understand by the term "*property*" as used in the Transfer of Property Act; also what I understand by "*simple mortgage*" as described in the same enactment. And if it is necessary to explain my meaning more concretely, I will do so by taking the following illustration, which will also help me in dealing with some of the other points in this case.

Let me suppose that A is the owner of certain property X which is free of all kinds of mortgage incumbrances. A borrows Rs. 90,000 from B and executes a simple mortgage in his favour hypothecating the property X to him as security for repayment of the loan after the lapse of 70 years, the date of the mortgage being 1883.

Upon this state of things the first question is, whether after the execution of the mortgage in favour of B, A continues to be the owner of the property X or not, and whether his rights and interests, subject of course to the mortgage in favour of B, can be called "*property*" within the meaning of the Transfer of Property Act. Secondly, the question is whether such rights as B derived under [480] his mortgage of 1883 can be called "*property*" within the meaning of the Transfer of Property Act.

I am of opinion that the answer to both these questions must be in the affirmative, because the negative answer would necessitate the following results :—

First.—That A, having no longer any property in X, could not execute a second mortgage, for, his power of transfer must be governed by the provisions of ss. 5 and 6 of the Transfer of Property Act, and in those sections the right of transfer refers only to the expression "*property*" as meaning what I have explained. If that explanation is erroneous, then there is no power in the Transfer of Property Act to enable a mortgagor after having executed a first mortgage to execute a second mortgage or to sell his rights, because *ex hypothesi* his rights in X after the first mortgage to B, cannot be called "*property.*"

Secondly, for similar reasons it would follow *a fortiori* that the rights of B under his mortgage of 1883 not being "*property*" with the meaning of ss. 5 and 6 of the Transfer of Property Act, he could not transfer them either by assignment or sale or by executing a sub-mortgage.

A more restricted meaning of the word "*property*" then I have adopted would, in my humble opinion, necessitate both these results; and I venture to say that I am wholly unaware of any authority in the Indian Law of Mortgages as it stood before the Transfer of Property Act (IV of 1882), or as it now stands since the enforcement of that enactment, to justify the view that either second or other subsequent mortgages of sub-mortgages are prohibited by the law. And if I am right so far, it follows that a second mortgage or a sub-mortgage is either legal or illegal. If such transactions are illegal, then a clear answer is obtained. But if it be accepted that they are legal and valid, as I hold them to be, then it follows that these transactions, falling under the category of the law of contracts, must be governed by the general principles of the Indian Contract Act (IX of 1872), as indeed expressly stated in s. 4 of the Transfer of Property Act itself, which lays down *inter alia* [481] that "the chapters

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and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872."

There is *nothing* in either of these enactments to prohibit a mortgagor after his first mortgage to deal with his rights by transfer in any form in which he chooses to alienate them. Nor is there anything in those enactments to render such subsequent transfers unenforceable at the instance of the transferee, that is to say, in the case of a second mortgage, for example, the second mortgagee would have the right to enforce the obligations contained in the covenants of his mortgage-deed.

There is, however, one point which, with reference to the covenants against alienation as contained in Hari Prasad, (defendant's) three mortgaages, dated the 10th September 1882, the 23rd February 1884, the 12th August 1885, and Mata Din Kasondhan's mortgage of the 6th August 1885 as also in Mata Prasad's mortgage of the 21st August, 1885, assumes importance, *viz.*,whether such covenants against alienation absolutely debar the mortgagor from dealing with his rights by way of transfer of the mortgaged property. The plea was actually taken by Hari Prasad in his defence to the action in the second paragraph of his written statement. This question was one of the subjects of consideration by me in *Ali Hasan* v. *Dhiraj* (1) and I expressed my views upon it at pp. 523 and 524 of the report. I ended my observations by saying—

"I am therefore of opinion that transfers made in breach of covenants against alienation—covenants so often introduced in mortgage-deed and so often infringed by mortgagors in this country,—are valid except in so far as they encroach upon the rights of the prior mortgagee, and that, with this reservation, such covenants do not bind the property so as to prevent the acquisition of a valid title by the alienee."

This view of the law is stated by Dr. Rash Behari Ghose in the second edition of his well-known work on the *Law of Mortgage in India* (page 157), and he sums up the case-law in the following words :—

[482] "It is necessary to observe that at one time the Courts used to give full effect to a condition against alienation (see the cases cited by the reporter in the note to *Chunni* v. *Thakoor Dass* (2)); but it is now settled that a transfer by the mortgagor in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee to realize his security. But, with this reservation, such a condition does not affect the property so as to prevent the acquisition of a valid title by the transferee of the equity of redemption. Covenants against alienation are often introduced in mortgage-deeds in this country, and, I may add are so often infringed by mortgagors. But such a covenant, although it may create a personal liability between the mortgagor and the mortgagee, does not render an alienation absolutely void, but voidable only in so far as it is in derogation of the rights of the mortgagee. In reality, therefore, a mortgagee does not, by virtue of such a covenant, acquire any higher rights than he would acquire even if the condition was absent, except, perhaps, as regards the necessity of making puisne claimants parties [*Radha Prasad Misser* v. *Monohur Dass* (3); *Chunni* v. *Thakoor Dass* (2), *Ali Hasan* v. *Dhiraj* (1)]. To these cases I may add the ruling of the Madras High Court in *Venkata Somayazulu* v. *Kannam Dhora* (4) and cite the authority of the various cases mentioned at p. 293 in *Macpherson's Mortgages* (7th ed.), where the rule laid down

(1) 4 A. 518. (2) 6 C. 317. (3) 1 A. 126. (4) 5 M. 184.

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is that alienations made by a mortgagor in breach of a covenant against alienation are bad only in so far as they interfere with the rights of those with whom the agreement not to alienate was made. And this rule is stated to be as old as the Full Bench ruling of the Calcutta Sudder Court in *Ubhy Charn Sheikhdar* v. *Jugat Kishore Raee* (1), which was followed in later cases.

Applying these principles to the facts of the present case, it follows that notwithstanding the mortgages of the 10th September 1882, and the 23rd February 1887, in favour of the defendant Hari Prasad, both of which contained covenants against alienation, the [483] mortgagor Kazim Husain was legally entitled to execute subsequent mortgages, as he did by the deed of the 6th August 1885, in favour of the plaintiff Mata Din Kasodhan, and by the deed of the 21st August 1885, in favour of the plaintiff Mata Prasad. Now, if these two latter deeds were valid contracts, as I hold them to be, they must be enforceable by suit in the Courts of justice. And if they are so enforceable, the right of the mortgagees to bring what was mortgaged to them to sale cannot be denied according to the terms of the contract, it being of course borne in mind that what was mortgaged to them was subject to prior incumbrances as I have already described. Such is the effect of the rule as stated at p. 290 of Macpherson on Mortgages (7th ed.,) where the learned author on the authority of numerous rulings says—

"And the mortgagor may either tranfer absolutely or mortgage his remaining interest in lands which he has already mortgaged without first redeeming them. The purchaser or mortgagee acquires the rights or interests of the mortgagor and stands in his place; he takes the property subject to the lien of the prior mortgagee, the liabilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor, nothing, in fact, but a revenue sale, injure the mortgagee's lien on the land; or on that which represents the land."

It has, however, been contended that the mere existence of prior incumbrances debars these plaintiffs who are puisne mortgagees from enforcing their remedy according to the terms of their mortgage-deeds, without the consent of the prior mortgagee as such, or without redeeming the prior incumbrances. It has been argued that this restriction upon the plaintiffs' right to bring the property mortgaged to them to sale arises out of the doctrine of priority of liens as understood in the Indian Law of Mortgages. That such restrictions do not arise out of any terms or covenants contained in the plaintiff's mortgage-deeds seems to me to be clear, and I will now consider whether the doctrine of priority as understood in our law subjects puisne mortgages to any such restrictions as are sought to be imposed upon them by the argument which I have mentioned.

[484] Now, mortgage being only a form of the transfer of immoveable property, the rule formulated in s. 48 of the Transfer of Property Act comprehensively describes the scope of the doctrine of priority, and it applies to mortgages as much as to other kinds of transfers. The section runs as follows:—

"Where a person purports to create by transfer at different times rights in or over the same immoveable property, *and such rights cannot all exist or be exercised to their full extent together*, each later created right shall,

(1) Cal. S D.A. 1848, 305.

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in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

In considering this section the words which I have emphasized are by no means unimportant, for they show that the rule of priority applies only where the rights of the prior transferee clash with the rights of the puisne transferee, and that such right of priority does not give to the prior transferee a free hand to deal with the puisne transferee's rights in any manner going beyond what is requisite to fulfil and protect the rights of the prior transferee. In other words, where the terms or covenants of a puisne transfer can be enforced without in any manner affecting the rights of the prior transferee, the terms of the puisne transfer must take effect, irrespective of the wishes of the prior transferee, because in such a case, the doctrine of priority does not come into play and the maxim "*Qui prior est tempore potior est jure*" upon which it is based has no reference. This view of the law is applicable as much to transfers by mortgage as to other forms of transfer of immoveable property and therefore my answer to the second question, as enunciated by me, is that so long as the enforcement of the puisne mortgage cannot in any manner affect injuriously the rights of the prior mortgagee, such prior mortgagee, is not entitled to prevent the enforcement of the terms of a valid puisne mortgage to which he was no party and which cannot defeat or in any manner operate in derogation of his prior mortgage security.

I may explain my meaning by taking an illustraion. A, the owner of certain immoveable poperty, hypothecates the same by [485] simple mortgage to B in 1883 as security for payment of Rs. 5,000 payable at the end of 25 years. In 1884 he executes a second simple mortgage of the same property in favour of C in lieu of Rs. 4,000 payable at the end of 15 years; and in 1885 he executes a similar mortgage of the same property in favour of D for Rs. 3,000 payable at the end of 3 years. In this illustration it will be observed that B's mortgage would fall due in 1908, C's mortgage in 1899 and D's mortgage in 1888. All the mortgages remaining unpaid, D comes into the Court seeking to recover his mortgage money by enforcement of his security without waiting for the lapse of the terms of the two prior mortgages and without seeking to redeem them. The question then arises whether he can maintain such a suit?

Now, s. 67 of the Transfer of Property Act distinctly declares that "in the absense of a contract to the contrary the mortgagee has, at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, has a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold." Clause (*a*) of that section leaves no doubt that in the case of a *simple mortgage* the only remedy available to the mortgagee for recovery of his mortgage money is to bring the mortgaged property to sale under a decree of the Court, for he could not sell it himself without the intervention of the Court as explained by me in *Kishen Lal* v. *Ganga Ram* (1)

It will be observed that the section, whilst conferring, upon a simple mortgagee the right of bringing the property to sale, does not either limit it to *first* mortgagees or otherwise qualify such right by saying that a puisne simple mortgagee must either delay the enforcement of his security

(1) 13 A. 28 (at p. 48).

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till the lapse of the terms of prior mortgages or that the redemption of such prior mortgages is a condition precedent to the enforcement of the puisne mortgage. Nor do I think that any such qualifications or restrictions can be imported into the section. [486] For I take it as an established rule of interpretation that when a statute has expressly conferred a right, such right cannot be qualified, restricted or defeated unless such qualification, restriction or defeasance is to be gathered from the provisions of the same statute or of other statutes *in pari materia*.

And if this is so, it becomes important to examine closely the various sections of the Transfer of Propety Act which have been cited in support of the proposition that, in the case of a simple mortgagee whose mortgage is puisne to prior mortgages, the right of sale conferred by section 67 of the Act restricts that right by rendering the redemption of prior mortgages a condition precedent to the exercise of the right.

Now, the first section to which reference may be made is section 74 of the Transfer of Property Act which runs as follows :—

"Any second or other subsequent mortgagee may, at any time after the amount due on the prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire in respect of the property, all the rights and powers of the mortgagee as such, to whom he has made such tender."

That this section confers a right upon puisne mortgagees to pay off prior mortgages cannot be doubted, nor do I think there can be any doubt that such right is limited to the immediately prior mortgage as indicated by the phrase "*the next prior mortgage*" used in the section. Further, I may say that the rights thus conferred upon the puisne mortgagees cannot be exercised under the section till after "the amount due on the next prior mortgage has become payable," that is to say, such right cannot be exercised either in respect of a first mortgage where there are intervening mortgages, nor before the lapse of the term of the mortgage immediately prior to the puisne mortgage. But more important than either of these points is the effect of the word "*may*" as it occurs in the earlier part of the [487] section, where the right to pay off prior mortgages is mentioned. I understand that word to mean an option as distinguished from what might have been the effect of the word "*shall*," if that word had been there employed, as it usually is where the Legislature intends to make an imperative mandate. The result of this view is that the right of paying off prior mortgages conferred upon puisne mortgagees in s. 74 is an optional right which they may or may not exercise at their choice; and it follows that the provisions of the section cannot operate as a qualification or restriction of the right to bring the mortgaged property to sale conferred upon all simple mortgagees by s. 67 of the Transfer of Property Act.

The next section to be considered is section 75 of the Act which runs as follows :—

"Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor."

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Now, in this section I fail to see any qualification or restriction of the right to bring the property to sale which section 67 of the Act confers upon simple mortgagees without limiting that right to first mortgagees. That right of sale belongs as much to *puisne* and *mesne* simple mortgagees as to the first simple mortgagee, subject of course to the rule of priority enunciated in section 48 of the Act, the exact scope of which rule I have already discussed. All that section 75 of the Act lays down is well illustrated in Mr. Justice Shephard's commentary on that section (2nd ed., p. 288), where he says—

"Thus when A has mortgaged the property successively to B, C and D; C and D have against B, and D has against C, the same rights as A has under the several mortgages against B, C and D; while C has against D the same rights as he has against A. That is to say, the later can redeem the prior mortgagee, and exercise the right of foreclosure or sale against any mortgagee posterior to him. In the case of a prior *versus* later mortgagee the former has the [488] right which the mortgagee possesses against the mortgagor, and may consequently sue for foreclosure or sale; since the later mortgagee, having taken as his security the right of redemption, occupies the position of the mortgagor."

In my opinion this illustration correctly explains the entire scope and effect of the section: but that effect falls far short of sustaining the proposition that the payment of a prior incumbrance is a condition precedent to the enforcement of a puisne or mesne simple mortgage or that such puisne or mesne mortgagee is bound to wait for enforcement of his security till the lapse of the term when the prior mortgages become redeemable. It equally falls short of sustaining the proposition that where there are several successive mortgages of the same property any mortgagee whether prior, puisne or mesne is bound before he can enforce his security to seek the liquidation of all the mortgages then subsisting upon the property, regardless of the amounts, nature and the period when such mortgages fall due. In short, I understand the effect of s. 75 to be that each successive mortgagee has the right to enforce his security according to its terms, subject to the rules of priority, and that, in addition he may redeem prior mortgages if he likes, and if he does not prefer to adopt that course he may proceed with his rights against the puisne incumbrancers, and the mortgagor.

And I may here say in passing in that I put a similar interpretation upon the provisions of s. 91 of the Act, so far as they relate to the rights of the puisne mortgagees, to maintain suits for redemption of prior mortgages, with this distinction that whilst the right to pay off a prior mortgage under s. 74 of the Act is limited to the immediately prior mortgagee, the right to *sue* for redemption under s. 91 is not restricted and applies to the redemption of all prior mortgages, subject, of course, to the covenants in such mortgages as to the time when they would be redeemable. This is apparent from the provisions of s. 60 of the Act. But notwithstanding this distinction two points remain, *viz.*, that the puisne mortgagee cannot, any more than the mortgagor himself, enforce redemption before the time when the mortgage is redeemable and [489] that neither is under the imperative necessity of seeking redemption. Their omission to redeem would, of course, bring with it its natural legal consequences: in the case of the mortgagor the extinguishment of such rights as may have been left to him in the mortgaged property after the execution of the mortgage security which may be enforced, and in the case of a puisne of the mortgagee the loss of his security by reason of the

enforcement of a prior mortgage which, though falling due, he did not choose to redeem to prevent sale under the prior mortgage.

But whilst this is so, it is one thing to say that if the right of redemption, whether under sections 74 and 75 or under section 91 of the Transfer of Property Act, is not exercised in due time, the puisne mortgagee may lose his security altogether: it is a totally different thing to say that the redemption of prior mortgages is a condition precedent to the enforcement by the puisne simple mortgagee of the right to bring the mortgaged property to sale in enforcement of his security—a right, which, as I have already said, has been conferred upon him in express and unqualified terms by section 67 of the Transfer of Property Act.

I am therefore unable to regard anything either in sections 74 and 75 or in section 91 as enjoining any qualifications or restrictions upon the right to sell which section 67 of the Transfer of Property Act declares in favour of all simple mortgagees without any restriction as to whether they are first, mesne or puisne mortgagees.

Where then is the authority in that statute or in any other for holding that a puisne simple mortgagee's right to bring the property to sale is subject to the condition that he should either wait for the lapse of the term of the prior mortgages or that the redemption of such prior mortgages is a condition precedent to the enforcement of his security?

The section of the Transfer of Property Act upon which stress has been laid is s. 85, which runs as follows:—

"Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a [490] mortgage must be joined as parties to any suit under this chapter relating to such mortgage. Provided that the plaintiff has notice of such interest."

Before stating the exact effect of that section, as I understand it, upon the rights of a puisne simple mortgagee to bring the mortgaged property to sale, or to redeem prior mortgages, I may premise that I regard that section as enunciating no rule of substantive law but only a rule of procedure for suits for foreclosure, sale and redemption instituted under Chapter IV of the Transfer of Property Act. I make this observation at the outset; and before passing on to the consideration of other points I am anxious to explain my views as to the effect of the word "*must*" as it occurs in s. 85 in the clause saying that: "all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage.'

Now, whatever may be the literal meaning of the word "*must*" in the English tongue, I have no doubt that, whilst it may be understood as more than merely *directory* and representing as strong an *imperative* mandate as the words "*shall*," when used in statutes, it does not convey the force in legal interpretation which is given to express prohibitions as to the action of the parties to a litigation or of the Courts of Justice. The word itself, however imperative, is affirmative in its effect and meaning, and however imperative such affirmative meaning may be, the statute law when interpreted draws a vast distinction between imperative affirmative mandates and negative words of prohibition. Actions which fall short of full compliance with affirmative rules whether merely directory or imperative are no doubt reprehensible, but they amount to only defects of procedure which can be remedied, whilst acts done in contravention of express legislative prohibition are *ultra vires*, illegal and without jurisdiction. I have already indicated that no such words of prohibition are to be found

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is s. 85 of the Transfer of Property Act, and I cannot therefore read that section as if it began by saying ; "*No suits shall be entertained unless all the parties etc.*" The section, as it stands, seems to me to be nothing more than a corollary to the [491] principles contained in the various sections of the Code of Civil Procedure as to the array of parties to a Civil suit, and beyond this I am unable to carry the effect of the rule as indicated by the section itself. That is to say, I cannot understand the rule as affecting the substantive incidents of valid mortgages except in the sense of mere procedure which must be clearly distinguished from substantive rights. Nor can I take it as justifying the importation of any qualifications of the right of sale which simple mertgagees, whether first, puisne, or mesne, possess under s. 67 of the Act, subject, of course, to the rule of priority as enunciated in s. 48 of the Act.

But it has been contended that the effect of the section goes far beyond my interpretation, that its provisions require that when a *puisne* or *mesne* simple mortgagee seeks by suit to enforce hissecurity by bringing the mortgaged property to sale, he is bound, as conditions precedent to the enforcement of his security, *firstly*, to pay off the prior mortgages, *secondly*, to wait for the expiry of the period when such prior mortgages become redeemable, and *thirdly*, to require that all the subsisting mortgages, whether *prior* or *puisne*, should be liquidated and brought into account in Court as if the suit was one for administration of an estate or the winding up of a company.

As I understand the argument, it amounts to this, that where a mortgagor has, by several successive mortgages of the same property, borrowed money at various times and on various conditions, including various terms as to the periods when the mortgages would be redeemable, it is not a matter of choice with any one of the *puisne* or *mesne* incumbrancers, but a matter of legal mandate, that he should, in seeking to enforce his own security against such rights as were mortgaged to him, seek to free the property of all prior and subsequent incumbrances, and bring to sale the full ownership of the property free of all incumbrances, so as to give a clear title of full ownership to the purchaser who buys the property in the auction sale which would thus take place. And, in support of this view, certain observations to be found in Dr. Whitley Stokes' Introduction to the Transfer of Property Act (*The Anglo-Indian Codes*, Vol. [492] I, p. 734) were referred to. I have read those observations with all the respect due to an author of such eminence, and all the more so, as it is a matter of the history of legislation in India that the Transfer of Property Act practically owes its existence to the juristic labours of the illustrious author when occupying the high position of Legal Member of the Viceroy's Legislative Council. But those observations do not go the length of the contention with which I am now dealing.

Under the law as it stood before the passing of the Transfer of Property Act (IV of 1882) much doubt and uncertainty existed as to who were the proper parties to a suit in which a prior, puisne, or mesne mortgagee sought to enforce his simple mortgage by bringing the property to sale. The ordinary course adopted by such a simple mortgagee, at least in this part of the country, was to sue only the mortgagor and to pray for enforcement of his security against the mortgaged rights, ignoring the existence of puisne incumbrancers and other persons interested in the property. Such suits resulted in decrees, where the plaintiff's mortgage was proved, in his favour resulting in sales, without giving those interested in saving the property any opportunity of paying off the plaintiff's mortgage and

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securing their rights from sale. I dealt with this matter in delivering my judgment in *Sita Ram* v. *Amir Begam* (1) where I said:—

"The law, as it stood before the Transfer of Property Act, as to the necessity in a suit by a first mortgagee of making a subsequent mortgagee a party was explained by me in *Ali Hasan* v. *Dhiraj* (2) following the ruling of Turner, J., in *Khub Chand* v. *Kalian Das* (3). It was there held that it was not absolutely necessary to make puisne incumbrancers parties to a suit by a first mortgagee, and that a sale in enforcement of the prior mortgage would defeat the rights of the puisne incumbrancer, who is presumed in jurisprudence to take with knowledge of the prior mortgage, or at least cannot take more than his mortgagor had to give. The puisne incumbrancer [493] could, of sourse, escape the decree by proving fraud or collusion, or he might prevent the sale in enforcement of the prior incumbrance, by redeeming it. But if neither condition is satisfied, sale in enforcement of the prior incumbrance would defeat the puisne incumbrance. Since the passing of the Transfer of Property Act (IV of 1882) it seems, under certain conditions, necessary, according to s. 85 of the Act to make puisne incumbrancers parties, with the result that if they do not redeem, their lien will be defeated in the absence of fraud, which might disturb the rule of priority under conditions such as those contemplated by s. 78 of the Transfer of Property Act (IV of 1882)." This matter was more fully considered by me in *Bhoop Singh* v. *Goolab Rai* (4) where I made the following observations which have not been published in the official reports and they are these:

"Such being the effect of the rulings of the other High Courts, it is important to consider how this Court has dealt with the same question in regard to suits brought to enforce the mortgage lien by sale of the mortgaged property, such as the plaintiff's former suit of the 24th April 1882, was, and to which only Bhajwant as the heir of Dalganjan Singh (the executant of the mortgage of the 28th April 1870), and Jagraj as the purchaser of the property under his own decree of the 14th August 1873, were impleaded. In the Full Bench case of *Khub Chand* v. *Kalian Das* (3), it was laid down by Turner, J., that when a suit is brought to enforce the lien under the mortgage, though it is not absolutely necessary for the plaintiff to make subsequent incumbrancers parties to the suit, and though if subsequent incumbrancers are not made parties to the suit, they are not bound by the decree which the plaintiff may obtain, and may at any time before sale come in and redeem, yet if they do not redeem, and a sale takes place, their liens will be defeated, unless they can show something more than the existence of their subsequent incumbrances, some fraud or collusion which entitled them to defeat the first imcumbrance, or to have it postponed to their own. The principle of the rule was followed by me in *Ali Hasan* v. [494] *Dhiraj* (2); and again in a very recent case —*Seeta Ram* v. *Wilaiti Begam* (5) in respect of a sale which had already taken place in execution of a decree enforcing hypothecation liens. Such has undoubtedly been the course of decision in this Court, and is in accord with the principle upon which the ruling of the Calcutta High Court in *Mathura Nath Pal* v. *Chunder Money Dabya* (6) proceeded, and is in special conformity with the dictum of West, J., in *S. B. Shringarpuri* v. *S. B. Pethe* (7), where that eminent Judge observed that 'It was not incumbent on the registered mortgagee, desiring to enforce his lien, to

(1) 8 A. 324 (at p. 339). (2) 4 A. 518. (3) 1 A. 240.
(4) 6 A.W.N. 1886, 269 at p. 271. (5) 6 A.W.N. (1886) 101. (6) 4 C. 817.
(7) 2 B. 662.

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search for subsequent incumbrancers or purchasers. It lay on them to inform him of the assignment of the equity of redemption or of the interests they had acquired. Registration of a subsequent sale did not supply the place of such notice, as the mortgagee, though he would properly look for prior incumbrancers, could not be expected to keep up a constant search for those subsequent to his own, and in the absence of notice, would properly proceed against the person *prima facie* liable to him. And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title.' Both these cases were referred to, and dissented from by the Madras High Court in *Venkata Somayazulu* v. *Kannam Dhora* (1) to which I have already referred; and I confess that, in view of this conflict of authority, I have, in considering this case, had much doubt as to whether I could still adhere to the dictum of Turner, J., in *Khub Chand* v. *Kalian Das* (2) which I followed with the concurrence of my brother Judges on more than one occasion, in the cases which I have already mentioned. But I do not think it is necessary for me to decide this question, because, whatever the rule of law may have been before the passing of the Transfer of Property Act (IV of 1882), the matter which has given rise to so much conflict of decision has now been settled by the Legislature in s. 85 of that enactment, where it is laid down that 'all persons having an interest in the property comprised in a mortgage, must [495] be joined as parties to any suit under this chapter relating to such mortgage: provided that the plaintiff has notice of such interest.' The Act must now be taken to have approved of those rulings which require that all persons having an interest in the mortgaged property, must be joined in a suit, such as the former suit of Gulab Rai, instituted by him on the 24th April, 1882, and although that suit was instituted before the Transfer of Property Act came into force, I am prepared to follow the rulings which s. 85 of the Act has approved, even though such a view may involve modification of the opinions which I adopted in the two cases already mentioned."

Such, then, was the law as to the array of parties in suits for enforcement of simple mortgage securities and gave rise to multiplicity of suits as to the rights claimed and enforced under *one and the same* mortgage, and as to the title which the auction purchaser in sales held in enforcement of such mortgage acquired as against other incumbrancers and other persons interested in the property sold. The legislature has removed this evil, and the law has now been placed upon a sounder footing by s. 85 of the Transfer of Property Act as to the array of parties in suits such as the present. The effect of that law so far as the impleading of puisne incumbrancers is concerned is the subject of a very recent ruling of my brother Straight in *Namdar Chaudhri* v. *Karam Raji* (3) where he, with the concurrence of my brother Tyrrell, laid down the rule that "if a prior incumbrancer having notice of a puisne incumbrance, does not, when he puts his mortgage in suit, join the puisne incumbrancer as a party, that puisne incumbrancer is in no way affected or prejudiced by the decree in the rights which the Transfer of Property Act gives him to redeem the prior incumbrancer. If he has been left out of that litigation, the puisne incumbrancer must be placed in the same position he would have held had he been a party to that litigation."

In this view of the law I concur. But it does not go the length of holding, that, where a suit has been improperly or defectively instituted in

(1) 5 M 184. (2) 1 A. 240. (3) 13 A. 315.

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respect of the array of parties required by s. 85 [496] of the Transfer of Property Act, such suit is to be defeated merely because of such defect, or that when such a suit has actually gone to trial and resulted in a decree, such decree is null and void as *ultra vires*. Much less does the ruling lay down any rule which could be understood to necessitate that when a suit is instituted by a mesne or puisne mortgagee for enforcement of his security by sale, and the prior mortgagee or mortgagees or other persons interested in the property are left out of the array of parties, the suit must fail.

I may now say, before proceeding any further, that I concede that s. 85 of the Transfer of Property Act requires, that to a suit by a mesne or puisne incumbrancer, both the prior and subsequent mortgagees must be made parties, so as to have an opportunity of contesting the genuineness, validity or extent of the plaintiff's rights under the particular mortgage which he seeks to enforce, and also to assert and vindicate such rights as they may have as between the plaintiff on the one hand, and themselves on the other. The section would in such cases require the plaintiff to implead as defendants (1) the mortgagor, (2) the prior mortgagees, (3) the mortgagees puisne to his incumbrance, and (4) other persons interested in the property which the plaintiff seeks to bring to sale by enforcement of his security. The effect of an adjudication in a suit thus arrayed would be that if the plaintiff succeeded in obtaining a decree for enforcement of his security, such decree would define his rights and be binding upon all parties defendants, and when a sale takes place in enforcement of the decree such sale would convey to the auction purchaser a title unhampered by any possibility of being subsequently qustioned by any one of the parties to the litigation. This is obviously a great benefit conferred by the section, but I do not think it aims at anything more.

It has been, however, argued that the section goes much further, for there would be no object in requiring such an array of parties unless the Legislature intended that when any mortgage is put in suit all other mortgages should be taken into account and liquidated so as to free the property from all incumbrances and render the sale [497] in enforcement of any security free of all charges so as to pass a clear title of full unencumbered ownership to the purchaser.

I will deal with this argument in two aspects. I will show in the *first* place that the array of parties required by the section has substantial benefits in preventing subsequent litigation, without subjecting the mesne or puisne incumbrancer to the necessity of paying off prior mortgages or bringing into account all incumbrances as a condition precedent to the enforcement of his security. In the *second* place, I will show that our rules of procedure contain no provision for determination of disputes as to priority or otherwise which may arise *inter se* between several mortgagees who, under s. 85, must necessarily be impleaded on *one and the same side* as parties defendants. For under the Code of Civil Procedure, no two mortgagees seeking to enforce separate mortgages, could join as plaintiffs in one and the same suit (s. 31), nor can any one be added as a plaintiff against his will (s. 32) though he may be added as a defendant so long as any relief is claimed against him, "and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

Dealing, then, with the first aspect; in a suit by a mesne mortgagee for enforcement of his security, the parties being arrayed as abovementioned, under s. 85 of the Transfer of Property Act, the mortgagor, who has to

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defend his rights of ownership in the property, will have the chance of contesting whether the security which the plaintiff seeks to enforce is genuine and valid, whether the amount claimed thereon is correct or has been reduced by subsequent payments. Similarly, the incumbrancers puisne to the plaintiff could raise any pleas, to the same effect (for such right is given to them by s. 75 of the Transfer of Property Act) and they would further in common with the mortgagor (under s. 88 read with s. 86) be allowed an opportunity of redeeming the plaintiff's mortgage to prevent the property from being brought to sale in enforcement of the plaintiff's security—thus obviating the evils of a fresh litigation as pointed out by my brother Straight in *Namdar* [498] *Chaudhri* v. *Karam Raji* (1). Now, this is obviously a great improvement upon the law as it stood before s. 85 of the Transfer of Property Act, and it will be readily observed that neither the terms of that section nor the exigencies of the advantage thus derived therefrom require that puisne incumbrancers to whom the right and opportunity of redemption is thus given should bring their mortgages into account, before the mesne incumbrancer, who is prior to them, can enforce his security. I can imagine and know many cases in which such puisne incumbrancers are either debarred by the terms of their mortgages from seeking recovery of the money due thereon, or are unwilling to forego the security which they already possess and which they wish to keep, preferring to pay off the prior mortgage to closing the benefit of their investment, and I am unable to understand anything in the section which would force them to do so at the will of the prior incumbrancer, or that of mortgagees puisne to them.

The advantages of impleading prior mortgagees, as required by the section, are equally great. In a suit by a puisne mortgagee it may be that he denies the validity or genuineness of the prior mortgage, or by ignoring its existence assumes that such a mortgage has already been paid off and is no longer subsisting. It may also be that whilst admitting the prior mortgage, he contests the amount remaining due thereupon as a charge upon the mortgagė property which would take precedence of the plaintiff's security by reason of the rule of priority as enunciated in s. 48 of the Transfer of Property Act. And, indeed it may also be, as I have known in numerous cases, that the mesne or puisne incumbrancer contends that although his security is puisne in point of time to that of the prior mortgage, yet the security possessed by such prior mortgagee must be postponed to the plaintiff's security, because the latter advanced money in consequence of the fraud and collusion of the prior mortgagee. By saying this, I mean that in mortgage suits by mesne or puisne incumbrancers in India it is not an uncommon plea, based, as it is, upon the doctrine explained in s. 78 of the Transfer of Property Act, which lays down that "where, through the fraud, misrepresentation [499] or gross neglect of a prior mortgagee another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee." On the other hand, there are cases in which a prior mortgagee, after the property has been mortgaged to a second mortgagee, makes further advances upon the same property and pleads that he made such advances by reason of the fraud and misrepresentation of the pusne incumbrancer in collusion with the mortgagor, and upon that ground claims priority, not only in respect of sums advanced upon the prior mortgage but also in respect of such advances as were made upon the mortgage subsequent in point of time to

(1) 13 A. 315.

the security which the plaintiff, the puisne or mesne mortgagee, seeks to enforce. Further, there are cases of which this very case affords an illustration, *viz.*, cases, in which the prior incumbrancer dealing direct with the mortgagor and behind the back of the mesne and puisne incumbrancers, purchases such rights of ownership as were left to the mortgagor after the execution of the various mortgages.

The preclusion of points such as these being raised by the prior mortgagee in any litigation which might ensue after the mesne or puisne incumbrancer has already obtained his decree, and that decree has resulted in a sale at which a third party has purchased is one of the important objects which s. 85 of the Transfer of Property Act aims at by requiring that the prior mortgagee should also be impleaded in such a cause. His being so impleaded would also give him an opportunity of expressing his consent in suits by puisne incumbrancers to the effect that the sale in enforcement of the puisne incumbrance may take place free from his prior incumbrance under conditions provided by s. 96 of the Transfer of Property Act, which appears to me distinctly to contemplate sales in enforcement of puisne mortgages subject to prior incumbrances. A prior mortgagee who had no such defences to raise would naturally not appear to contest the suit of the mense of puisne incumbrancer, for unless such suit assails the genuineness, validity or amount due upon the prior mortgage, he has no reason to defend the suit, for whatever decree may be passed upon a mesne or puisne incumbrancer's suit **[500]** as to the sale of the property, such sale could not affect the interests of the prior mortgagee.

These considerations seem to me to furnish ample explanation of the expediency which induced the Legislature to make the provisions contained in s. 85 of the Transfer of Property Act as a rule of procedure guiding the array of parties in such mortgage suits. But there is nothing in that section, as I understand it, to render it necessary that at the choice and at the suit of any one of several mortgagees of the same property, all the mortgages are to be called into account, the prior mortgages are to be paid off, the puisne mortgages are also to be liquidated, and the suit is to be proceeded with, much in the same manner as a suit for the administration of an estate or the winding up of a company.

This leads me to the consideration of the second aspect of this discussion, *viz.*, whether either the Transfer of Property Act or the Code of Civil Procedure furnishes any rules as to the adjudication of diputes in mortgage suits in the manner which must necessarily be required by an argument which maintains that as a condition precedent to the enforcement of a mesne or puisne incumbrance all the subsisting mortgages must be brought into account and liquidated before a sale can take place to satisfy the mesne or puisne incumbrancer who seeks to enforce his security when it falls due without waiting for the terms upon which other incumbrancers, whether prior or puisne to him, advanced money to the mortgagor and the periods when such mortgages would become redeemable. Even assuming, for the sake of argument, that a mesne mortgagee is bound to pay off *prior* mortgages, the question remains how he is to force two or more incumbrancers, *puisne* to his mortgage, to redeem each other or to enforce their respective securities against each other in a suit not instituted by any one of them and in which they are all arrayed on one and the same side as defendants.

It is equally difficult to conceive how in such a suit decrees for redemption or sale could be made as between co-defendants *inter se*, **[501]** or, if such decretal orders are inserted in the decree granted to the

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plaintiff, how such decretal orders are to be enforced by one co-defendant against another who, so far as the plaintiff is concerned, are his judgment-debtors, and as such, liable to the execution of his decree, subject of course to such conditions as have been imposed upon the right decreed to him. And it is needless to say that such conditions can never be such as to leave the decree-holder at the mercy of any or all of the judgment-debtors as to the enforcement of the right decreed. In my opinion this view is not opposed to any principle laid down by the Lords of the Privy Council in *Umes Chander Sircar* v. *Zahur Fatimd* (1), which deals with the especial pleadings and facts of that particular case, and does not seem to proceed upon any special provision of the Transfer of Property Act.

Perhaps the best way to deal with this point is to take an illustration and conceive the kind of pleas which may possibly be raised in such a suit, with reference to the hypothesis upon which the argument I am now considering proceeds. The illustration which I take is the following:—

A, the owner of certain immoveable property, hypothecates it, that is, executes simple mortgages first in favour of B, then successively in favor of C, D, E, F, G, and H. That these successive mortgages are all valid cannot be denied, unless it is held (which as I have already stated cannot be held) that after the execution of one mortgage the mortgagee can no longer-deal with his rights of ownership in the mortgaged property by executing a second or other subsequent mortgage. This being so, let me conceive that C, the second mortgagee, seeks to enforce his security by bringing the mortgaged property to sale, that is to say, such rights and interests as were mortgaged to him by A subject to the prior incumbrance of B.

[502] Now in such a suit the provisions of s. 85 of the Transfer of Property Act would require that the array of parties should be the following:—

C, (2nd mortgagee) ... ... plaintiff.

v.

A, mortgagor	...	...	...	defendant	1.
B, 1st mortgagee	...	...	...	,,	2.
D, 3rd ,,	...	...	...	,,	3.
E, 4th ,,	...	...	...	,,	4.
F, 5th ,,	...	...	...	,,	5.
G, 6th ,,	...	...	...	,,	6.
H, 7th ,,	...	...	...	,,	7.

Now, in dealing with a suit such as this, the respective rights of various mortgagees as declared in s. 75 of the Transfer of Property Act must be kept in view, also the provisions of s. 85 of that Act as to the array of parties; and upon the hypothesis of the argument, which I regard as unsound, I will conceive defences which may be raised in such a suit rendering it impossible to be decided under any rules of procedure recognised by our Code (Act XIV of 1882), notwithstanding its amendments. Let me then conceive the following defences:—

(1) A, the mortgagor, either denies that he ever executed the mortgage in favour of C, or pleads that the mortgage has been partly or wholly paid off.

(2) B, the first mortgagee, pleads that the mortgage in favour of C, was illegal and invalid, because in his deed there was a covenant against subsequent alienation by A, the mortgagor, and A the mortgagor had therefore no authority to execute the second mortgage in favour of C, the

(1) 18 C. 164.

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plaintiff, whilst A, mortgagor, defendant No. 1, denies that he ever executed a mortgage in favour of B, defendant No. 2, or that that mortgage should in any manner be taken into account.

(3) D, the 3rd mortgagee, defendant No. 3, pleads that not only the mortgage in favour of C, the plaintiff, but also the mortgage [503] in favour of B, the first mortgagee, defendant No. 1, were fraudulent and collusive and without consideration, that therefore he is not to be regarded as the 3rd mortgagee but as the first mortgagee, thus entitled to defeat not only the claim of the plaintiff C, but also to defeat the pretensions of B, who claims to be the first incumbrancer of the property.

(4) The defence of E is that though the mortgage executed by A, the mortgagor defendant No. 1, in favour of the plaintiff C was valid, the mortgage in favour of B, defendant No. 2, who claims to be the mortgagee, was never executed, is not genuine and no money therefore is due upon it, and that his (E's) fourth mortgage was therefore free of any incumbrance such as B, defendant No. 2, asserts.

(5) The plea of F is that all the mortgages executed by A, the mortgagor in favour of B, defendant No. 1, C the plaintiff, D the third mortgagee, defendant No. 3, E, the fourth mortgagee, defendant No. 4, were genuine and valid, but that all these persons through fraud, misrepresentation or gross neglect induced him (F) to advance money on the security of the mortgaged property, and they should therefore be postponed to his (F's) mortgage security for purposes of satisfying his demand under the rule contained in s. 78 of the Transfer of Property Act.

(6) The plea of G, the sixth mortgagee, defendant No. 6, is that the mortgage in favour of the plaintiff C is genuine and valid, but that the mortgages in favour of B. defendant No. 2, D, defendant No. 3, E, defendant No. 4, and F, defendant No. 5, were not valid and no consideration passed upon them. and therelore his (G's) rights are not subject to any of the incumbrances claimed by the abovementioned defendants Nos. 2, 3, 4 and 5.

(7) The plea of H, defendant No. 7, is that, although the plaintiff's mortgage is genuine and valid, yet he cannot enforce his security otherwise than subject to his (H's) mortgage, because in taking the mortgage C, the plaintiff, joined with B, D, E, F and G, in inducing him (H) to believe that the property was free of all [504] incumbrance and it was upon such guarantee that he (H) advanced the money.

Such may be the pleas in a suit such as the one which I have conceived as an illustration. I do not wish to complicate the illustration further by saying that, if the pleas of these various defendants also raised questions as to the amount due and paid upon each successive mortgage, the rights of each mortgagee, who being defendant in the cause seeks priority over another, would require a separate issue for determination, which issue, according to the hypothesis with which I am now dealing, could not arise as between the plaintiff on the one hand and the defendant on the other, but would arise between on or more defendants *inter se*.

Similarly, there may be pleas other than those that I have conceived in the illustration, in which the defendants quarrel *inter se* as to the right which each possesses under his mortgage, and, by the mathematical rule of permutations and combinations a suit of this character might give rise to many more issues as between defendants *inter se* as to their respective rights not only as to priorities and amounts of their lien, but also as to their rights to enforce the redemption of prior mortgages, and also as to enforcement of securities against the puisne incumbrancers.

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It would almost be a waste of time to illustrate how such other issues might arise between mortgagees who are all co-defendants and between whom issue sarise such as those which I have already indicated. That such issues which are disputes between co-mortgagees *inter se* do not concern the plaintiff C, so long as he enforces his security according to the covenants contained therein and subject of course, to the priorities which may be asserted against him, is obvious; for all that he wants is to enforce a valid contract for recovery of his money by bringing to sale the rights and interests which were mortgaged to him by the mortgagor A, of course subject to such incumbrances as may be proved against him.

So long as the plaintiff's rights are resisted by any one of the defendants, who, in a suit such as I have contemplated in the illustration, should be arrayed in point of parties, (as s. 85 of the [505] Transfer of Property Act requires) the issue would be one between the plaintiff on the one hand and the defendant or defendants on the other. But the moment issues are raised between the defendants *inter se*, as to priorities of mortgages, as to fraud or collusion, as to the amounts due upon each mortgage, such issues, if they can be so called, are issues for dealing with which the rules as contained in our Code of Civil Procedure are inadequate for purposes of ajudication. Points in dispute between defendants cannot properly be called "*issues*" within the meaning of s. 146 of the Code; nor do the rules of evidence as understood in our law, entitle co-defendants *inter se to* cross-examine each other's witnesses, for the right is limited to parties arrayed on opposite sides of a litigation (*vide* s. 137 and s. 138 of the Evidence Act), and if this is so, it is difficult to see how any issues, which arise between two or more mortgagees as to their conflicting claims in a suit in which all of them are arrayed as defendants, can be brought to trial. If they could be brought to trial, it follows that they could be compromised between the contending co-defendants without the consent of the plaintiff.

It would be nothing other than an unnecessary expenditure of time to explain that in our own Code of Civil Procedure in common with other systems of adjective law which go to the remedy *ad litis ordinationem*, it is only in very few exceptional cases, that, a *lis*, by which word I understand a dispute, is to be adjudicated upon in any manner other than by disposing of it as a dispute between two and only two parties. In other words, a triangular litigation is unknown to our Code of Civil Procedure except where a special provision is made.

If this is so, where is the authority to justify the view, that a suit such as I have contemplated in the illustration can ever be adjudicated upon, as one and the same suit, in one and the same litigation, in which the interests, and pleas of the co-defendants are opposed to each other *inter se*, as distinguished from pleas raised by them jointly or severally against the remedy which the plaintiff C seeks to enforce upon his mortgage security? Further, where is the authority in our British Indian Law that, even if such an adjudica-[506]tion could be made upon disputes between defendants *inter se*, such an adjudication would be binding upon them either within the rule of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure, or, within the meaning of s. 40 or 41 of the Indian Evidence Act (I of 1872)? One thing is certain, that so far as the efficacy of judgments or adjudications is concerned as binding upon the parties within the meaning of the rule of *res judicata* as understood not only in the English Law but also in the British Indian Law, it is necessary that the parties who are so held bound must be arrayed on opposite sides in a suit or proceeding.

framed between those parties. It is equally certain, that where such is not the case, the rule does not apply, and the adjudications are not binding in the sense of preventing the re-agitating of the same points in a subsequent litigation. That is to say, in the illustration conceived and the pleas therein represented, as arising between mortgagees *inter se*, who are co-defendants asserting rights of priority over each other, charges of fraud and collusion against each other, each asserting that the amount claimed by one co-mortgagee is more than is due to him, all these disputants being arrayed on one and the same side in the suit of C, as defendants, no adjudication upon such disputes can ever pass *in res judicatam*. For reasons for this view I need only refer to my judgment in the imperfectly reported case of *Sital Prasad* v. *Bansidhar* (1) which had the concurrence of the late Mr. Justice Brodhurst.

And if that ruling is right, what is the use of making such adjudications between co-defendants as are not binding upon them? The only result would be to delay the remedies to which the plaintiff C, in my illustration would be entitled, without any binding adjudication upon the disputes between the defendants, the other mortgagees, *inter se*.

The Legislature, no doubt, might have provided remedies for such necessary results of procedure, if it so intended, by a special legislation. But it is clear to my mind that it would be inexpedient to do so, and that in framing s. 85 of the Transfer of Property Act [507] the Legislature did not intend either to disturb the well-recognised principles of the rule of *res judicata*, or to render suits for enforcement of a simple mortgage, suits in which not only the mortgage sought to be enforced is to be brought into question by those who are parties defendants to the cause, but also all other mortgages are to be brought into account for purposes of liquidation, and disputes arising among the defendants mortgagees *inter se* are also to be adjudicated upon.

If such had been the intention of the Legislature (an intention which juristic reason would render extremely inexpedient) s. 85 of the Transfer of Property Act would not be the only section in that enactment. For I should have expected a larger number of sections making exceptions to the rule of *res judicata*, and a larger number of sections providing the procedure whereby a triangular dispute is to be adjudicated upon in a case in which a mortgagee, suing to enforce only his security by bringing the mortgaged property to sale, is met by pleas which, sofar as his right is concerned, may of course be dealt with as between him and the defendants, but which so far as they raise disputes between co-defendants mortgagees *inter se*, cannot be disposed of in a binding adjudication between them,and which pleas, so far as the plaintiff is concerned, do not interest him at all; for priorities of lien or other disputes as to amount or otherwise between the defendants mortgagees cannot affect him so long as his security is enforced.

I have dwelt upon this aspect of the case at such length because it shows that s. 85 of the Transfer of Property Act must be read exactly as it stands, and that no notions outside that section are to be imported into it for any view which justifies the argument with which I am dealing, and also to indicate the view that questions of mere procedure which form part of adjective law *ad litis ordinationem* must not be confounded with the rules of substantive law *ad litis decisionem*. I have also dwelt upon this matter in order to show that if the distinctions which are pointed

(1) 2 A.W.N. (1882) 168.

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out are not kept in view, the rules contained in our Code of Civil Procedure Act XIV of 1882), which is a consolidatory enactment, as shown in the preamble, [508] are as powerless as any rules of procedure contained in the Transfer of Property Act (IV of 1882) to enable adjudication of disputes between co-defendants, where issues are raised between them in a suit by the plaintiff C, the second mortgagee, in the suit which I have taken as an illustration.

It is, therefore, in my opinion certain that, whilst the provisions of s. 85 of the Transfer of Property Act require that all persons interested in the mortgaged property should be made parties to any litigation in respect of any mortgage sought to be enforced, the entire scope of that section is limited to the object that the genuineness, validity and enforcibility of the particular mortgage sued upon should not be called into question in a subsequent litigation; for the simple reason that all those parties would be parties defendants to the very suit in which, in the case of a simple mortgage, the plaintiff C, as in my illustration, would be seeking to enforce his security by sale, and any pleas raised against the remedy which he claims would in that very suit be decided once and for all as between him and the defendants, so as to convey to the purchaser who purchases in an auction sale in enforcement of the plaintiff's security a title unhampered by any objections which could be raised by any one of the parties to the suit.

To carry the effect of the section any further, is to legislate probably upon grounds which are neither contemplated by the Legislature nor amenable to any such practical effect as our rules of Civil Procedure recognise. In cases where there is a large number of mortgagees holding securities upon one and the same property under various terms as to the conditions of the mortgages, including the periods when such mortgages would become redeemable, it would be leaving all the mortgagees to the mercy of any one of such mortgagees if it were to be held that the effect of s. 85 of the Transfer of Property Act is that at the suit and choice of any one of the puisne or mesne mortgagees the property to be brought to sale must be cleared of all incumbrances so as to give a title to the purchaser at such sale free of all incumbrances.

[509] I think I have said enough to show that in the present case s. 85 of the Transfer of Property Act required that the plaintiff Mata Din Kasodhan, in seeking to enforce his security under the simple mortgage of the 6th August, 1885, should also have impleaded the puisne mortgagee Mata Prasad, whose simple mortgage-deed is dated the 21st August, 1885, in order to enable him to exercise the right of redemption conferred upon him by s. 75 of the Transfer of Property Act to save the property from sale in enforcement of the plaintiff's security. Mata Prasad, however, was not impleaded in the suit as defendant in the cause, and this undoubtedly was a defect in the array of parties in such a suit if the plaintiff Mata Din Kasodhan had notice of Mata Prasads' puisne incumbrance within the meaning of s. 85 of the Transfer of Property Act. There is, however, no allegation in the defence to the effect that the plaintiff Mata Din Kasodhan had any such notice, and naturally there is no trace of any plea in defence objecting to the suit upon the ground of want or defect of parties. Not only was such a plea not raised in the Court of first instance, but was not raised in the lower appellate Court. If it had been so raised, it could easily have been remedied by the addition of the name of Mata Prasad (the plaintiff in the connected suit) under s. 32 of the Code of Civil Procedure as a defendant to the suit, and

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the defect would have been remedied. It was, however, not so remedied, and the suit went to trial resulting in a partial decree of the claim, which decree has been upheld by the lower appellate Court. Under these conditions, the question is whether the suit should be absolutely defeated?

This question is simply a question of procedure and practice, and I think I am within the authorities not only of the Courts of Justice in India, but also of the practice of the Courts in England in saying, that such objections if not taken at the earliest stage in the Court of first instance and are foregone there, cannot be taken for the first time in a Court of appeal, much less in a Court of second appeal such as this Court. This indeed is the effect of s. 34 of the Code of Civil Procedure (Act XIV of 1882) which if for no reason other than the fact that it is a later statute should govern **[510]** s. 85 of the Transfer of Property Act (IV of 1882), both sections being in *pari materia*. And if this is so, the defect of parties caused by the absence of Mata Prasad will not defeat the action altogther. Indeed, so far as Mata Prasad himself is concerned, he can have no reason to complain, for, according to the ruling of my brethren Straight and Tyrrell in *Namdar Chaudhri* v. *Karam Raji* (1) his right of redemption, &c., cannot be affected by the decree in the suit, and further, considering that his connected suit was tried by both the lower Courts along with the suit of the plaintiff Mata Din Kasodhan, he (Mata Prasad) had ample opportunity of applying under s. 32 of the Code of Civil Procedure to be added as a defendant to this suit, of which opportunity he never took advantage. Under these circumstances I do not think either that the defendant Hari Prasad, who never took the plea in the Court of first instance, nor in the lower appellate Court, should at this stage be allowed to raise the plea for the first time, not so much on his own behalf as on behalf of his antagonist, Mata Prasad, plaintiff in the connected suit. I would therefore reject the plea and deal with the suit with reference to the rights of the parties as they already have been arrayed as parties to the suit.

This leads me to the consideration of the *third* and perhaps the most important point in the case, namely, the legal effect of the purchase from Kazim Husain and Nadir Husain made by the defendant Hari Prasad under the sale-deed of the 20th September 1886. That such a sale and purchase cannot mean the enforcement of the defendant Hari Prasad's securities is obvious: because, as I explained in the case of *Kishen Lal* v. *Ganga Ram* (2), a simple mortgagee could not without intervention of the Court bring the property to sale by his own private act, and it follows *a fortiori* that he could not by privately purchasing the property himself achieve the same results. His purchase therefore is nothing other than a purchase which, though valid so far as the mortgagor is concerned, can have no effect in defeating the right of the mesne or puisne incumbrancers. The question then is, whether such pur-**[511]**chase extinguished such rights as he had under his mortgages of the 10th September 1882, and the 23rd February 1884, which were prior to the plaintiff Mata Din Kasodhan's mortgage of the 6th August 1885, which he seeks to enforce in this suit, and if such purchase did not so extinguish those mortgages, to what extent may they be used as a shield or protection for the defendant Hari Prasad in resisting the plaintiff Mata Din Kasodhan's suit?

This question is by no means *res integra*, so far as I am concerned,

(1) 13 A. 315.

(2) 13 A. 28, at p. 43.

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because it had to be considered by me on a former occasion in *Sirbadh Rai* v. *Raghunath Prasad* (1) and again in *Janki Prasad* v. *Sri Matra Mautangui Debia* (2). In both those cases I had the honor of being associated with Mr. Justice Oldfield, and in both of those cases I had the misfortune of not being able to agree with my hon'ble colleague as to the exact scope and extent of the rule enunciated by the Lords of the Privy Council in *Gokaldoss Gopaldoss* v. *Rambux Seochand* (3), which is the leading case upon the subject, and the authority of which cannot be questioned by this Court. The former of these cases was the subject of an appeal to the whole Court under s. 10 of the Letters Patent and is reported as *Raghunath Prasad* v. *Jurawain Rai* (4), where, as I understand the Full Bench ruling, my dissentient judgment was upheld and the decree framed was in accordance with what I had suggested in my judgment in the Division Bench. But in consequence of the brevity of the judgments in that case, it has been contended before the Full Bench in that case this the *ratio decidendi* upon which my judgment proceeded in the case of *Sirbadh Rai* v. *Raghunath Prasad* (1) was not approved by the Full Court, and that it is therefore still *res integra* so far as the Full Bench of this Court is concerned. As to this contention, all I need say is that no other *ratio decidendi* is suggested by the Full Bench ruling (I.L.R. 8 All. 105) in the case, and that the judgment of my brother Straight suggests no doubt in my mind that he adopted the *ratio decidendi* and its conclusions which I had expressed in dissenting [512] from Mr. Justice Oldfied in the case when it was before the Division Bench (I.L.R., 7 All., p. 568, *vide* pp. 573-76). The contention however raises doubts which, I understand, are shared on the Bench, and I therefore feel called upon to repeat what I said in that case, as part of my *ratio decidendi* in this case.

Referring to the ruling of the Lords of the Privy Council in *Gokaldoss Gopaldoss* v. *Rumbux Seechund* (3) and explaining it (*vide* pp. 571—72 of I.L.R. 7 All.), I went on to say :—

"Such being my interpretation of the ruling of the Privy Council in the case of *Gokaldoss Gopaldoss* (1), I cannot help feeling that the present case has a different aspect. The appellants, by paying off Lachman's prior mortgage of 1866, are no doubt entitled to claim the benefits of that mortgage, but they cannot, in my opinion, be understood to have acquired rights greater than those which Lachman himself possessed. It seems to me that appellants possess two distinct capacities, *first*, as holders of the equity of redemption, and, *secondly*, as persons entitled to the benefits of Lachman's mortgage of 1866. It is clear that in the former capacity they could not resist the suit which aims at enforcing a valid security, and in the latter capacity, the payment of the mortgage of 1866 can at best place them in the position of assignees of that mortgage (*vide* last sentence in Story's "Equity Jurisprudence," s. 1053 c).

"But such position will not, as I understand the law, enable them to prevent sale of the property in enforcement of the plaintiff's mortgage ol 1874, because such sale would not disturb or clash with the rights under the mortgage of 1866 which they have acquired by subrogation, and in their capacity as such, the exercise of the plaintiff's rights cannot affect them. Nor can I hold that the union of the latter capacity with the former can in itself confer upon them rights higher than those which the mortgage they have paid off created. To hold the contrary view seems to

(1) 7 A. 568. (2) 7 A. 577. (3) 11 I. A. 126=10 C. 1035. (4) 8 A. 105.

me to amount to the proposition that the purchaser of the equity of redemption and the first mortgagee could, by a transaction entered into in *the* [513] *absence of the intermediate incumbrancer*, and irrespective of his interests, place him in a worse position than before. Such a doctrine would be analogous in principle to the rule of tacking which the law of mortgage in this country, so far as I am aware, never recognised, and which has now been expressly negatived by s. 80 of the Transfer of Property Act.

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"The matter therefore resolves itself into the question, whether the holders of the rights of mortgage of 1866 could prohibit the enforcement of the mortgage of 1874; in other words, can a prior mortgagee prevent the sale of the equity of redemption in enforcement of a subsequent security?"

"It seems to me that, notwithstanding the mortgage, the mortgagor or the holder of the equity of redemption can alienate his rights by private sales, and it follows that he can do so by hypothecation. Such sale or hypothecation would, of course, be subject to the prior mortgage, and could in no manner disturb the priority of lien possessed by the prior incumbrancer or militate against his interests. So long as there can be no conflict between the rights created by the prior and the puisne incumbrances, it appears to me that property subject to two or more incumbrances can be sold in enforcement of any one of them, and the purchaser in such sale would acquire such right as the position of the incumbrance with reference to the rule of priority could convey. Such seems to me to be the effect of the unreported ruling of this Court (S. A. No. 159 of 1876), to which my brother Oldfield was a party. I think I may safely say that such was the law and the uniform course of decision before the passing of the Transfer of Property Act, and I have not been able to find any provision in that Act which lays down the contrary rule. S. 74 of the Act enunciates the rule that a subsequent mortgagee possesses the right to pay off a prior mortgage, but such provision cannot be understood to confer upon the prior incumbrancer the power of prohibiting either the mortgagor from dealing with the equity of redemption or the puisne incumbrancer from enforcing his security, of course subject to the rights created by the prior incumbrance. Indeed s. 96 of the Act distinctly [514] contemplates enforcement of puisne incumbrance without paying off the prior incumbrances, for it speaks of the sale of property subject to prior mortgage. Such a sale in enforcement of a puisne incumbrance cannot affect the prior mortgage, and no such conflict of rights can take place as in the case before the Privy Council, where both the contending mortgages included the right of possession which of course could not be simultaneously enjoyed by both the mortgagees. It seems to me that any other view of the law would necessarily involve the proposition that the only manner in which a puisne incumbrancer by hypothecation can enforce his security, is to pay off the prior mortgage first, and then to bring the property to sale. It is easily conceivable that such a rule would operate as a great hardship in cases where the value of the prior security is enormously larger than the amount of the puisne incumbrance, whilst in cases where the amount due on the prior mortgage does not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would be obliged to wait for his money till the prior mortgage became redeemable. I find much difficulty in holding that the law contemplates such contingencies, and I am of opinion that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his

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securities, so long as such enforcement does not clash with the rights secured by the prior mortgage.

"Under this view, the appellants, as purchasers of the equity of redemption, hold that right, subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the mortgage of 1866 does not place *the equity of redemption* on a better footing, though it entitles them to the benefits of that martgage, secured to them in the same manner as to the original mortgagee Lachman, whose rights they have acquired by subrogation. In arriving at this view, I have had to consider whether the case of *Gaya Prasad* v. *Salik Prasad* (1) is an authority which binds me to adopt a contrary opinion. Having carefully examined the case, I find that [515] it was not a Full Bench ruling of this Court, but only a reference under s. 575 of the Civil Procedure Code, arising out of a difference of opinion between the learned Judges of the Division Bench (Pearson and Oldfield). The case was then heard by Stuart, C. J., and Straight, J., "in the absence of the learned Judges who referred the case, a procedure which, according to the view expressed by a Bench of three Judges of the Court in the case of *The Rohilkhand and Kumaon Bank* v. *Row* (2) was erroneous. But putting aside this consideration, I find that out of the four judgments that are reported in that case, the judgments of my brothers Oldfield and Straight bear upon the question, which I am now considering, whilst the judgment of Pearson, J., proceeds upon a totally different ground, and the judgment of Stuart, C. J., is silent upon the point. Under these circumstances I do not feel myself bound by the ruling upon the point immediately before me, namely, whether the purchaser of the equity of redemption, who pays off a prior mortgage, can, by reason of acquiring the benefits of that mortgage, prevent the property from being brought to sale in enforcement of a mortgage which is anterior to the purchase, but subsequent to the mortgage paid off. Before leaving this question, however, I must refer again to some of the cases which I have already cited. The report of the case of *Ramu Naikan* (3) is not very clear upon this point, but I may take it, that it laid down the rule "that a subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the first mortgage." This is the *dictum* of Dernburg cited and adopted by Mr. Justice Holloway in that case; and the effect of the last part of Mr. Justice West's judgment in the case of *Mul Chand Kuber* (4) seems to be the same. With nearly the whole of that judgment I fully concur, and I would not willingly dissent from the conclusion of such eminent judges even upon the point now under consideration, were it possible for me to hold that the right of a prior incumbrancer enables him to suspend the enforcement of the puisne incumbrance by hypothecation, and that redemption of the former is a condition precedent to the [516] enforcement of the latter, and so long as I cannot hold this I find myself unable to hold that the doctrine of subrogation can enable the party who benefits by it to hold rights which the prior incumbrancer (to whom he is subrogated) himself never held. I have carefully studied, and, I may say with great advantage, the judgments of Mr. Justice Holloway and Mr. Justice West, both of whom I esteem as eminent Judges, and great jurists, but (I say this with profound respect) neither of those judgments contains any exposition of the law upon the exact point on which I have ventured to differ from them, and no other authorities have been cited

(1) 3 A. 682. (2) 6 A. 468. (3) 7 M.H.C.R. 229. (4) 11 B.H.C.R. 41.

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which sufficiently satisfy me to arrive at any conclusion other than that at which I have arrived. In all the cases to which I have been referred, the exact point seems to have been assumed or taken for granted as a necessary corollary to the doctrine of subrogation which prevents extinguishment of the prior mortgage."

When I expressed these views I must have been unaware that the same principle had already been adopted by the Madras High Court, for, in the report of my judgment I find no reference to those cases. One of them is the case of *Vencatachella Kandian* v. *Panjanadien* (1) which was decided by Turner, C.J., and Kindersley, J., and from the judgment of Sir Charles Turner in that case I wish to quote a passage which expresses my views in language better than I can employ. After dealing with the ruling in *Ramu Naikan* v. *Subbraya Mudali* (2) Sir Charles Turner went on to say:—

"If a person holds a mortgage on an estate, and after the owner has created a second mortgage in favour of a third party, acquires what right remains in the owner he does not thereby lose his right as mortgagee. The merger is prevented by the interposition of the right created in favour of the second mortgage, but I cannot accept the application of the principle adopted by the Court. When a second mortgage is created in favour of a person who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that [517] dictates the preservation of the rights created by the first charge, I am unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the mortgagee. If the first mortgagee had not acquired the right remaining in the owner, it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale) then a sale should have been ordered of the property to discharge both mortgages and the proceeds should have been applied to their satisfaction in order of priority, but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance."

I entirely agree with these views, and it was in accordance with the principles therein enunciated that in a later case, *Ganga Dhara* v. *Sivarama* (3) the decree with the concurrence of Turner, C.J., and Muttusami Ayyar, J., was prepared—thus indicating that three Judges of the Madras High Court, namely, Turner, C.J., Kindersley and Muttusami Ayyar, JJ., agreed in a view similar to that which I took in a case of *Sirbadh Rai* v. *Raghunath Prasad* (4) and which, as I understand, was approved by a Full Bench of five Judges of this Court on appeal in *Raghunath Prasad* v. *Jurawan Rai* (5), when I had not the honor of being a member of that Bench. To the names of the learned Judges of the Madras High Court which I have mentioned I may add the name of Mr. Justice Shephard, who, in his commentary on s. 101 of the Transfer of Property Act, which only

(1) 4 M. 213. (2) 8 M. 246. (3) 8 M. 246. (4) 7 A. 568. (5) 8 A. 105.

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enunciates the old rule of equity as explained by the Lords of the Privy Council in the case of *Gokuldas Gopaldas* v. *Rambux* [518] *Seochand* (1) and referring to my dissentient judgment as to the effect of that ruling in *Sirbadh Rai* v. *Raghunath Prasad* (2) goes on to express views which I wish to quote *verbatim* simply to show how fully that learned Judge agrees with me in interpreting the efficacy of the doctrine of merger and subrogation within the meaning of the Privy Council ruling. Mr. Justice Shephard says in the second edition of his work on the "Transfer of Property Act" (pp. 372-373) :—

"Mahmood, J., held that under the rule in Gokal Doss' case the defendant could not be understood to have acquired rights greater than those of the first mortgagee and that, as the latter could not have resisted a suit for sale at the instance of the second mortgagee, so the defendant, though entitled to possession until redeemed, could not prevent the plaintiff enforcing the security so long as such enforcement did not clash with the right secured by the prior mortgage. This decision, which agrees with that of the Madras High Court, seems unquestionably right."

I think I may add that the same is the effect of the rule as stated by Dr. Rashbehari Ghose, in the second edition of his well-known work on the Law of Mortgage in India (pp. 141-2), and I now proceed to explain that if the rule is carried further, it would involve the recognition of the principle of tacking which has been expressly abolished by s. 80 of the Transfer of Property Act. Perhaps the best way to express my meaning is to take an illustration :—

A mortgages first to B for Rs. 5,000 and then to C for Rs. 3,000. SubsequentlyB purchases the rights of ownership still remaining in A from him for Rs. 15,000.

C comes into Court to enforce his security by sale of the mortgaged property impleading the mortgagor A and the mortgagee B. The suit would thus be properly arrayed in point of parties according to section 85 of the Transfer of Property Act, for the illustration assumes that no other person is interested in the property.

[519] A does not appear to defend the suit, or if he appears admits C's claim.

B pleads that the purchase made by him was partly in lieu of money due upon his prior mortgage, the amount then due upon the mortgage being Rs. 11,000 and partly for a further sum of Rs. 4,000 which he paid to A as part of the consideration of sale and that therefore the plaintiff C could not bring the property to sale.

The question then would be what is the exact effect and scope of such a plea? It is clear according to the Privy Council ruling in *Gokuldoss Gopaldoss* v. *Rambux Seochand* (1), as explained be me in *Sirbudh Rai* v. *Raghunath Prasad* (2), that the fact of the purchase by B of the rights of A did not extinguish B's prior mortgage so as to render it unavailable to him as a shield or protection in resisting the claim of the puisne mortgagee C, and the same is the effect of s. 101 of the Transfer of Property Act.

But, then, the question would be what is the exact extent of the shield or protection to which the defendant B, in his double capacity of being the prior mortgagee and the purchaser of A's right would be entitled to as against the plaintiff C? My answer to the question is that such shield or protection must be regarded as co-extensive with the pecuniary and other liabilities enforcible under B's prior mortgage, neither more

(1) 11 I.A. 126 = 10 C. 1035. (2) 7 A. 568.

nor less. So that in the illustration the pecuniary value of the shield or protection to which B would be entitled would be exactly Rs. 11,000, which, according to the illustration, was due to be upon his prior mortgage at the time of his purchase from A. And here I may say at once that to that extent B would be entitled to assert his priority and insist that no sale that would take place in enforcement of C's security, should be free of the incumbrance to that extent by reason of priority. But he would be entitled to no such priority with reference to the Rs. 4,000 which he advanced subsequently to the mortgage in favour of C in making his purchase from A. To hold that by pure dint of being a prior mortgagee making a purchase behind the back of the puisne mort-[520]gagee, C, he (*i.e.* B) obtains priority also in respect of the fresh Rs. 4,000 would be to hold that he could tack on this fresh advance to his prior mortgage and thus postpone C's security. I say so, because the rule in principle would be the same, if instead of making the purchase from A, B had obtained another mortgage in lieu of the fresh advance of 4,000 rupees.

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In my opinion, our law does not allow this, for it repudiates the doctrine of tacking, and I hold that in the case supposed in the illustration, all that B would be entitled to is to assert his priority of incumbrance to the extent of 11,000 rupees due upon his prior mortgage at the time of the purchase from A, and that as to the further advance of 4,000 rupees he should be regarded as puisne to the plaintiff C. In other words, as prior mortgagee, he could claim priority to the extent of the moneys due upon the prior mortgage, but as purchaser of the rights of the mortgagor A, he could not resist the suit of the plaintiff C, the object of whose suit is only to sell such rights as existed in it at the time of the mortgage and subsisted in him, till he, dealing direct with the prior mortgagee B, conveyed them to him by private sale. Those rights cannot be protected simply in consequence of the accident of the purchaser happening to be a prior mortgagee, and it is only in respect of the saleability of rights that any difference of opinion existed between the views of Mr. Justice Oldfield and my own in the case of *Sir Badh Rai* v. *Raghunath Prasad* (1).

Applying these principles to the present case, all that the defendant Hari Prasad could plead was that his prior mortgages of the 10th September 1882, and the 23rd February 1884, were not extinguished by his purchase of the 20th September 1886; that the priority arising from those mortgages was still available to him as a plea requiring that the enforcement of Mata Din Kasodhan's security of the 6th August 1885, by enforcement of sale cannot be decreed free of the prior two mortgages; and that it should be so declared in passing the decree in favour of the plaintiff Mata Din Kasodhan. Beyond this I am unable to hold that he (Hari Prasad, [521] defendant) either as prior mortgagee or as the purchaser of the rights of Kazim Husain in the 4-annas share of mauza Barwa Kotwa (which is the only subject-matter of this appeal) had any right to resist the suit, unless indeed he contested the genuineness and validity of the plaintiff's mortgage of the 6th August 1885, which he did not do. Nor, as I have already explained, did he object to the frame of the suit in point of parties by reason of Mata Prasad, the puisne mortgagee of the 21st August 1885, not being impleaded as a party defendant to the suit.

In accordance with the views expressed in this judgment, I would decree this appeal, and, setting aside the decree of the lower Appellate

(1) 7 A. 568.

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Court, remand the case under s. 562 of the Code of Civil Procedure to that Court, directing it—

(1) To take an account of what was due to the defendant Hari Prasad on his mortgages of the 10th September 1882, and the 23rd February 1884, in respect of the 4-annas share of Kazim Husain in mauza Barwa Kotwa (which is now in suit) at the time when the sale-deed of the 20th September 1886 was obtained by the defendant Hari Prasad.

(2) To pass a decree in favour of the plaintiff in accordance with the terms of section 88 of the Transfer of Property Act, allowing the defendants such period as the Court may think fit for payment of such sum of money as may thus be found due upon the plaintiff's hypothecation bond of the 6th August 1885.

(3) To decree that in default of such payment the property, subject to the plaintiff's mortgage of the 6th August 1885, be sold subject to the prior lien of Hari Prasad under his mortgages of the 10th September 1882, and the 23rd February 1884, so far as they affect the 4-annas share of Kazim Husain in mauza Barwa Kotwa, the amount found due to the defendant Hari Prasad in respect of Kazim Husain's 4-annas share in suit under the defendant Hari Prasad's mortgages of the 10th September 1882, and the 23rd February 1884, as ascertained under the first issue, thus remitted.

[522] I would leave the question of costs to the discretion of the lower appellate Court under s. 220 of the Code of Civil Procedure.

For similar reasons I would decree the appeal of Mata Prasad (S.A. No. 1213 of 1888), and would frame a decree on similar principles, but since I understand that the views adopted by the majority of the Full Bench are opposed to mine, I need not pass a decree which is opposed to their views.

STRAIGHT, J.—I have had the great advantage before coming into Court of carefully perusing and considering the judgments of the learned Chief Justice and my brother Mahmood, and it is not without having given the fullest attention to all the arguments used in those two learned and exhaustive judgments that I have come to the conclusion that the view which the learned Chief Justice has taken is the correct one and that in which I ought to concur. I have only a few words to add. In one portion of my brother Mahmood's judgment there is an elaborate reference to the difficulties likely to arise where the frame of a mortgage suit is such as the learned Chief Justice holds it should be, in the application of the principle of *res judicata* between the parties arrayed as defendants. Now, if I understand the law aright, when a statute specifically declares that a particular form of suit is to have the parties who fill certain characters in reference to the property to which the suit relates, arrayed therein, the Court having to deal with that suit must not only deal with the rights of the plaintiff and defendants on the one side and on the other, but must deal with and adjust the rights of the defendants *inter se*, just as much as in a partition suit where one of the several joint owners is seeking partition as against half a dozen others, not only has the measure of the plaintiff's right and share to be determined, but also the measure of that of each of the defendants. I believe that no doubt exists in the mind of any lawyer that in a partition suit it is incumbent on a plaintiff to bring in as parties all those who are interested in the subject matter. And why? Necessarily for the purpose of effectually once and for all ascertaining and settling their respective rights and providing against the possibility of further litigation. My brother Mahmood has more than once spoken of the

[523] statute of limitation as a statute of repose. From what I remember when I first arrived in this country as to the multiplication of suits that used to come before this and the other Courts with reference to mortgaged property, the inconvenience which continually arose and the mischiefs that attended them, I am not at all surprised that the Legislature put its foot down very firmly, and determined by the framing of s. 85 of the Transfer of Property Act to strike a deathblow to that multiplication of suits which becoming a perfect pest to the Courts which had to administer the law; and s. 99 is also illustrative of the drastic methods the Legislature adopted, and, in my opinion, properly adopted. In the old days, it was often the practice for a mortgagee to put his mortgage debt in suit as a simple money claim and not to ask for sale of the mortgaged property. It was also the practice for a mortgagee having an independent money claim against the mortgagor to bring a suit, obtain a decree and attach the mortgaged property and subsequently to bring it to sale. I need scarcely point out the complications and difficulties which often arose when there were subsequent incumbrances and as to what was the precise nature of the interest the mortgagee, if he purchased himself, as he invariably did, had acquired, and if he did not purchase himself but some third party did purchase that person almost always bought the luxury of a law suit, while, in either event, the mortgagor suffered. It was to meet this that s. 99 was enacted, which provided that where a person standing in the position of a mortgagee of landed estate obtains a decree against his mortgagor for the satisfaction of any claim, "whether arising under the mortgage or not," and not being a decree for sale on his mortgage, and attaches the mortgaged property he shall not bring the property to sale until he has first brought the suit provided for by s. 67 in which the parties must be arrayed as provided in s. 85 and he may do so without any bar of s. 43 of the Code of Civil Procedure. Now I say these two provisions are a strong indication that the Legislature intended, and most righteously intended, to have litigation with regard to mortgaged estate so far as possible dealt with and disposed of in a single suit with all the parties interested in the mortgaged property before the Court. I [524] just may in conclusion refer to the decree my brother Mahmood would pass in the present suit, namely, that an account should be taken declaring what was due on a particular date to the defendant Hari Prasad, and necessarily also that an account should be taken as to what was due to the mortgagee, plaintiff, and that the puisne incumbrancer should have a right to sell the property subject to the ascertained amount due to Hari Prasad. Now if Hari Prasad had come into Court to enforce his mortgage, making the present plaintiff a party defendant, as he would be bound to, it cannot be denied that the only right the latter would have to stand in the way of the sale prayed for would be a right to redeem. I cannot myself see why because the plaintiff Mata Din was the first to come into Court his position is any better or stronger. No doubt the amount of Hari Prasad's prior incumbrance has been determined between Mata Din and Hari Prasad, but what about the absent mortgagor who has never appeared in the suit, or Mata Prasad who has never been brought on as a party, what is to prevent the mortgagor from hereafter, as against Hari Prasad, denying the mortgage to Mata Din and Mata Prasad; or Mata Din and Mata Prasad contesting with one another the genuineness or otherwise of their several mortgages. In any event Hari Prasad is left to the almost certain prospect of further litigation when he desires to enforce his prior mortgage. Now in the particular form of suit which is contemplated by section 85 what hardship is there in the form of decree

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that would have to be passed? It would do no more than give effect after investigation and determination to the actual rights of the respective mortgagees which by the Transfer of Property Act are declared. In neither of the present cases did Mata Din or Mata Prasad include the other as a defendant, although they had full knowledge of each other's charge and they each sought to bring to sale the whole eight annas of Barwa Kotwa. In my opinion the learned Chief Justice's decree is the right one, the provisions of section 85 being in my opinion mandatory and imperative and the interests of each of these persons being known to the other in each case and they not having been joined as parties defendant, the [525] several suits were bad and were rightly dismissed by the lower appellate Court.

TYRRELL, J.—I concur in the judgment and decree of the learned Chief Justice.

KNOX, J.—This second appeal raises questions of great importance with respect to the rights of second and other subsequent mortgagees. I do not propose to recapitulate the facts of the case. They have been given so fully by the learned Chief Justice and by my brother Mahmood, that I shall content myself with formulating the results found into two or three brief sentences. Mata Din, with whose rights this appeal is concerned, occupies the position of a third mortgagee in point of time, and he prays the Court for an order that a deed of sale over the mortgage, property, subequent in point of time to his mortgage, and obtained by the mortgagees prior to him in lieu of monies due to them under two simple mortgage-deeds held by them may be set aside, and the mortgaged property, the subject of his, Mata Din's, mortgage-deed, brought to sale. He has made no tender of the amount due to the said prior mortgagee, and, moreover, has not sought foreclosure of a simple mortgage executed by his mortgagor in favour of a mortgagee subsequent to him, *viz.*, one Mata Prasad. Moreover, he has made Mata Prasad no party to this suit.

The question is whether, under the above circumstances, this Court should grant him the relief he prays for, and whether he, under the said circumstances, is entitled to an order for sale of the mortgaged property.

There can be, and there is, no question raised but that the law controlling the present case is that contained in Act IV of 1882.

The several mortgage-deeds which have been filed in this record, read in the light of the said Act, are amply sufficient to determine the position which the parties occupy to one another.

Two persons, Kazim Husain and Nadir Husain, mortgagors, have purported to create by transfer at different times rights in or over this same immoveable property. The mortgaged property which Mata [526] Din Kasodhan seeks to bring to sale is, so far as is material for the purposes of the present appeal, a 4 annas share out of 8 annas of Barwa Kotwa. The transferor, Kazim Husain, in Matadin's favour, gave or purported to give Matadin on the 6th of August 1885, the right to bring this property to sale if he did not repay on or before a date specified the monies borrowed by him. But the same Kazim Husain had on a prior date joined in creating an exactly similar right over the same property in favour of one Hari Prasad, and on a second date still prior to the 6th of August 1885 had a second time purported to give the said Hari Prasad a similar right over the same property.

In each case he purported to give Hari Prasad the same right which he purported to create in favour of Matadin, *viz.*, the right to sell the 4 annas share in mauza Barwa Kotwa. So far as this property is concerned,

he imposed no limit, and when the parties contracted on the first and on the second occasion, Hari Prasad may have been and probably was the more ready to grant the loan asked for, by the knowledge that he by the transaction acquired a right to ask the Court in the case of default by the mortgagor to bring to sale the whole of the property until his debt was satisfied. He might well have refused to enter into the transaction if he had known or contemplated that the whole or some portion of this property would be brought to sale without his having a hearing and without, at any rate, his debt being repaid before that sale was ordered. Property does not, as a rule, improve in value by being made the subject of repeated transactions of sale, and it is not difficult to contemplate the case of property originally sufficient in value to satisfy three or more mortgages for which it is made security depreciating owing to sale, it may be one sale only, to such an extent that it no longer commands in the eyes of the buying public a value sufficient to cover two of the three or more mortgages for which it was accepted and would have sufficed as security but for its having been put up to sale.

The rights to sell created by these mortgages were not rights which could be exercised to their full extent together, and there **[527]** being in the prior mortgages no special contract or reservation binding the earlier transferee, the right created in favor of Matadin was subject to the rights previously created and was neither more nor less than the right of a subsequent mortgagee.

The rights of subsequent mortgagees as against a prior mortgagee, so far as regards redemption, foreclosure and sale of the mortgaged property are defined and limited by section 75 of the Act. They are simply the rights which the mortgagor has against the prior mortgagee and no other right of any kind whatever. We are not left without guidance in the Act as to what those rights are. They are enumerated in the sections numbered as ss. 60 to 66, both inclusive, and throughout those sections the word "sale" or the verb "to sell" in any form occurs only once, *viz.*, in s. 63, where it obviously has no reference to the question immediately before me. I fail to find any express right of sale conferred upon the mortgagor as against his mortgagee throughout those sections.

Similarly, when I come to contemplate what rights Matadin Kasodhan has so far as regards sale of the mortgaged property as against a subsequent mortgagee, I find, on again returning to s. 75, that he is confined to the rights which he has against his mortgagor. These are set out in ss. 67 to 77 of the Act, and they are confined (the exceptional circumstances of s. 69 which do not apply here being always excepted) to an order from a Court for sale obtained in a suit to which such mortgagor, or, in the case immediately under contemplation, subsequent mortgagees —the words must be interchanged—is a party.

Thus, then, I hold that, as regards mortgagees prior to him, if a mesne incumbrancer wishes to bring mortgaged property to sale, and joins in the suit against the mortgagor, as he should do and has done in the present instance, a prior mortgagee, he can do so only by redeeming or asking for redemption. Moreover, he cannot, so long as he, the mesne incumbrancer, occupies the position of a second or subsequent mortgagee, bring the property to sale, if he can bring it to sale at all, except by a suit to which every mortgagee is a **[528]** subsequent party. He has, in short, not the free hands that a prior mortgagee has. Nor is there any hardship that I can see in his being fettered and restricted in his right regarding the mortgaged property by the existence of the prior and subsequent mortgages. He

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took his mortgage with notice of the existence of the mortgage prior to his and presumedly with a knowledge that his right would always be subject to it. Further, the fact of the mortgagor resorting to him and contracting with him a subsequent mortgage should have rendered him alive to the possibility of the mortgagor creating further and subsequent mortgages, if he can obtain them.

I have not attempted to govern my judgment by president, for the simple reason that this point has been so thoroughly exhausted by the learned Chief Justice. He has reviewed the authorities to be found in the judgments of this Court, of the other High Courts, and of their Lordships of the Privy Council.

That review shows that in almost every case, and that virtually, with the exception of two learned Judges, all other Judges who have considered a similar question to the one now before this Court have held directly or impliedly that "a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, were necessary parties; and further, that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immoveable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property." "I need hardly say that I have for myself carefully examined these authorities, and I agree with him in the results which he has deduced from them and which I have just given expression to. It is therefore needless for me to say more upon this part of the appeal than that with such authorities before me, it is impossible to arrive at a conclusion which would have the practical effect of declaring those authorities to be in error, unless I were able to prove [529] conclusively from sources not considered in those judgments that there was room for another and a different opinion.

Such sources I have not been able to discover, nor have I been referred to them. On the contrary, the law appears to me to confirm, and to have been framed, whether of set purpose or not, in accord with those of the authorities cited above which were prior to 1882.

It will be seen from the view that I have taken that, independently of the presence of section 85 in the Transfer of Property Act, Matadin Kasodhan could not have succeeded in the present suit without joining as a party to it Mata Prasad. Whether he could have succeeded had he arrayed Mata Prasad as a defendant, it is needless to consider, for he has not so arrayed him.

Section 85 of the Act is, in my opinion, only the conclusion of the whole matter discussed in the previous section. It shows that an insuperable bar is placed in the way of all plaintiffs who bring a suit under Chapter IV of the Transfer of Property Act, unless and until they array as parties to the suit all persons having an interest in the property comprised in the mortgage sued upon, always provided that the plaintiff had notice of such interest when he brought the suit, or at any time when he could have asked the Court to make an interested person a party.

It is not open to the appellant to plead that he had not such notice.

I am of opinion that any mortgagee who brings a suit under the Act touching the mortgaged property, does so at the risk of having his suit rejected if he neglects to search the registers kept by the registrar of the district in which the mortgaged property is situated and to array as

parties to his suit all whom from those registers he finds to be persons having an interest in the mortgaged property. This precaution is neither impossible nor impracticable and is only what every prudent man will adopt upon seeing the stringent language contained in s. 85 and the definition of the term "notice" in s. 3. In this case, however, there was another course open to Matadin. At the same time that he brought his suit, a suit of a [530] similar nature had been filed by Mata Prasad, the subsequent mortgagee, and was being prosecuted *pari passu* with his suit. How can it be said, then, that he had no notice of the subsequent mortgage, and that it was not open to him to ask the Court under s. 32 of the Code of Civil Procedure to array as a party to his suit Mata Prasad?

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It is urged that s. 85 must be read as controlled by s. 34 of the Code of Civil Procedure, and that this Court must consider the want of parties as a matter which has been waived.

If the view which I hold regarding the rights of a subsequent mortgagee be correct, it is obvious that s. 34 of the Code cannot control s. 85 of the Transfer of Property Act, but must give way to it.

Further, waiver can only be made of advantages which the law confers solely for the benefit and protection of an individual in his private capacity, and where such law can be dispensed with without infringing on any public right or public policy. There can, however, be little or no room for doubt that s. 85 found its place upon the statute book, not merely for the protection of individual persons, but to put an end to scandals which prevailed and which were so graphically described by the Hon'ble Mr. Evans when the Transfer of Property Act was being brought on to the statute book. He particularly notes that there then existed "no machinery for bringing together into one suit the various incumbrances on the property; endless confusion had been the result, and the decisions of the courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered:" and concluded with the pregnant words,—"It had been one of the objects of this chapter to remedy these and other similar evils."

It is also contended that a result of s. 85 will be to convert a suit under the mortgage chapter into a suit for the settlement of all dis-[531]putes that may arise between the parties interested in the mortgaged property; that it is easy to contemplate such a suit being of a most complex nature and one for the determination of which in one and the same suit the Civil Procedure Code makes no suitable provision. It may be well doubted whether this be so, but even were this a good objection, my answer to it is that I have to administer the law as I find it, and not as I might prefer it to be.

I find that a similar rule prevails in England. The rule there as enunciated by Fisher in his well-known Treatise on Mortgage is,—"As a general rule, all persons who have an interest either in the right of redemption, or in the security, must be joined, though the result may be the trial of a legal right betweeen parties thus brought before the Court for different purpose" (Fisher on Mortgage, ss. 13-60). And I observe on the same authority a case quoted whereon a bill to redeem it became necessary to decide as to the voluntary character of a post-nuptial settlement (1 Eden, 55).

1891 JULY 25. — FULL BENCH. — 13 A. 432 (F.B.).

It would be difficult to contemplate a case involving more complex interests.

It must not be overlooked that the language contained in s. 85 of the Transfer of Property Act varies in a remarkable degree from the language usually employed in statutes. For reasons best known to those who drafted the section, and reasons which I think they have given expression to, the framers of the Act have not contented themselves with saying that all persons having an interest in the property may or shall be joined as parties to any suit under Chapter IV of the Act. They have gone further and prescribed in language which may be inartistic, but is most expressive, that all such persons must be joined as parties. I am well aware of the conflict of opinion which has obtained over the interpretation to be placed on the word "may" and the words "it shall be lawful" in interpreting procedure authorized by a statute, a conflict which was fully considered in the case *Julius* v. *Lord Bishop of Oxford* (1). Whether in this case I follow the rule of interpretation that the meaning of words regulating procedure are to the "solved *aliunde* from the context, from the particular provisions or from the [532] general scope and objects" of the enactment under consideration, or the rule that "enabling words are always compulsory where they are words to effectuate a legal right," I see no reason for believing that the Legislature intended to leave with the parties interested in a mortgage any option as to what parties they might or might not array or with the courts who have to decide a suit brought under Chapter IV of the Act any option as to whether they might or might not grant relief in a suit where the parties were not arrayed as required by that section. For, in considering this section, we are confronted with a word which is not merely in effect "must" but with the word "must" itself. The procedure so imperatively enjoyed is possible, nay, more, it is practible. There is no place for the argument that the section is merely one which confers a discretionary power. The parties, if they seek relief, are bound to array all persons interested, and the courts before they grant relief are bound to see that the parties do so array the persons interested.

On every ground, therefore, I have no hesitation in concurring with the learned Chief Justice that this appeal must be dismissed.

Last of all, I would only add that I concur in the opinion that "the rights, liabilities and reliefs of mortgagors and mortgagees, including second and subsequent mortgagees, so far as redemption, foreclosure and sale are concerned, were in British India before Act IV of 1882 came into force, what Chapter IV of that Act has defined and declared such rights, liabilities and reliefs to be."

ORDER OF THE COURT.

The appeal will stand dismissed with costs and the decree below will be affirmed.

Appeal dismissed.

(1) L.R. 5 App. Cas. 214.

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REVISIONAL CIVIL.

13 A. 533= 11 A.W.N. (1891) 172.

13 A. 533=11 A.W.N. (1891) 172.

[533] REVISIONAL CIVIL.

Before Mr. Justice Mahmood.

MALIK RAHMAT (*Plaintiff*) v. SHIVA PRASAD AND OTHERS (*Defendants*).*
[18th March, 1891.]

Small Cause Court—Judgment of Small Cause Court, what should be contained therein—Revision—Civil Procedure Code, ss. 203, 562, 622, 647—Act IX of 1887 (Small Cause Courts Act), s. 25.

Section 203 of the Code of Civil Procedure does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given.

Where a judgment in a Small Cause Court suit stated merely that the suit was dismissed for reasons given in the Judge's decision in another suit and the judgment in the suit so referred to was in the following words :—" Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered. That the claim is decreed with costs" —*held* that this was in fact no judgment at all, and the case must be remanded for re-trial on the merits under the analogy of s. 562 of the Code of Civil Procedure, read with s. 647 *ib.*

[Diss., 12 A.W.N. 160; N F., 6 C.L.J. 527 (530); F., 57 P.R. 1901; R., 18 Ind. Cas. 216=109 P.L.R. 1913.]

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Munshi *Jwala Prasad*, for the applicant.

Munshi *Madho Prasad*, for the opposite parties.

JUDGMENT.

MAHMOOD, J.—This is an application under s. 25 of the Provincial Small Cause Courts Act (IX of 1887), and also under s. 622 of the Code of Civil Procedure (Act XIV of 1882), invoking my interference as a Judge sitting in the revisional jurisdiction of this Court in regard to such matters. Mr. *Jwala Prasad*, who appears for the petitioner, and Mr. *Madho Prasad*, who holds the brief of Mr. *Kashi Prasad*, for the opposite parties, are agreed that these two sections apply and that the determination of the case depends upon their effect.

The facts of the case are that one Malik Rahmat, who is the petitioner before me, pawned certain jewels for the amount of Rs. 100 [534] to Sheo Prasad, Seopal and Sukhnandan on the 20th August 1887, and it was agreed that whatever sum of money may be repaid out of the debt the pawned property should, to the extent of such payment, be released from the pawn.

Now the plaintiff states that Rs. 40 out of the amount thus due under the pawn of the 20th August 1887, was paid by him, and that to the extent of the value of such payment some of the pawned jewels were released some time about the 27th April 1888, and thereafter another payment of Rs. 67-8 was made some time about the 22nd April 1889, and that upon such payment having been made the defendants had promised to return the rest of the pawned jewels, but that they did not keep their word and the jewels were not therefore returned.

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* Miscellaneous application No. 52 of 1890, for revision of a judgment, dated the 19th April 1890, of Babu Mrittonjoy Mukerji, Judge of the Court of Small Causes of Benares.

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This incident is stated to be the cause of action for the present suit. The suit was met by the plea that the aforesaid sum of Rs. 67-8 was never given to the defendants, pawnees, and that therefore the suit could not prevail.

During the pendency of the cause there was some other dispute between the same parties which was pending in the Small Cause Court, in which the defendant to this cause was the plaintiff and the plaintiffs in this cause were the defendants. The suit was tried by the Small Cause Court Judge of Benares, and that suit was decided on the 19th April 1890, being Suit No. 1228 of 1889 and a copy of the judgment in that cause is upon the record.

This being so, the entire judgment in this case passed by the learned Small Court Judge consists of the following words :—

"For the reasons given in my decision in 1228, decided to-day, the plaintiff is not entitled to recover the jewels without paying the debt due to the defendant. Order. Suit dismissed with costs."

Now it was because of the brief manner in which this judgment was worded that I was anxious to see the record of the case to which it referred. The record was sent for by my order of the 20th February 1891, in order to enable me to understand what [535] reasons were given in the case to which reference was thus made by the learned Judge of the Small Cause Court.

The record has come up and I wish to quote the whole of the judgment in order to show how little there is anything of the expected reasons in the case. The judgment runs as follows :—

"Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to the plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiffs ? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered. That the claim is decreed with costs."

This was the order made by Mr. Mrittonjoy Mukerji, exercising the powers of a Small Cause Court Judge, under the jurisdiction which he possessed under the Provincial Small Cause Courts Act (IX of 1887), and this is the kind of judgment in which he, in the exercise of the powers thus conferred upon him, thought fit to exercise them.

It has been to me a matter frequently for consideration on the Bench in this Court whether the Small Cause Court powers, as implied and required by the Small Cause Courts Act (IX of 1887), are such as should be entrusted to officers who are not fully cognizant of the dignity which the finality of a Small Cause Court decree implies.

In the present case I have no doubt that Mr. *Jwala Prasad*, for the petitioner, is perfectly right in contending that there is absolutely no guarantee upon the record itself that the learned Judge, Mr. Mrittonjoy Mukerji, who presided in the Small Cause Court at Benares, ever understood the case at all or the facts which would have a bearing upon the right decision of the case. And I think the learned pleader was perfectly within his rights when he asked me, under the peculiar circumstances of the case, to rule that the judgment, or rather, the so-called judgment, in this case is no judgment at all, because it indicates neither the appreciation of the facts of the case nor of the law which is applicable to them.

Mr. *Madho Prasad*, who holds the brief of Mr. *Kashi Prasad*, for the opposite party, has called my attention to s. 203 of the Code [536] of Civil Procedure in order to sustain the only point which he could urge on behalf of his clients, namely, that the Judge of a Small Cause Court

is not bound to record judgments in the same fashion and with the same fullness as Judges in other Civil Courts, I wish to say again that Mr. *Madho Prasad* was perfectly right in thinking that the first part of the section is the only one which could help the case of his clients, because upon the facts the learned pleader himself felt that he could not sustain the judgment of the lower Court.

I wish to say now what I have never said before, that the investiture of the Small Cause Court powers in Judges, which does occur and is frequently exercised in the direction of the policy upon which the Provincial Small Cause Courts Act (IX of 1887) is based and the policy upon which the enactment antecedent to it, Act XI of 1865 was based, may be an exercise of power resulting in disastrous results, keeping in view the finality of the jurisdiction which such Courts possess. In the present case I am afraid such has been the result, because, even keeping in view the provisions of s. 203 of the Code of Civil Procedure, and even keeping in view all that Mr. *Madho Prasad* in his argument has addressed to me in regard to the matter, I have no doubt that the learned Judge of the lower Court should have dealt with the case in the manner required by law, and not in a manner which gives neither the points nor, to me, any guarantee that he sufficiently understood the cause.

The exact extent of the revisional powers contained in s. 25 of the Provincial Small Cause Courts Act (IX of 1887), has been the subject of consideration in a recent case decided by the Full Bench of this Court in *Muhammad Bakar* v. *Bahal Singh* (1).

Similarly the powers of this Court under s. 622 of the Code of Civil Procedure have been the subject of consideration by their Lordships of the Privy Council in the case of *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (2).

The effect of these rulings has been considered by me in some earlier cases, to which I need not refer in detail. What I hold now [537] is, that under the circumstances of this particular case the learned Judge of the Small Cause Court was entirely wrong in thinking that his judgment in the case to which he refers, namely, No. 1228, contained any reasons or the decision of this cause, I have therefore a case which has been decided without any reasons, and s. 203 of the Code of Civil Procedure will not enable even a Small Cause Court Judge to dispose of cases in this manner, or to think that he has done justice to the parties when he has written a judgment such as the one which is now before me.

I therefore regret that, acting under the powers which this Court possesses as a Court of revision, the only order which I feel called upon to make is that the application be allowed, the judgment of Mr. Mrittonjoy Mukerji, Judge of the Small Cause Court of Benares, dated the 19th April 1890, be set aside as no judgment at all, and that that Court be called upon to pass the proper order in the case according to the requirements of the law. Acting under the anology of s. 562 read with s. 647 of the Code of Civil Procedure, I set aside the decree and remand the case for trial upon the merits with reference to the order which I have made. Costs will abide the result.

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(1) 13 A. 277. (2) 16 C. 749.

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13 A. 537=
11 A.W.N.
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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

WALI AHMAD KHAN AND OTHERS (*Defendants*) *v.* AJUDHIA KANDU (*Plaintiff*).* [18th March, 1891.]

Possession—Ejectment—Suit in ejectment on a possessory title—Act I of 1877 (Specific Relief Act), s. 9.

Per EDGE, C.J., STRAIGHT *and* TYRRELL, JJ., (MAHMOOD, J., *dissentiente*).

Section 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being, whatever his title, in possession of immoveable property, is ousted therefrom.

[538] That section does not debar a person who has been ousted by a trespasser from the possession of immoveable property to which he has merely a possessory title, from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. *Davison* v. *Gent* (1); *Asher* v. *Whitlock* (2); *Wise* v. *Ameer-un-nissa Khatoon* (3), *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (4), *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (5) and *Muhammad Yusuf* v. *Sukh Nath* (6) referred to.

Per MAHMOOD, J.

A person who is suing upon a merely possessory title to recover possession of immoveable property against a person who has ousted him must bring his suit, if at all, under s. 9 of Act I of 1877, and therefore within six months from the date of his dispossession.

[R., 29 A. 52 (59)=3 A.L.J. 775=A.W.N. (1906) 264; 29 B. 213 (219)=7 Bom. L.R. 12; 7 C.P.L.R. 3 (4); 12 C.P.L.R. 59 (62); U.B.R. (1897-1901) 270; 78 P. R. 1902=137 P.L R. 1902; U.B.R. (1892-1896), Vol. II, 619.]

THE facts of this case are fully stated in the judgments of Edge, C.J., and Mahmood, J.

Mr. *Abdul Raoof* and Mr. *Abdul Jalil*, for the appellants.

Munshi *Kashi Prasad* and Pandit *Sundar Lal*, for the respondent.

JUDGMENTS.

MAHMOOD, J.—I regret that in consequence of the course which this litigation has taken, it is necessary for me to deliver a longer judgment than I should otherwise have considered necessary.

The suit is one of small pecuniary valuation, but the points which arise in it are important and it can scarcely be doubted that it was in view of this circumstance that the learned Chief Justice and myself by our order of the 22nd May 1891, referred the case to a Bench consisting of five Judges. The case has accordingly been heard by a Bench consisting of all the members of this Court.

The facts of the case are to be considered with reference to the pleadings of the parties, and I shall therefore begin with those pleadings, because without fully appreciating them it is scarcely possible to appreciate the points of law to which the circumstances of this case have given birth.

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* Second Appeal No. 879 of 1888, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 17th March 1888, reversing a decree of Munshi Matadin, Munsif of Ballia, dated the 2nd September 1887.

(1) 26 L.J. Exch. 122. (2) L.R. 1 Q.B. 1. (3) 7 I.A. 73.
(4) 6 B. 215. (5) 8 B. 371. (6) 7 A.W.N. (1867) 55.

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Now the first matter to consider is the exact effect of the allegations in the plaintiff's plaint, and to deal with those allegations [539] with reference to the property now in suit. The property in suit, as also the reliefs sought by the plaintiff, are best represented by the plaint itself.

The land in suit measures I biswa 7½ dhurs in plot No. 46 in the *abadi* area of mauza Sagarpani, and of this area the possession is sought by the plaintiff with a prayer that the defendants should be ejected from such land.

Upon the land thus in suit, and this being the solitary area to which the litigation relates, it was alleged in the plaint that there stood a mosque built by the defendants some time about the 21st October 1881, and in that plaint it is also alleged that such building of the mosque took place without the consent of the plaintiff and in collusion with the zemindars of the village. This appears from the statement contained in the third paragraph of the plaint. Upon this allegation the relief sought in clause (1) of the prayers in the plaint for relief was that the mosque should be demolished, as the defendants had no right in the land upon which they had built the mosque.

The second relief sought by the plaintiff was the recovery of a sum, approximately Rs. 81-8, as damages mentioned in clause (*b*) of the prayer for relief in the plaint.

The third relief sought in the plaint was that costs of the suit, together with interest, should be awarded to the plaintiff.

I have dwelt upon the exact scope of the prayers in the plaint in this detailed manner, because I think that it is important to realize the scope of the action.

For similar reasons I consider it necessary to state the pleas upon which the action was resisted. It was resisted mainly upon the following grounds :—

(1) That the land in suit did not belong to the zemindars of the village under whom the plaintiff claimed, but formed part of the premises belonging to the mosque in which the defendants were interested according to law.

[540] (2) That the plaintiff could therefore have no title to the land, at least no such title to the land as could be derived from the zemindars.

(3) That the defendants' possession of the land in suit had been older than the prescriptive period of 12 years, and that therefore neither the plaintiff nor the zemindars could have any title to the land and that the mosque sought to be demolished was built so long ago as 1873. This last plea was raised in para. 3 of the written statement of the defendants.

(4) That the lease under which the plaintiff claimed could not include the land in suit, because no such lease was ever given by the zemindars, and this statement occurs in para. 2 of the defendants' written statement.

Upon this state of the pleadings the Munsif, Munshi Matadin, framed issues represented in his judgment of the 2nd September 1887, and I refer to his judgment to render the facts of the case intelligible.

Upon the pleadings as already stated by me it is clear that it rested upon the plaintiff who sued to oust the defendants to prove his title for seeking such ouster, coupled as that prayer is with the demolition of the mosque, because, to put the matter upon the broad juristic sense, it is for him, who seeks a change to show why the change he seeks should be made. This is not only a rule of law, but also of every ratiocinative science in connection with such problems. It therefore lay upon the plaintiff to prove the reason why the defendants should be ousted; why

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the mosque and other buildings sought to be demolished should be demolished; why the damages claimed should be awarded. The desire of the plaintiff was to disturb the state of things as it existed on the 21st March 1887, when this suit was instituted, and of the defendants that it should remain undisturbed. The suit must be defeated unless the plaintiff shows such a cause as would require a Court of Justice at the date of the suit to disturb the state of things as they were on that date.

I am afraid I have spoken too abstractly in enunciating this doctrine of jurisprudence, and it will therefore be easier for me to [541] explain the application of that doctrine to the circumstances of this case by making reference to concrete facts as they have been found in the case itself.

The first question in the case is, whether Ajudhia, the plaintiff-respondent, ever had a title to the land of which he claims possession or any right to seek the other reliefs by demolishing the mosque and recovering damages which he sought in the plaint.

The question then is, what is his title? The title asserted by him is not one of ownership, but an alleged lease from the owners, whom he asserts to be in collusion with the defendants. Where is the lease? It has been found that there is no written lease, and therefore, naturally enough, it is not upon the record. His title therefore necessarily rests upon oral evidence.

I seriously doubt whether, as a simple question of law, a lease of property such as the one in dispute in this case can, under the principles enunciated by the Transfer of Property Act, be orally granted, unless it be for agricultural purposes. But I let this matter pass.

I am aware that it is not the duty of this Court as a Court of second appeal to examine the weight of evidence whether oral or documentary in cases which come up before us in second appeal under s. 584 of the Code of Civil Procedure. I am also aware that this principle has been recognised, not only by Her Majesty's High Courts of Judicature in India but also by their Lordships of the Privy Council. But I think also that it is the duty of the Court when dealing with second appeals and in considering conclusions at which the lower appellate Courts have arrived to consider whether or not those conclusions have been arrived at in due compliance with the rules of law governing the admissibility of evidence, and which involve questions of the burden of proof, especially in cases in which a title is asserted by a plaintiff who seeks to oust a defendant and that defendant denies the title and asserts that the plaintiff has no title at all.

It is with reference to this view of the law that I wish to quote a few passages from the judgment of the Munsif, Munshi Matadin, [542] as to his conclusions upon the evidence which he had before him, upon the pleadings of the parties and upon the issues which he framed. After having framed those issues, which are clear enough in the judgment of the Munsif himself, he went on to say:—

"There is no sufficient proof for the plaintiff that he held possession all along of the land in dispute under an arrangement by the zemindar, and that during the period alleged by him the defendants built the mosque, &c."

Again he says:—"The evidence of the defendants' witnesses proves to the Court's satisfaction that the mosque and shed, &c., in dispute are old and have existed for more than 12 years, and that the land in dispute is possessed by the defendants themselves."

With reference to the locality, after stating that he had deputed two

amins to prepare the map of the locality, he goes on to say as to the plaintiff's allegation regarding possession :— 1891 MARCH 18.

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"On the other hand, it appears from the map prepared by the Court amins that to the south of the mosque there are the platform for keeping *tazias* and houses belonging to the defendants and others, and then there is the manufactory of the plaintiff, and that the mosque, &c., in dispute are exactly in front of the defendants' platform for keeping *tazias* towards the north. It can by no means be supposed that at this place the plaintiff held possession of any portion of land. So far as this Court can consider, the present suit of the plaintiff appears to be entirely malicious and cannot justly be allowed to prevail."

Upon this finding the Munsif dismissed the suit *in toto*. The plaintiff thereupon appealed to the learned District Judge, who, though recording emphatic findings in his judgment of the 17th March 1888, does not appear to have fully appreciated the exact area of the land in suit or its exact identity. Nor does he seem to have fully appreciated the scope of the relief prayed for in the plaint, for that relief included a prayer for the demolition of the mosque, which, according to the plaintiff's own allegation in the plaint (*vide* para. 3 of the plaint), was constructed as long ago as **[543]** the 21st October 1881, and according to the defendants' allegation as long ago as 1873.

The learned Judge's judgment contains many indications that he confused plot No. 38 with the land now in suit, which, as stated by me, is 1 biswa 7½ dhurs in plot No. 46, and on which the mosque sought to be demolished stands, and which is the solitary subject-matter of the suit so far as it seeks ejectment (*vide* relief in the prayer for relief in the plaint).

The learned Judge, however, found that the possession of the plaintiff was disturbed when he put upon the land a stack of wood for fuel and that fuel was removed by order of the Magistrate who granted, to use the words of the learned Judge himself, a perpetual injunction some time about the 28th July 1886, prohibiting the plaintiff from stacking the fuel upon the land now in suit. After the doubt which I have expressed as to whether the learned Judge realized the identity of the land, it is not necessary for me to rule whether that finding as a question of fact was or was not right.

Upon this state of things, the case came up before me in second appeal sitting as a single Judge in this Court on the 3rd July 1889, and I felt then, as I feel now, that the judgment of the learned District Judge from which the second appeal had been preferred proceeded upon a confusion and misapprehension as to the identity of the property in suit, and also therefore as to the facts which required determination by a Court of first appeal.

In consequence of this circumstance I disapproved of the somewhat emphatic findings of fact arrived at by the learned District Judge and remanded the case under s. 566 of the Code of Civil Procedure for clear findings upon the following points :—

"(1) what are the exact terms of the lease upon which the plaintiff comes into Court, and do those terms entitle to the plaintiff to maintain an action in ejectment by demolition of the buildings erected by the defendants?

"(2) For how long have the defendants been in actual possession of the land, and what has been the nature of such possession **[544]** as against the zemindar from whom the plaintiff is the lease-holder"?

It has been contended before the Full Bench that this order of remand was wholly unnecessary, because the findings of fact at which the learned

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District Judge had arrived were sufficient to dispose of the rights of the parties, so as to render them unameuable to judical interference by this Court as a Court of second appeal under s. 584 of the Code of Civil Procedure, and in support of this contention certain authorities were cited to which special reference is not necessary, because they are familiar.

Upon the remand order which I thus made, the case went back to the lower appellate Court, at which time the presiding officer was another Judge. Mr. Fox was then officiating in that appointment. That learned Judge, by his finding, dated the 17th August 1889, sent up the case again, and among those findings is the following passage :—

"The defendants' possession is not alleged to be permissive; such as it is, it is adverse to the zemindar and his lessee the plaintiff. I find that the site of the mosque building proper (*vide* plan) has been in defendants' possession since 1881, and the rest of the land since 1886. I observe that Mr. Nicholls, though he 'affirmed the appeal,' did not order the destruction of the mosque building. His judgment is somewhat obscure on this point. Plaintiff did not appeal respecting the *site* of the mosque."

Now this finding is the reason, and a necessary reason, why it was necessary for me sitting here as a Judge in second appeal to ascertain whether or not the learned District Judge had understood the identity of the land which was in dispute. That was the reason why the remand order made by me on the 3rd July 1889 was made.

The facts stood thus, that whilst Mr. Nicholls as District Judge confounded plot No. 38 with the property now in suit, namely, plot No. 46, and of that plot 1 biswa $7\frac{1}{2}$ dhurs, the next District Judge in dealing with it held that the property on which the [546] mosque stood and which formed the subject-matter of the litigation had, as in the quotation which I have given, been in the possession of the defendants at least since 1881, and the rest of it since 1886.

To the findings thus returned by Mr. Fox neither of the parties to the litigation consented, because I find that both the parties presented objections under s. 567 of the Code of Civil Procedure to those findings.

Upon this state of things I had to consider the case in the Single Bench, and I find for the reasons stated in my order of the 17th December 1889, I thought that the case required reference to a Bench consisting of two Judges. The rules of the Court at that time permitted such reference, notwithstanding the fact that the single Judge had made an order of remand.

The case accordingly came on for hearing before the late Mr. Justice Brodhurst and myself, sitting as Judges of a Division Bench of this Court consisting of two Judges, and by our order of that date we concurred in remanding the case again under s. 566 of the Code of Civil Procedure for clear findings as to the terms of the lease upon which the plaintiff's suit was based, and, as my judgment in that case shows, for specific information as to what I said in that judgment with reference to the issue which was remanded on the former occasion. I said this :—"The object of the issue was to have full information in connection with the terms of the lease, that is to say, the time when the lease was executed, the terms on which it was given to the plaintiff, the exact area to which such lease related, as to whether or not it included the land now in suit, and other circumstances connected with what are called the terms of a document."

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The case was accordingly remanded, with the concurrence of the late Mr. Justice Brodhurst, upon those issues, and, if I remember rightly, the explanation of the issues was suggested by him to me.

Upon this issue being remanded, the present learned District Judge, Mr. Pennington, has recorded findings the effect of which is that there is no proof that the plaintiff ever held any lease form the zemindars; that there is no proof that the payment of rent alleged [546] by him in the plaint was ever made; that there is no proof that he was ever in physical possession of the land in suit. The learned Judge sums up his finding in the penultimate paragraph of his order. He says;—"My finding on the issue remanded is that if they were on oral lease in 1280 Fasli as alleged by plaintiff (which is doubtful) it included the area of the land now in suit, but that it was not a lease in propetuity nor for any fixed term, and that plaintiff can have no claim against defendants on this lease."

This finding, so far as it relates to questions of fact, is in my opinion a finding binding upon this Court as a Court of second appeal, but it is not binding upon this Court over questions of law which arise from it and that question is a serious one.

It is this. Is there any such thing as possessory title known to the Indian Law, and, if it is, where is the authority for such a title? Such a title was practically unknown to the Indian Law till the considerations which required the enactment of s. 15 of Act XIV of 1859 necessitated that such a title should be recognised, in order to keep the peace and to prevent parties from ousting persons in possession by force or fraud. Now this enactment of s. 15 of Act XIV of 1859 has been the subject of interpretation by their Lordships of the Privy Council, and they have held that because possessory title is intended for these purposes, no such possessory title shall enable the plaintiff to come into Court to seek remedy by ouster, unless such claim is brought within six months as provided by s. 15 of Act XIV 1859. That ruling is in the case of *Wise* v. *Ameer-un-nissa Khatoon* (1).

That case also is an authority for saying that whenever a possessory title is made the basis of a claim such as this and is brought after the laps of six months, such a title is not to be listened to, because there has been too much delay for relying upon such a title.

Another point upon which also their Lordships of the Privy Council have delivered their judgment is that the ordinary rule of burden of proof as to ownership is not to be disturbed except under the statutory provisions as to possessory title to which I have [547] already referred. Those provisions have now been reproduced as s. 9 of the Specific Relief Act (I of 1877), but they do not in my opinion alter the law, for s. 15 of the Limitation Act, (XIV of 1859) was unjuristically placed in the old Limitation Act,though it deserved a place in an enactment which related to specific relief. One thing, however, is clear, that in both these enactments, whether specific relief be regarded as a subject falling under the category of substantive law or a subject relating to adjective law, the period of six months is a necessary incident before any possessory title can be asserted as the basis of an action for ejectment. This view has been repeatedly adopted by the High Courts in India, and it is fully supported by the rulings of the Privy Council.

This being so, it is important to consider the date of the suit which was the 21st March 1887, and then the date of the ouster

(1) 7 I.A. 73.

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by the defendants which, so far as this plot, No. 46 is concerned, took place some time, according to the plaintiff's own statement, in 1881. The suit was therefore undoubtedly beyond the six months' period allowed by s. 9 of the Specific Relief Act.

This being so, the next question to consider is, that, inasmuch as the possessory title cannot be pleaded as the basis of the action in ejectment, whether the ordinary rule of law as contained in s. 110 of the Evidence Act would not apply. In my opinion, under the circumstances of this case, considering that the ouster from the land now in suit is admitted to have been so old as 1881, and also in view of the circumstance that the suit was not instituted until the 21st March 1887, the ordinary presumption of law, that he who is in possession of land owns it, applies, and such presumption cannot be abrogated by any statement or proof, even of such facts as that of forcible or fraudulent ouster anterior to six months from the date of the suit.

The ruling of *Asher* v. *Whitlock* (1) has been cited as an authority for a proposition opposite to the view which I have taken in this case, but that ruling in my opinion cannot in the first place, abrogate the statutory provisions of s. 9 of the Specific Relief Act (I of [548] 1877), nor can it apply to India if the argument is that it applies in a manner which abrogates the statutory law. The principle recognised there, is that a forcible or fraudulent ouster by a defendant will not enable him to shift the burden of proof as to ownership of title on to the wrong party. That doctrine, so far as it goes, is sound, and has been adopted by their Lordships of the Privy Council in the case of *Sundar* v. *Parbati* (2), and from that ruling it is not possible for me to differ. I regard that ruling as represented in the report itself as one which is binding upon this Court, but that ruling does not apply to the case here.

Here the action, as I said before, was one in ejectment. The broad effect of the defence is that the plaintiff had no title; that those under whom he claims have no title, and that the very lease never existed, and the finding of the lower appellate Court is entirely in favour of the defendants.

I only wish to add a few words as to this order of remand made by me in the Single Bench on the 3rd July, 1889. That order was made because I thought, and still think, that Mr. Nicholls had not understood the case and that he had therefore confounded the identity of the property in suit. It was also made because the judgment of the learned Judge was not in accordance with the requirements of s. 574 of the Code of Civil Procedure.

Then as to the second remand order, namely, the one made by Mr. Justice Brodhurst and myself, on the 24th April 1890, I wish to say that my honorable colleague and myself had fully apprehended the difficulties of the case when that remand order was made, and that the second remand was necessary because of the finding of the lower appellate Court being again inadequate to prove anything other than a possessory title in the plaintiff. Such a possessory title, as I have said, cannot rest longer than six months according to s. 9 of the Specific Relief Act. The suit was instituted after six months of the alleged dispossession; the land was in the possession of the defendants ever since 1881, and it had been the subject of litigation between the parties with the result that the plaintiff's stack of wood [549] was removed by the Magistrate's order on the 18th July 1886,

(1) L.R. 1 Q.B. 1.

(2) 12 A. 51.

and that the possession of the defendants had, even from that date, been anything other than that obtained by force and fraud, because the possession was obtained, under the order of the Magistrate and it was peaceably obtained, and it was so retained till this suit was brought, and such a suit being later than six months from the ouster alleged in the plaint could not therefore be entertained as a possessory suit.

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I am of opinion that upon this state of things this appeal should prevail, that the decree of the lower appellate Court should be set aside, and that the decree of the Court of first instance dismissing the suit should be restored with costs in all Courts. I would order accordingly.

EDGE, C. J.—My brother Mahmood has given as his reasons, for the reference of this case to the Full Bench of the whole Court, that it involved questions of law of great difficulty and importance. Speaking entirely for myself, I did not consider that there was any question of law in the case involving the slightest difficulty. This case was heard before my brother Mahmood and myself on the 21st instant, and at the rising of the Court it stood adjourned for judgment. On the morning of the 22nd my brother Mahmood informed me that we differed, and it appeared that we differed in fact as to the legality of these orders of remand also as to the constructions and effect of s. 9 of the Specific Relief Act, and further as to the right of a person having a title by possession to maintain a suit of ejectment against a person who was a pure trespasser and had ejected the person having that possessory title. In my humble judgment those questions were easy of solution but, inasmuch as there was this difference, my brother Mahmood wished the case to be referred to the Full Bench and I agreed to refer it.

I regret that I should be unable to follow my brother Mahmood into many of the matters to which he has alluded this morning in his judgment many of the considerations inducing him to make the orders of remand, as those matters were not suggested by either of the orders of remand which he made, or during the course of the [550] argument in this case, or until this morning when my brother Mahmood proceeded to deliver his judgment.

Let us see what this case is. It is a suit brought by one Ajudhia Kandu, a Hindu, against certain Muhammadans; and in that suit the plaintiff alleged that the defendants had wrongfully built upon land that was in his possession as tenant and had ousted him, and that they had at a subsequent period thrown out walls and enclosed other portions of the plaintiff's holding. The plaintiff alleged that he was a tenant of the zemindars and held under them. The defendants, on the other hand, set up a title in themselves, their case being that on the land in dispute their ancestor had erected a hut or house and had lived in it, and that the plaintiff never had had possession of any of the lands in suit. Now that was a very simple case to try. It was a case in which, according to my view of the law, the plaintiff could rely on proof of a letting by the zemindars to him, and if he failed to prove such a letting he could rely on the fact of his possession anterior to that of the defendants and, if he established that anterior possession, then upon the fact of their wrongful entry upon the land, they having no lawful right to do so. The question of the defendant's title was also an easy matter for consideration, and the plaintiff having proved *prima facie* title, either as lessee or as a person who was in recent possession until ousted by the defendants, it was then for the defendants to prove a title which entitled them to eject the plaintiff and thus to establish that their entry upon the land was rightful.

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The suit was brought on the 21st March 1887 in the Court of the Munsif of Ballia. It was decided by the Munsif on the 2nd September 1887, the Munsif finding against the plaintiff and dismissing the suit. Thereupon the plaintiff, on the 1st November 1887, appealed to the Court of the District Judge, and in that appeal he did not claim demolition of the *masjid*, that is quite plain. He did not claim possession of the land on which the *masjid* stood; that also was plain, and was plain apparently to my brother Mahmood when he made the first order of remand. The plaintiff did claim in appeal to have possession given to him of the land [551] adjoining the *masjid*, which he alleged the defendants had wrongfully entered upon and surrounded by a wall after his, the plaintiff's fuel had been removed from that land.

There was another point. It is in no way admitted that the defendants had been in possession of the land with which we have to deal and which my brother Mahmood in second appeal had to deal with, that is, the land adjoining the *masjid* and on which the plaintiff had stacked his fuel. I say it is no way admitted that the defendants were in possession of this land since 1881. As a matter of fact, the plaintiff's fuel was removed from those lands, as has been found, under the order of the Magistrate, dated the 18th July 1886, and it was subsequently to that removal that the defendants wrongfully went on the land and enclosed it. The District Judge on appeal, dealing properly with the subject-matter of appeal which was before him and discarding the matter in the suit which was not before him, namely, the question of the land upon which the *masjid* stood, confined his attention to the question as to who was entitled to the land adjoining the *masjid* which was ear-marked as the land upon which the plaintiff had stacked his fuel, which stack was ordered to be removed by the order of a Magistrate on the defendants' complaint that it was adjoining the *masjid* and there was danger from its vicinity; so that, if there was confusion in this Court, in the Court of first appeal there was no confusion as to the plot of land which was in dispute in appeal between the parties.

Now the District Judge, I must say this in vindication of his judgment, made no confusion as to numbers. There was a reference to several old papers and maps. The District Judge pointed out that on the old village maps the boundaries of properties were very carelessly entered, and what he did confine his attention to was, who was entitled to the land which was ear-marked as the land adjoining the *masjid* upon which the plaintiff's stack of fuel had been?

What took place before him? The right and title of the zemindars to dispose of the land in question was not questioned before the District Judge. It was not disputed and it had never been suggested before him, or in this Court until yesterday, that any [552] question was in issue still as to the right and title of the zemindars to dispose of the land and put the plaintiff in possession. It was not a point, as I shall show hereafter, which apparently was present to the mind of my brother Mahmood when he made his first or his second order of remand. If it was present to the mind of my brother Mahmood, it was not one of the reasons suggested in those orders of remand for making them, nor was it a question inquired into in those orders of remand.

Let us see how Mr. Nicholls, the District Judge, dealt with this case. His finding, so far as it is necessary to refer to it, is as follows:—

"I consider it fully proved that the land claimed was let to plaintiff by the zemindars who had power so to dispose of it. I consider it fully proved that, till the order of the Deputy Magistrate to remove the fuel

stack, the plaintiff was stacking his fuel on the empty space between the *masjid* and the house of Durga and Bhikhari, Koeris and I hold it to be fully proved that as soon as the defendant saw the fuel removed, he wrongfully enclosed the space between the standing *masjid* and the houses of those two Koeris and built a *saiban* on plaintiff's ground and to the south put up fictitious cattle troughs and the like."

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Then he goes on, and we know what his decree was:—

"Reversing the finding of the lower Court, I decree the claim of the plaintiff in full as regards the demolishing of the walls and recent erections. The whole of what lies east and south of the *masjid* as it stood on the 16th July, 1886 is to be restored to the condition it was then in. The appellant generously gives up his money claim for damages and previous costs. These parts of his claim and appeal stand dismissed."

That was the decree and judgment against which the defendants appealed here. It was not possible on that appeal to raise any question as to the *masjid* or the site on which the *masjid* stood. That point had not been gone into by the District Judge, and he had given no decision on that, because it was not before him. The **[553]** whole question before this Court in second appeal was the question whether on those findings of fact the plaintiff had made out his right to a decree for possession and for demolition of the walls wrongfully built by the defendants since 1886. It was not open to the defendants-appellants in second appeal to question those findings of fact, unless they were in a position to show that there was no evidence upon which the District Judge could have come to those findings and then it would have become a question of law. No such ground of appeal was put forward, and it was obvious that if any such ground had been put forward it would have been a false one. There was evidence before the District Judge, he refers to it in his judgment, and he finds that that piece of land was let to the plaintiff by the zemindars and he finds that it was occupied down to the 18th July, 1886, by the plaintiff stacking his fuel upon it, and he finds that neither the defendants nor any one on their behalf ever entered upon that land until the defendants took the opportunity of wrongfully making entry upon it after the passing of the Magistrate's order for the removal of the fuel. We must not let this case be confused by extraneous matters. It is well to remember that the order of the Magistrate was not an order dealing with title. It was an order passed on the complaint of the defendants that by reason of the stacking of fuel by the plaintiff there was danger to the *masjid*. The Magistrate on being satisfied that there was such danger, properly made that order.

Then for the first time on the making of that order the defendants took the opportunity of encroaching upon their neighbour's grounds. The defendants appealed to this Court. It was an appeal which could be heard by a single Judge. I am bound to say that on these findings of fact I cannot conceive what point of law there was which could be argued in appeal on behalf of the defendants. The findings of fact were conclusive on this Court, and on those findings of fact there could be only one answer in law, and that was judgment for the plaintiff confirming the decree below with possession. However, my brother Mahmood made an order of remand. He tells us to-day that that order may have been made **[554]** because the Judge below had not complied with the provisions of s. 574 of the Code of Civil Procedure, and that it may have been made on the ground that Mr. Nicholls may have been mistaken as to the identity of the land which was in dispute between the parties. In matters of this kind it is always unsafe, I am speaking from my own experience, to rely

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upon one's memory as to what was passing through one's mind nearly two years before. In order to ascertain what were the reasons for the remand and what was the view my brother Mahmood then took as to appeal before him, I may refer to the actual words he used in his order of remand of the 3rd July, 1889. That order of remand is as follows:—

"The plaintiff-respondent came into Court upon the allegation that he was the lessee from the zemindar of the village in which is situate the land in suit. The plaintiff's allegation was that in his lease the land was included, and that the defendants resisted him placing fuel on the land, and that, such fuel having been removed by the order of the Criminal Court, dated the 18th July, 1886, the defendants took advantage of the order and raised a wall, claiming the land to form the courtyard of the mosque situate in immediate vicinity of the land. The ouster is stated to have occurred between the 28th July, 1886, and the 15th September, 1886. The present suit was instituted on the 21st March, 1887, and it was resisted upon the ground that the land in suit did not belong to the zemindar of the village, but formed part of the premises belonging to the mosque in which the defendants were interested, and, secondly, that the plaintiff could therefore have no title to the land, and, thirdly, that the defendants' possession had been older than the prescriptive period, and therefore neither the plaintiff nor the zemindar could have any title to the land. It was also pleaded that the lease under which the plaintiff claimed did not include the land in suit. The learned Judge of the lower appellate Court has recorded findings in certain incomplete terms. In the first place, he says:—'I consider it fully proved that the zemindars had the right to dispose of the waste land as they allege they have done. There is absolutely no evidence (the parole evidence of the defendants is beneath criticism) that the land in dispute ever formed part of the *masjid* or of the [555] *masjid* precincts. There is evidence, poor in quality, that before the *masjid* was built, Zorawar, grandfather of defendant, had a thatched hut on the spot, but there is no evidence at all that the limits of his site extended an inch beyond what is now covered by the *masjid*.' After these observations the learned Judge goes on to say—'I consider it fully proved that the land claimed was let to plaintiff by the zemindars who had power so to dispose of it; I consider it fully proved that, till the order of the Deputy Magistrate to remove the fuel stack, the plaintiff was stacking his fuel on the empty space between the *masjid* and the house of Durga and Bikhari, Koeris, and I hold it to be fully proved that as soon as defendant saw the fuel removed, he wrongfully enclosed the space between the then standing *masjid* and the houses of those two Koeris and built a *saibon* on plaintiff's ground, and to the south put up fictitious cattle troughs and the like.' These findings appear to me to be findings of fact which tend against the defendants, but before disposing of the case finally it is necessary to have clear findings upon the following points:—

(1) What are the exact terms of the lease upon which the plaintiff comes into Court, and do those terms entitle the plaintiff to maintain an action in ejectment by demolition of the buildings erected by the defendants?

(2) For how long have the defendants been in actual possession of the land, and what has been the nature of such possession as against the zemindar from whom the plaintiff is the lease-holder?

To take the last issue first. There was a clear finding that the defendants had failed to make out their case that the land which they had attempted to prove that their ancestor had occupied was the land

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which was in dispute before the District Judge. As to the first issue, I fail to see what the terms of the lease had got to do with this matter. The finding was, lease or no lease, as a fact that the zemindars had got a right to let and put the plaintiff in possession and the plaintiff had occupied that land up to the 18th of July, 1886. It was not suggested by the defendants that the [556] plaintiff held a lease which was forfeited, or that he had been ejected from the land by his landlord. There was no issue raised which could make it a matter of consideration between the plaintiff and these defendants what the terms of that lease were. The lease may have been void and indefinite, and it may have been open to any and every objection on the part of the zemindars, if the zemindars were defending this suit; but I fail to see how a person who is found to have wrongfully and without any title come on to the land of another can challenge that man's title and say "show me the terms of the lease upon which you hold."

The case went down on remand. Unfortunately, on the first issue the order which went down referred to "relief" instead of "lease" and that led to some confusion in the Court below. The then District Judge, Mr. Fox, made findings and reported them to this Court. The case was then again remanded by my brother Mahmood and the late Mr. Justice Brodhurst to the District Judge. It came then before Mr. Pennington, who was then acting as District Judge, and Mr. Pennington went into the matter and he returned his findings. Those findings were returned on the 12th June, 1890, and those apparently are the findings upon which in my brother Mahmood's opinion he would give a judgment in favour of the defendants-appellants in this case.

I must say, speaking entirely for myself, that I do regret that any local dispute between a Hindu and some Muhammadans should have been kept alive in that district over all these years by those orders of remand, which appear to me to have been not only unnecessary, but not justified, this being a second appeal, by s. 566 of the Code of Civil Procedure. What is the power of the Court under s. 566 to make an order of remand in a second appeal? Before considering that section, it is well to bear in mind that the Code of Civil Procedure prohibits a Court in a second appeal from questioning the findings of fact of the lower appellate Court unless there is no evidence or, what is the same thing, no admissible evidence in support of them. Their Lordships of the Privy Council have said more than once in unequivocal language that that is the [557] law, and the Courts in this country in second appeal are debarred from questioning, in any form, shape, or way, the findings of fact, when there is evidence in support of them, no matter how erroneous in the opinion of the Court those findings may be. One has to bear that in mind when one has to consider the power of the Court under section 566 of the Code. Section 566 is as follows:—

"If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required.

"And such Court shall proceed to try such issues and shall return to the appellate Court its finding thereon together with the evidence".

It is obvious from that section that a Court in second appeal

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cannot make an order of remand which tends to question the findings of fact of the lower appellate Court. A Court of second appeal frequently no doubt, would have come to a different conclusion as to the facts from that which was come to by the lower appellate Court. But because we are not satisfied with those findings and because they are not findings which we should have come to, we would not be justified in making an order of remand which would re-open questions of fact which have already been found by the lower appellate Court. And further it is obvious that an order of remand should not be made if the findings of fact of the lower appellate Court, rightly or wrongly, dispose of the issue before the Court. It is no part of our business to hunt about and find means by which we may upset a decree and decision of the lower appellate Court of which we do not approve. Now I have come to the conclusion that these various remands not only were unnecessary, but that they were practically and in fact a violation of the principle that we should not in second appeal interfere with the findings of fact of the lower appellate Court. I pointed out that [558] on those findings of the lower appellate Court, no question would have arisen as to the area of the land. It was found that land was let by the zemindars. No question could have arisen as to the terms of the lease. It was not suggested that any lease was determined except by the wrongful act of the defendants and that could not determine the plaintiff's title. Under these circumstances, in my judgment, we are bound to decide this case on the findings of fact which were come to by Mr. Nicholls as far back as the 17th March 1888, and to discard the findings of fact, although I think they are immaterial, which were come to on the subsequent orders of remand.

I do not think, for myself, that, strictly speaking, it is necessary to consider at all the construction and meaning of s. 9 of the Specific Relief Act, or the question whether a person who has merely a title by possession can maintain a suit for ejectment against a person who subsequently comes upon the scene and without any title in himself disturbs the plaintiff from the possession which he was enjoying, such as it was, because on the record there is the finding of fact of Mr. Nicholls that the plaintiff was in possession until he was disturbed by the defendants, and that he was in possession as tenant to the zemindars who had authority to dispose of the land. However, as the question has been raised by my brother Mahmood it is as well for us to consider it and dispose of it once for all, so far as this Court is concerned. I do not propose to go at any length into the authorities on that point; I shall leave that question to be dealt with by one of my brother Judges who is more familiar with the authorities than I am. But I wish to express views of mine on the point which I have expressed on several occasions. Section 9 of the Specific Relief Act was a section which, in my humble judgment, was passed in order to prevent persons ousting a man from possession except by due process of law, and it was intended that under that section a suit might be brought within six months, and the person ousted be put into possession no matter what title he had. It was a section the object of which was to drive persons who wanted to eject a person into the proper Court and prevent [559] them from going with a high hand and ejecting such person. That section has nothing to do with a suit on title for possession. The section itself says in one of its paragraphs—"nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

It is merely a section which enables a man to come into Court and be put back into possession, if, although he had no title, he was actually in possession, notwithstanding what title the other person may prove. It does not suggest for one moment that a man who had a possessory title should be compelled to bring his suit under that section or not at all.

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With regard to the right of a person who is in possession to remain in that possession until he is ejected by a person with superior title, the cases in England are consistent. There are several cases to the same effect in this country and their Lordships of the Privy Council have quite recently recognised the fact that a mere simple title of possession, there being no other title at all, is sufficient to enable the person to maintain a suit against a person who has got no better title; and it stands to reason that it ought to be so. It would in my judgment be contrary to justice, equity, good conscience, and common sense to hold that a man who had been, for instance, for eleven and half years in quite and undisturbed possession of land to which he had no right except his title by possession might be disturbed by a stranger going along the road coming in and ejecting him, such stranger not having any title whatever to the land. It would be contrary to common sense to say that the man so ejected should be limited in his right to bring his suit by s. 9 of the Specific Relief Act. It would be depriving him of a right which is enjoyed by all the subjects of Her Majesty, a right of vindicating their rights to property of which they have been wrongfully dispossessed. It certainly cannot lie in the mouth of the defendants in this case who had no title at all, to say, " you have got no legal title, and therefore I was entitled to come in and turn you out." That would amount to saying that a person who has possessory title can be turned out by an absolute stranger who [560] has no title at all. I would therefore dismiss this appeal with costs.

STRAIGHT, J.—As one of the Judges who has been called in consequence of the difference of opinion between the learned Chief Justice and my brother Mahmood I desire to make a few observations with regard, first of all, to the order of remand which was originally made when he was sitting as a Single Judge, and, secondly, as to the remarks which have fallen from him to-day, by which it was made to appear that the construction put by my brother Mahmood on s. 9 of the Specific Relief Act is the admitted construction adopted practically not only by all the Courts in India but by the Privy Council.

This suit, which commenced, as we know, in the month of March, 1887, need not be discussed by me as to the shape in which it was precisely presented in the plaint. It is enough for me to consider the precise question which was before the learned Judge in appeal and which he fully considered and which he determined. That question was, whether these defendants having already a mosque or *masjid* erected upon certain land, had encroached from the proper area upon which that mosque was situated on to the land which had been in the possession and occupation of the plaintiff between the months of July and September 1886. The learned Chief Justice has said, and I entirely agree with him, that that was a very simple issue. I am thankful to think that no question of probability was introduced into this case by the learned Judge. It was as probable that the Hindu zamindar and the original tenant, the Hindu plaintiff, had conspired for the purpose of defeating or injuring these Muhammadan defendants as that these Muhammadans had done an arbitrary and *zabar dast* act in inclosing land that did not belong to them. Fortunately, however, these considerations have not been introduced by the learned Judge

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below. The learned Judge tried the case upon the pure question of fact, namely, was the encroachment alleged by the plaintiff made upon his land or land in his occupation between the months of July and September 1886? The learned Judge has found in plain terms that the encroachment was [561] made; that the wall was put up; that the *saiban* was erected, and that the land was in the occupation and enjoyment of the plaintiff at the time those acts were done. Of course if a Court of second appeal takes upon itself not to like the findings of fact recorded by a Court of first appeal, it is a very easy process for it to remand the case, and to go on remanding it, until a Judge is found who gives a finding to the liking of the Court of second appeal. I am sometimes dissatisfied with the findings of fact recorded by the Court of first appeal, but I have always felt myself constrained to accept those findings, where there are clear materials in the record from which the Judge might find certain conclusions and where the case is not one of absence of any evidence. The result of unnecessary remands in this case has been that whilst Mr. Nicholls, in the first instance, in most clear and explicit terms found in one way, we have an intermediate remand to another Judge, who gives a somewhat halting reply, and a second remand to a third learned Judge, resulting in that learned Judge taking a different view altogether. How long is this to go on, and when would a Court ever have an opportunity of bringing litigation to a close? I suppose that it was with that feeling s. 564 of the Civil Procedure Code was framed, and a very wholesome provision it is.

I say with the most profound respect to my brother Mahmood that had I been his colleague I should have dissented from that remand, because, in my opinion, it was not only wholly unnecessary, but contrary to the provisions of s. 564. Therefore I concur with the learned Chief Justice that what Mr. Nicholls found as the Court of first appeal before the remands were made must provide the material upon which this appeal must be determined, and behind those findings of fact we to-day cannot go.

It has been said that s. 9 of the Specific Relief Act bears the construction, namely, that which my brother Mahmood has placed upon it. Then the result is this, that a man who has been in peaceable possession of immoveable property for a period of 10 years, may, by the forcible entry of an absolute stranger and trespasser, be turned out, and that if he does not bring his suit within six months, the fact [562] of his antecedent peaceable possession is no evidence of his title. What is s. 9 of the Specific Relief Act? It only reproduces the rule which says that a person having a right to which wrong has been inflicted, is entitled to come into Court and assert that right. If my brother Mahmood's reading of s. 9 of the Specific Relief Act is correct, then it would be practically precluding the suit contemplated by art. 142 of the Limitation Act. What s. 9 of the Specific Relief Act intended to do, and in my opinion does, is to provide a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised. This s. 9 is no more than a reproduction of a provision of the Roman Law by which the prætor was entitled to restore possession to a person who had been forcibly dispossessed of property. It was thought, and wisely thought, that if power was not given to the Civil Courts to afford this speedy remedy, most high-handed and intolerable cases of dispossession might occur, with the result that

the intruder, having forced himself into possession, might snap his fingers and say "here I am in possession; prove your title and do your worst." It would neither be justice, equity, good conscience, nor common sense to recognise or tolerate any such doctrine, and I for one decline to do so. In this connection I think it right to refer to the case of *Davison* v. *Gent* (1). There it was remarked by Baron Bromwell—"It may be that the plaintiffs have no right as against Sherwood, and that Sherwood might have a title as against them. But Sherwood is not a party to the suit. The party who has turned the plaintiffs out of possession is sued. The plaintiffs only fail to show that they have a title under a particular person. It is not for the defendant then to ask it to be presumed that he has any title or right to recover. It is for him to prove that he has title or right to recover. It is for him to prove that he has title in answer to the plaintiff's proof of a prior possession."

The same view is to be found in *Asher* v. *Whitlock* (2) and has recognised in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (3) [563] and *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (4) and in a ruling of this Court to be found in the *Weekly Notes* for 1887, p. 55, *Muhammad Yusuf* v. *Sukh Nath.* My brother Mahmood did not refer in terms to the passage in the Privy Council judgment of which he spoke, which is to be found in L.R., 7 I. A., p. 73, *Wise* v. *Ameer-un-nissa Khatoon.* But, as the Chief Justice of Bombay observed in the case reported in the I. L. R., 8 Bom., those remarks of Sir Barnes Peacock in delivering the Judgment of their Lordships of the Privy Council must be read in conjunction with the facts of that very peculiar case. I cannot hold or allow that the course of authority in India has ever been to the effect that s. 9 of the Specific Relief Act debars a person who has not brought his suit within six months of his dispossession from giving evidence of his possession in support of his title. Under these circumstances I have no hesitation whatever in holding that the findings of fact of Mr. Nicholls being accepted, the suit of the plaintiff was rightly decreed, and that the plaintiff was entitled to eject the defendants; and further, that the land being in his possession and the erections being the erections of trespassers, he was entitled to remove them. I agree in the order made by the learned Chief Justice.

TYRRELL, J.—I entirely concur in what has fallen from the learned Chief Justice and my brother Straight.

KNOX, J.—I had proposed to preface my judgment by quoting certain portions of the judgment of the learned District Judge which satisfied me that the lower appellate Court had before it a clear view of the question involved in the appeal and had arrived at a positive finding which disposed of this question. The portions to which I had intended to refer have been given in full by the learned Chief Justice in the judgment which he has just delivered and I do not therefore repeat them. I only repeat that after a careful consideration of the judgment delivered by Mr. Nicholls, I am satisfied both that that learned Judge had properly seized himself of the questions that arose before him in that appeal and that he had pronounced upon those questions findings which disposed of [564] them. I therefore hold that this Court is precluded by law from going beyond those findings of fact, and the position to which I revert in coming to a decision in this second appeal is the position at which the case

(1) 26 L J. Exch. 122. (2) L.R. 1 Q.B. 1. (3) 6 B. 215. (4) 8 B. 317.

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stood prior to the 1st July 1889. Reverting to that position I find no question of law involved in the pleas as recorded in the memorandum of appeal, nor indeed did I find any in the argument addressed to me whilst sitting in this Full Bench which properly flowed from those pleas or which bore upon the sole question arising in this case, namely, whether in law the plaintiff had made out his title for possession and demolition of the buildings which have been found wrongfully erected by the appellant. I would, therefore, without any reference to or consideration of what has been found by the Judge of Ghazipur since the 1st July 1889, dismiss this appeal with costs.

Appeal dismissed.

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13 A. 564=11 A.W.N. (1891) 164.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

SHER SINGH AND OTHERS (*Judgment-debtors*) v. DAYA RAM AND OTHERS (*Decree-holders*).* [30th April, 1891.]

Execution of decree—Principal of res judicata *as applied to execution proceedings—Rule in Sarju Prasad* v. *Sita Ram—Civil Procedure Code,* s. 373.

Where a judgment-debtor, being entitled and having an opportunity to plead s. 373 of the Code of Civil Procedure as a bar to execution of the decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the Court and orders passed thereon, the principle of *res judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought in fact to have been held to be barred by the operation of s. 373 abovementioned.

[R., 16 A. 390 (393)=14 A.W.N. 131; 21 A.W.N. 32.]

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. T. *Conlan* and Mr. *A. H. S. Reid*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

STRAIGHT, J.—This is a first appeal in execution, and the decree to which it relates was dated the 16th December 1879. That is a [565] decree passed upon a mortgage, and was, so I am informed, drawn up in the form then prevailing, providing for the sale of the mortgage property in the event of the amount of the decree not being paid by the mortgagor, judgment-debtor.

The first application for execution was made on the 22nd April 1880, and no further reference need be made to that proceeding. The second application for execution was put in on the 29th January 1883, and upon it certain proceedings were taken. Among others a report was called for from the office as regards the property sought to be sold, and the pleader for the decree-holder was required to file an affidavit as to whether the property to be sold was or was not ancestral property of judgment-debtor. A considerable period of time passed without anything being done, and on the 18th March 1884, the following order was made on the second application of the 29th January 1883 :—

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* First Appeal, No. 89 of 1888 from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 28th May 1888.

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"The pleader for the decree-holder stated that his client does not wish to prosecute the case further, it is therefore ordered that it be dismissed for default."

On the 20th March 1884, the third application was put in, and by his petition the decree-holder sought for sale of the property mortgaged. On the 13th May 1884, notification of sale was issued, fixing the 21st July 1884, but the judgment-debtors got time for the payment of the amount of the decree and the sale was postponed. Subsequently fresh notices of sale were issued for the 20th September 1884, when one Kalyan Das put in an objection and asked that one of the properties notified for sale should be sold first, to which the decree-holder, on the 20th November 1884, agreed. On the 5th February 1885, the sale of that property was trasferred to the Collector, as it was considered that such property was the ancestral property of the judgment-debtor.

With regard to this application and what was done upon it I may say that it was a real application, according to law, accepted by the Court below, and, as the judgment-debtors were cited, they had an opportunity of being heard and of offering and setting up any [566] objections that they might be in a position to prefer to the execution of the decree, amongst them, of contending that the order, dated the 18th March 1884, was a bar to the Court's entertaining the application of the 20th March 1884. No such objection was ever taken, and the very same remarks apply to the application of the 28th May 1886, by which the decree-holder applied for the sale of the mortgaged property. On the 5th June 1886, notice was issued to the judgment-debtors to show cause why the sale should not take place. They did not appear, but two persons, one of them Karan Singh, did appear, and upon his application the proceedings were struck off, as will be seen by an order of the Subordinate Judge of Aligarh dated the 28th July 1886, which is in the following terms :—

"This date was fixed for the hearing of this case. A regular suit has, however, been instituted by Karan Singh. The number of that suit is 141 of 1886. An order has been passed in the said suit for postponement of the sale. No further proceedings can therefore be taken."

The case was then struck off. That order got rid of the application of the 28th May 1886, and on the 9th January 1888, the application with which we are concerned in the present appeal was put in by the decree-holder for the sale of the mortgaged property, and the learned Subordinate Judge has allowed the decree-holder to execute the decree. Two objections are urged by the judgment-debtors before us as to the propriety of that order. The first of these is that looking to the terms of the former order, dated the 18th March 1884, the principle of the case of *Sarju Prasad* and the subsequent rulings of this Court, which adopted and followed it, as set out in the Full Bench ruling, should be applied, and we should hold that that order was a bar to all the subsequent applications that were made, and was a fatal impediment to the decree-holder's subsequent application.

The second point urged by the learned counsel for the appellant is that the execution should have been transferred to the Revenue Court, the property attached being the ancestral property of the [567] judgment-debtors, and this may be disposed of at once. No such question appears to have been raised before the Court below, nor are there any materials upon this record to guide us in forming an opinion upon it. All I can say is that the Court which has the conduct of the proceedings in execution, that is, the Court below, may, at the instance of the judgment-debtors, if

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proper materials are placed before it, hereafter decide this question according to law and make such order as appears proper and right.

The first point referred to above is one of great importance, and in order to guard against any possible confusion or misunderstanding as to the means upon which it is in this particular case decided, I think it necessary to explain the grounds upon which I come to the conclusion I have. In my opinion the principle laid down in *Ram Kirpal* v. *Rup Kuari*(1) prohibits me from going behind a formal application for execution of a decree admitted by a Court executing a decree, in which notice has been issued to the judgment-debtors and proceedings from time to time have been taken thereunder in execution of that decree. I concede that the decree-holder in the case might be in a difficulty if the judgment-debtor could go behind the proceedings which were instituted by the application of the 20th March 1884. But in my opinion the judgment-debtor cannot do so. I have already stated and I need not repeat all that was done upon that application. What I wish to emphasize now is that it was a real and substantial proceeding taken by the Court at the instance of the decree-holder, to which the judgment-debtors were made parties, in which orders were made which could only have been made by the Court upon the assumption that what had hitherto been done had been properly done and according to law. It seems to me that the objection on the score of s. 373 of the Code of Civil Procedure cannot be gone into in the present case, and that the argument for the judgment-debtors cannot prevail. I hold therefore that the learned Subordinate Judge was right in the conclusion at which he arrived, though I wish to add this much in regard to the application of the 28th May 1886, that considering the nature of the final order passed in that proceeding it would not, having regard [568] to what was laid down in the case of *Fakirullah* v. *Thakur Prasad* (2), have acted as a bar within the meaning of s. 373 of the Code of Civil Procedure. The order then made was an order by the Court of its own motion in reference to a suit then pending on its own file in which it had already issued an injunction restraining the execution proceedings.

I dismiss the appeal with costs.

MAHMOOD, J.—I am entirely of the same opinion. My brother Straight has aleady stated that the rule laid down in the Full Bench case of *Radha Charan* v. *Man Singh* (3) approving an earlier ruling of this very Bench is not to be shaken in its authority or in its application. My brother has also said that, so far as the order of the 28th July 1886, striking off the application for execution dated the 28th May 1886, made by the Subordinate Judge of Aligarh, is concerned, the ruling of *Fakirullah* v. *Thakur Prasad* (2) does not govern this case. That proceeding is therefore of no value to either party for the purposes of barring any application for execution of the decree.

And moreover the important point upon which I entirely concur with my brother Straight is the principle of not going behind a proceeding in execution which has already been taken to be valid. This rule is contemplated not only by the case of *Ram Kirpal* v. *Rup Kuari* (1) and *Mungul Parshad Dichit* v. *Girja Kant Lahiri* (4), but also by the general principles laid down by their Lordships in the Privy Council in the case of *T.R. Arunachellam Chetti* v. *V.R.R.MA.R. Arunachellam Chetti* (5). I have considered it necessary to say this because there are some

(1) 6 A. 269. (2) 13 A. 179. (3) 12 A. 392. (4) 8 C. 51. (5) 15 I.A. 171.

cases now pending in this Court which have been referred by me to a Bench of two Judges for the decision of this very question, and I may add that the view of the law now taken by my brother Straight and myself is in accord with the suggestion which I made in delivering my judgment in *Badri Nath Misr* v. *Ram Rup Singh* (1).

Appeal dismissed.

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13 A. 569 = 11 A.W.N. (1891) 156.

[569] APPELLATE CIVIL.

Before Mr. Justice Mahmood.

ILAHI BAKHSH AND ANOTHER (*Decree-holders*) v. BAIJ NATH (*Judgment-debtor*).* [2nd June, 1891.]

Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re sale—Order against defaulter to make good such deficiency—No appeal from such order—Civil Procedure Code, ss. 2, 293, 540, 588.

No appeal lies from an order under s. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Soudagar Mal* v. *Abdul Rahman Khan* (2) and *Tapesri Lal* v. *Deokinandan Rai* (3) followed.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Pandit *Moti Lal*, for the appellants.

Mr. *D. Banerji*, for the respondent.

JUDGMENT.

MAHMOOD, J.—Upon the case being called on for hearing Mr. *Dwarka Nath Banerji* for the respondent takes a preliminary objection to the effect that the appeal does not lie, and in order to render the objection and the grounds upon which it proceeds intelligible, it is necessary to state the following facts:—

On the 24th January 1880, one Jogal Kishore obtained a decree for recovery of Rs. 11,583-0-9, against the present appellants, Ilahi Bakhsh and Rahim Bakhsh, by enforcement of lien against certain immoveable property belonging to them.

In execution of the abovementioned decree mauza Dharampur was sold by auction on the 20th June 1882, when the present respondent, Baij Nath, made a bid of Rs. 7,500, and deposited one-fourth of the price in Court as required by law. He, however, failed to deposit the three-fourths of the sale-money within the period of fifteen days, and the result was that the auction-sale of the 20th June 1882, stood as annulled.

On the 20th November 1883, the same property was brought to sale by auction for the second time, and upon this occasion two [570] persons, Ghulam Ahmad and Ghias-ud-din, purchased it in lieu of Rs. 6,665, that is to say, for a sum which fell short of Baij Nath's bid of the 20th June 1882, by Rs. 835.

Matters stood thus, when on the 19th November 1886, Rahim Bakhsh and Ilahi Bakhsh aforesaid applied to the Court for recovery of Rs. 835

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* First Appeal, No. 182 of 1890, from an order of Babu Mata Prasad, Subordinate Judge of Bareilly, dated the 9th June 1890.

(1) 10 A.W.N. (1890) 9. (2) 10 A.W.N. (1890) 85. (3) 10 A.W.N. (1890) 89.

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from the defaulting bidder Baij Nath, present respondent. This application purported to have been made under s. 293 of the Code of Civil Procedure, and, upon the application having been made, Baij Nath, respondent, preferred objections, but his objections were disallowed, and on the 8th January 1887, the subordinate Judge made an order that the sum of Rs. 835 was to be paid to them by Baij Nath.

It appears then that on the same day, namely, the 8th January 1887, Jogal Kishore, the holder of the decree of the 24th July 1880, applied for attachment of the sum of Rs. 835 in the hands of the respondent, Baij Nath. The attachment was actually made on the 14th January 1887, and it seems that subsequent to the attachment the decree-holder, Jogal Kishore, sold the decree to one Raghubar Dyal, who is no party to this litigation.

On the 1st December 1880, the respondent, Baij Nath, paid the sum of Rs. 835 to Raghubar Dyal, the abovementioned purchaser of the decree.

On the 4th January 1890, the abovementioned Ilahi Bakhsh and Rahim Bakhsh applied to the Subordinate Judge to execute his order of the 8th January 1887, with the object of recovering Rs. 835 from Baij Nath, respondent. Baij Nath thereupon objected to the execution upon the ground that he had already paid the sum of Rs. 835 to Raghubar Dyal, and was therefore no longer liable to pay to Ilahi Bakhsh and Rahim Baksh. These objections were allowed on the 9th June, 1890.

It is from this order that this first appeal has been preferred, and Mr. *Dwarka Nath Banerji* contends that inasmuch as the order must be taken to have been one made under the provisions of s. 293 of the Code of Civil Procedure, and inasmuch as Baij Nath, respon-[571]dent here, was no party to the original decree of the 24th January 1880, the order which is the subject of appeal is not such an order as can be called a decree either in the regular sense of the terms as understood in the regular suit, or a decree within the explanation of it in s. 2 of the Code of Civil Procedure, and therefore no first appeal could lie under s. 540 of the Code. Mr. *Dwarka Nath Banerji* in support of his contention has relied upon *Soudagar Mal* v. *Abdul Rahman Khan* (1), in which the learned Chief Justice and Mr. Justice Brodhurst concurred in holding that no appeal lies from an order under s. 293 of the Code of Civil Procedure for recovery from a defaulting purchaser of a deficiency of price happening on a re-sale of the property, such order not being a "decree" within the meaning of s. 2 of the Code. This view of the law was followed by my brother Tyrrell in *Tapesri Lal* v. *Deoki Nandan Rai* (2).

In view of these two rulings Mr. *Moti Lal* frankly concedes that he cannot support the appeal so far as the preliminary objection is concerned. Following the principle of the rulings cited I hold that no appeal lies, and I dismiss the appeal with costs.

Appeal dismissed.

(1) 10 A. W. N. (1890) 85. (2) 10 A. W. N. (1890) 89.

13 A. 571=11 A.W.N. (1891) 167.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

1891 JUNE 26.

REVISIONAL CIVIL.

13 A. 571= 11 A.W.N. (1891) 167.

NATHAN AND OTHERS (*Defendants*) v. KAMLA KUAR AND ANOTHER (*Plaintiffs*).* [26th June, 1891.]

Landholder and tenant—Suit for possession of fallen wood of self-sown trees growing on an occupancy holding—Burden of proof.

A zamindar claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy-holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied, and (*sed quære*) there is no general rule in India to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.

[572] THIS was a reference from the District Judge of Saharanpur for decision of the following question:—"Does the burden of proving the right to fallen wood in the case of self-grown trees in an occupancy tenant's holding fall on the landlord or on the tenant?" The facts out of which the refence arose are sufficiently stated in the judgment of the Court.

The Hon'ble Mr. *Spankie*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and KNOX, J.—This is a reference by the late Officiating Judge of Saharanpur. The plaintiffs were zemidars. The defendants were two occupancy tenants of the plaintiffs. The plaintiffs brought this suit alleging a right to the fallen wood of a pipal tree, which, as we gather from the reference, had grown within the occupancy holding of the defendants. It is stated, and we must take it to be the fact, that the tree was not planted by the zemindars or by the tenants, and that it was a self-planted tree. The question which we are asked is, does the burden of proving the right to fallen wood in the case of self-grown trees in an occupancy tenant's holding fall on the landlord or on the tenant?" We have been referred to several authorities, but none of them appears to us to apply to a case like this. The case of *Deoki Nandan* v. *Dhian Singh* (1) does not apply. That was a case in which the landlord claimed a right to cut down and remove fruit-bearing trees which were growing on his tenant's holding. That, apart from special custom or contract, he clearly could not have a right to do. The other cases do not relate to self-grown wood. On behalf of the tenants Mr. *Spankie* has contended that they had the right not only to take the fallen wood of self-grown trees but to prevent such trees growing. We certainly think that a tenant would clearly be entitled to prevent the growth of any trees which were not growing at the time of the commencement of his tenancy, and the growth of which would interfere with the purpose for which the land was let to him, provided that there was no custom or contract [573] to the contrary. However, that does not assist us to answer this question. We are not aware of any authority in India which enables us to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of

* Miscellaneous Application No. 128 of 1890, under s. 617 of the Civil Procedure Code, with a reference by H. B. Punnett, Esq., District Judge of Saharanpur, dated the 5th August 1890.

(1) 8 A. 467.

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self-grown trees. In our opinion a person who brings his suit, claiming that the fallen timber of self-grown trees within an occupancy-holding belongs to him must prove his right by showing a general custom of the district, a particular custom of the village, of a contract which gives him the right. In this case there was a *wajib-ul-arz*. The learned Officiating District Judge did not consider that the *wajib-ul-arz* could be treated as satisfactory evidence. We do not intend to decide whether it can or not, but we merely point out that it was a *wajib-ul-arz* made as long ago as 1867, and that it should be a question possibly for the consideration of the District Judge what effect should be given to the *wajib-ul-arz* if he found that it had been acted upon and the correctness of it had not been disputed until quite recently. We ought to say, as our opinion is invited on the point, that the law in England relating to fallen timber could not, in our opinion, be accepted as evidence of custom or representing what the law is in India on this point.

The papers will be returned to the District Judge of Saharanpur with the answer which we have given.

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13 A. 573 = 11 A.W.N. (1891) 157.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

RADHA KISHEN AND OTHERS (*Defendants*) *v.* RAJ KUAR (*Plaintiff*).*
[15th July, 1891.]

Justice and equity and good conscience—Succession to out-casted Brahmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow.

Khuman, a Brahmin, lived with a Bania widow, for which offence he was outcasted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons [574] in possession of the property which he had acquired. This being so, the brothers of the deceased Khuman sold the property which had been thus acquired by him to one R. K. R. K. thereupon sued his vendors and the surviving sons of Khuman by the widow, together with their mother and the widow of a deceased son for recovery of the property:—

Held that the sons of Khuman by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by Khuman as against the brothers of deceased who had remained in caste.

THE facts of this case, are sufficiently stated in the judgment of the Court.

Pandit *Ajudhia Nath*, for the appellants.

The Hon'ble Mr. *Spankie*, for the respondents.

JUDGMENT.

EDGE, C. J., and KNOX, J.—This was a suit to recover possession of certain zamindari property, some houses and bonds and other property, from the surviving sons of one Khuman, the mother of those sons and the widow of a deceased son. The other defendants are brothers of Khuman, who sold to the plaintiff. The facts of the case are peculiar. Khuman

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* Second Appeal No. 84 of 1889, from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 24th September 1888, reversing a decree of Rai Ishir Prasad, Subordinate Judge of Farakhabad, dated the 22nd August, 1838.

was a Brahmin, and, having taken a Bania widow to live with him, was outcasted. He left his village, removed to another village, and there lived with the Bania widow. In course of time she bore children to him, the eldest of whom is now thirty-five years old. She and her sons and the widow of one of the sons are the first lot of defendants to whom we have referred. Khuman and his sons, as we infer from the judgment of the lower appellate Court, carried on cultivation together, and Khuman, according to the finding of the lower Court, acquired the property in dispute in this suit. It has been found by the first Court that the plaintiff paid no consideation whatever for the sale to him. That finding is not dissented from in the judgment upon which the decree under appeal was founded. The Judge below gave the plaintiff a decree for possession. Against that decree this appeal has been brought.

1891 JULY 15.

APPELLATE CIVIL.

13 A. 573 = 11 A.W.N. (1891) 157.

We have been referred to texts from Manu, to passages from West and Buhler and to several authorities, and none of them seem to us precisely to govern this case. We have here a case of the illegitimate offspring of parents who belonged to the twice-born classes of Hindus, the father being a Brahmin, the mother a Bania. [575] We have also to deal with a case in which the property in dispute, which is in the possession of the offspring of those parents was, according to the finding of the lower appellate Court, which we must accept, the self-acquired property of Khuman, after he had been outcasted, after he had left his family and his village and had started in another village to make a livelihood for himself, the woman who lived with him and their children. If we were trying this case as a Court of first instance, or as a Court of first appeal, we should come to the conclusion that Khuman having lost his caste, had started a separate family altogether; separate, that is, in the sense of total and absolute separation from the family of his birth and his caste-fellows. We cannot find amongst the authorities and texts cited to us any sure principle to guide us in this case. Under these circumstances we must act on the principles of equity and good conscience and decline to oust from the possession of the property acquired by Khuman, his sons, and their mother and the widow of the deceased son for the benefit of the vendee of brothers who were not parties to the acquisition of any portion of this property, and which was not acquired by any ancestor of theirs. This is a very peculiar case, and the view we take of it might be absolutely inapplicable in other cases; but, holding the opinion which we do as to what good conscience dictates, in the present case we allow the appeal with costs, and dismiss the suit with costs.

Appeal allowed.

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13 A. 575 = 11 A.W.N. (1891) 158.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

JWALA PRASAD (*Plaintiff*) v. SALIG RAM (*Defendant*).*
[20th July, 1891.]

Jurisdiction—Civil and Revenue Courts—Appeal—Erroneous exercise of jurisdiction by subordinate Court capable of being made a ground of appeal to the High Court.

Where the High Court is the Court of appeal from any particular subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal

* Appeal No. 1 of 1891 under Section 10 of the Letters Patent.

1891 JULY 20. before it, the High Court has power as an appellate Court to set right the proceedings of such subordinate Court. *Kishna Ram* v. *Hingu Lal* (1) and *Tota Ram* v. *Ishur Das* (2) overruled.

APPELLATE CIVIL.

13 A. 575 = 11 A.W.N. (1891) 158.

[576] THIS was a suit to recover the sum of Rs. 81-3-0 as arrears of rent, brought by the plaintiff-respondent, against the defendant-appellant in the Court of the Deputy Collector of Etawah. No question of the rate of rent due was in issue. The Deputy Collector found that the defendant was the plaintiff's tenant and decreed his claim in full. The defendant then appealed to the District Judge, who entertained the appeal, and, reversing the decree of the Court of first instance, dismissed the plaintiff's suit. The plaintiff then appealed to the High Court. The case came before Young, J., who reversed the decree of the District Judge and restored that of the first Court. From this decree the defendant appealed under s. 10 of the Letters Patent.

Mr. *J. Simeon*, for the appellant.

Munshi *Madho Prasad*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This appeal relates to a suit for rent brought in the Court of the Deputy Collector of Etawah for a sum below the value of one hundered rupees. The first Court decreed the plaintiff's claim, on which the defendant preferred an appeal to the Court of the District Judge, who reversed the decision of the first Court and dismissed the plaintiff's suit. From that decree a second appeal was preferred to this Court, and, relating to a sum of less than one hundred rupees, it came before Mr. Justice Young. A preliminary objection was taken to the hearing of the appeal on the ground that as no appeal lay to the District Judge, *a fortiori* no appeal lay to this Court. That proposition had authority in cases to be found in I.L.R., 4 All. 237 and Weekly Notes 1887, p. 76, to both of which I was a party, and there are other rulings of mine to a like effect. I have for some time past, after consultation with the rest of the Court, come to the conclusion that those rulings were erroneous, and that when this Court is the Court of appeal from a particular subordinate tribunal, and that subordinate tribunal acts without jurisdiction in the trial of a suit or on appeal, this Court has power in the form of an appeal to set right the proceedings of such subordinate tribunal.

[577] This was the view Mr. Justice Young took of the preliminary objection in the present case, and, rejecting it, he allowed the appeal, reversed the judgment, and restored the decree of the first Court. The only point taken here is that Mr. Justice Young was wrong on the question of jurisdiction. I think he was right and dismiss the appeal with costs.

EDGE, C. J.—I agree.

Appeal dismissed.

(1) 4 A. 237. (2) 7 A.W.N. (1887), 76.

13 A. 577 = 11 A.W.N. (1891) 169.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

1891 JULY 27.

REVISIONAL CRIMINAL.

13 A. 577 = 11 A.W.N. (1891) 169

QUEEN-EMPRESS v. BISHAMBAR LAL.*
[27th July, 1891.]

Criminal Procedure Code, ss. 133, 136. 140—*Act XLV of* 1860, *s.* 188—*Disobedience to order duly promulgated by public servant.*

A person against whom an order under s. 133 of the Code of Criminal Procedure is passed, who neglects to take any steps whatever in respect of such order within the time therein specified, either by way of complience therewith or by way of objection thereto in the manner prescribed by law, renders himself liable to be proceeded against under s. 188 of the Indian Penal Code without its being necessary to wait until the order has been made absolute. If such order is made absolute under s. 140 of the Code of Criminal Procedure, further proceedings can then be had, under s. 188 of the Indian Penal Code, against the person disobeying the order absolute. When an order under s. 133 of the Code of Criminal Procedure has been made absolute under s. 140 *ib.* its validity cannot subsequently be questioned. *Queen-Empress* v. *Narayana* (1) approved.

[F., and Appr., 31 M. 280 (281) = 18 M.L.J. 216 (217) = 3 M.L.T. 403 (404) = 8 Cr. L.J. 151; R., 1900 P.L.R. 24 (28); D., 20 A. 501 (503) = 18 A.W.N. 141.]

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *Ross-Alston*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

STRAIGHT, J.—The District Magistrate of Mirzapur made an order under s. 133 of the Criminal Procedure Code requiring the applicant, Bishambar Lal, to remove from a public thoroughfare certain stones that he had placed thereon in such a way as to cause an obstruction within a period named in such order, or to appear and show cause against the order, or apply for a jury to try whether the same was reasonable and proper. The petitioner did neither one [578] thing nor the other. He neither obeyed the order for removing the stones, nor did he appear on the date fixed to show cause against the order, nor did he apply for a jury to try whether the same was reasonable and proper. In other words, he wholly disregarded and flouted the Magistrate's order, and it is not surprising therefore that, upon this being brought to the Magistrate's knowledge, proceedings were instituted against him under s. 188 of the Indian Penal Code for disobedience to an order lawfully promulgated by a public servant having authority to make such order. The case was tried before the Joint Magistrate of Mirzapur, who convicted the petitioner and fined him in the very moderate amount of 5 rupees. He now comes to this Court in revision and assails that order upon two grounds, first, that the Magistrate who tried the case had no jurisdiction under the provisions of s. 487 of the Criminal Procedure Code, and, secondly, that the District Magistrate's order not having been made absolute, there could be no offence under s. 188, Indian Penal Code.

As to the first of these objections it proceeds upon a misconception of the facts. The learned Counsel was instructed that Mr. Holms, the Joint Magistrate who tried the charge under s. 188, was the Magistrate who

* Criminal Revision No. 352 of 1891.

(1) 12 M. 475.

1891 JULY 27. — REVISIONAL CRIMINAL. — 13 A. 577 = 11 A.W.N. (1891) 169.

issued the order under s. 133, but this turns out not to be so. Mr. Crooke, the Magistrate of the District, was the person who issued such last-mentioned order.

Then I come to the second contention, and Mr. *Alston* vigorously urges, that if effect is given to the views of the two Courts below, the result is that a man can be punished twice over for the same offence. That does not appear to me to be quite an accurate representation of the mattter. It seems to me upon the proper reading and construction of s. 136 with those sections that precede it, that where an order has been issued under s. 133, Criminal Procedure Code, and the person on whom it has been served does not perform the act he is directed to do, or do what is open to him, namely, appear on the date fixed and show cause aginst the order or apply for the appointment of a jury, he is treating that order of the authority entitled to make it with contempt, and that for that con-[579] tempt, he, neither obeying it, nor seeking by finding fault before the proper tribunal to set right that order nor asking for a jury to say whether it is right and reasonable, has rendered himself liable to punishment. It should be noted that the words of the section are that "if such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by s. 135, he shall be liable to the penalty prescribed in that behalf in s. 188 of the Indian Penal Code, and the order shall be made absolute."

There is a clear and distinct provision as to the conditions precedent to the penalty that the section imposes, and the words with which the section closes follow after, *viz.*, "and the order shall be made absolute." Now it seems to me that in this case the order might have been made absolute under s. 140, and that after the notice contemplated by that section and the refusal still by the petitioner to obey that order, that would again be punishable, and that the person making it would have the power to enforce all the remedies provided s. 140. In my opinion when once an order has been made absolute under s. 136, it is incompetent for the party against whom that order has been made to go behind it and question its validity in any way. In this view there is the case reported in I.L.R., 12 Mad, 475 (*Queen-Empress* v. *Narayana*) with the reasoning of which I entirely concur. The effect of my view, therefore is, that if, as I have said, a person to whom an order under s. 133 is issued flouts that order in the manner contemplated by s. 136, Criminal Procedure Code, not only does he render himself liable to the provisions of s. 188, Indian Penal Code then and there, but without any further inquiry or proceeding that order must be made absolute, and behind that order he cannot at any future time go. In this aspect of the case I think that this application for revision fails and I dismiss it.

Appeal dismissed.

13 A. 580=11 A.W.N. (1891) 166.

1891 JULY 28.

APPELLATE CIVIL.

13 A. 580=11 A.W.N. (1891) 166.

[580] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

RAM KISHEN UPADHIA (*Plaintiff*) v. DIPA UPADHIA (*Defendant*).*
[28th July, 1891.]

Second appeal—Plea raised at the hearing which was not taken in the memorandum of appeal—Practice.

A plea that the memorandum of appeal in the lower appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation is not a plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal.

[R., 15 A. 123 (128) (F.B.)=13 A.W.N. 47; 34 C. 941 (948)=11 C.W.N. 959 (967)=6 C.L.J. 237 (246).]

THE plaintiff-appellant claimed a declaration of right and maintenance of possession in respect of a certain zemindari share by cancelment of certain Settlement Court's decisions. He obtained a decree in the Court of first instance. The defendants appealed; and the Court of appeal (the Subordinate Judge), finding that the plaintiff-respondent had been out of possession for more than twelve years before suit, decreed the appeal and dismissed the plaintiff's claim. The plaintiff then appealed to the High Court, and there a plea was sought to be raised in his behalf which had not been taken in the memorandum of appeal, namely, that the defendant's memorandum of appeal in the lower appellate Court had not been properly stamped, and that the deficiency in stamp had not been made good within the period of limitation.

Mr. *J. Simeon*, for the appellant.

The Hon'ble Mr. *Spankie*, for the respondent.

JUDGMENT.

STRAIGHT, J. (Knox, J. concurring). I have had an opportunity of consulting the learned Chief Justice upon the question raised by the learned pleader for the appellant which was not taken in his memorandum of appeal, *viz.*, that by reason of the fact that the memorandum of appeal presented to the appellate Court was insufficiently stamped on the date upon which it was presented, there was no appeal at that time before the Court, and the subsequent payment of the deficiency did not cure the defect and save the bar of [581] limitation. My brother Knox and I, in common with the learned Chief Justice, are agreed that where a question of this kind is not specifically taken in the memorandum of appeal, involving as it does primarily a matter of Court-fees and the other incidental inquiries that necessarily arise in regard thereto, it should not be entertained. That being so, we have to consider whether there is any ground for this appeal. The learned pleader has not seriously contended that the finding of the learned Judge that the plaintiff-appellant was never in possession of the property to which he seeks a declaration of his title, is not strongly in favour of the view that the plaintiff had no title in respect of which he could claim to have a declaration. The appeal is dismissed with costs.

Appeal dismissed.

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* Second Appeal No. 424 of 1889 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghazipur, dated the 11th January 1889, reversing a decree of Maulvi Muhammad Abdul Ghafur, Munsif of Ballia, dated 10th November 1887.

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JULY 30.

APPELLATE CIVIL.

13 A. 581= 11 A.W.N. (1891) 193.

13 A. 581=11 A.W.N. (1891) 193.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

TULSA (*Plaintiff*) *v.* KHUB CHAND (*Defendant*).*
[30th July, 1891.]

Mortgage—Prior and subsequent mortgages—Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree to be given.

Where in a suit to bring certain immoveable property to sale under a mortgage it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immoveable property in order to save a portion thereof from sale under two prior mortgages : *held* that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs ; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance ; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged.

[R., 33 C. 1133=4 C.L.J. 121=10 C.W.N. 1010 ; 2 C.L.J. 202 (214); 12. C.P.L.R. 70.]

THE facts of this case are fully given in the judgment of the Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant.

[582] Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C. J., and STRAIGHT, J.—The suit out of which this second appeal has arisen was brought on the 8th of February 1882, by Khub Chand against Musammat Tulsa and Bhupal upon an hypothecation bond which had been executed by Bhupal in favour of Khub Chand on the 15th of June 1872, and by which Bhupal had hypothecated, amongst other things, his ancestral zemindari share of 1 biswa, 6 biswansis, $16\frac{3}{4}$ kachwansis in mauza Salempur, Pironda. The plaintiff by his suit sought to bring the mortgaged property to sale.

We are not concerned with the case of Bhupal. He is not a party to this appeal. Musammat Tulsa defended the suit as to 15 biswansis of the 1 biswa, 6 biswansis, $16\frac{3}{4}$ kachwansis zemindari share on the ground that she had a prior lien. The circumstances upon which her claim of lien depends are as follows:—

By two bonds, dated respectively the 22nd of December 1865, Bhupal had hypothecated the 15 biswansis in question to Desraj. Desraj died, and after his death his widow and his son, Khub Chand, obtained on those bonds decrees for sale of the 15 biswansis share. The sale was fixed for the 20th of July 1877. In order to satisfy the amounts of those decrees and thus save the 15 biswansis from sale, and for other purposes, Bhupal, on the 10th of July 1877, borrowed Rs. 1,200 from Baldeo Das, and, in consideration of the moneys advanced, executed on that date a bond in favour of Baldeo Das hypothecating his proprietary rights

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* Second Appeal No. 1141 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated 23rd April 1888, reversing a decree of Babu Abinash Chandar Banerji, Subordinate Judge of Aligarh, dated 6th October 1885.

in the zamindari share of 1 biswa, 12 biswansis, which included the 15 biswansis in question. It was expressly stated in the bond of the 10th of July 1877 that the Rs. 1,200 was borrowed partly to satisfy those two decrees. On the 12th of July 1877, Bhupal, out of that Rs. 1,200 paid into Court, in the one suit, Rs. 204-4-6, and in the other, Rs. 295-11-6, in all Rs. 500, and thus satisfied the two decrees and saved the 15 biswansis share from sale. Baldeo Das died before the commencement of the suit. His widow, Musammat Tulsa, has vested in her such rights and interests as Baldeo Das acquired by the mortgage of the 10th of July 1877.

[583] On the above facts the Subordinate Judge dismissed the plaintiff's claim to have the 15 biswansis share brought to sale. On appeal, the District Judge set aside that portion of the decree of the Subordinate Judge which exempted the 15 biswansis share from sale and decreed their sale, but provided that a sale of the 15 biswansis share should only be resorted to in the event of the proceeds of a sale of the balance of the 1 biswa, 6 biswansis, $16\frac{3}{4}$ kachwansis, that is, 11 biswansis, $16\frac{3}{4}$, kachwansis being found insufficient to discharge the amount due to the plaintiff under the mortgage of the 15th of June 1872. The defendant, Musammat Tulsa, has appealed.

Mr. *Durga Charan Banerjee* for the appellant and Mr. *Jogindro Nath Chundhri* for the respondent respectively cited many authorities, all of which, with one exception, have been considered, since this appeal was argued, in the Full Bench case of *Matadin* v. *Kazim Husain* (1). The exception was an unreported decision of this Court of the 27th of March 1888, in the case of *Musammat Deva Kuar* v. *Bhojraj* and *Debi Sahai*.*

Mr. *Jogindro Nath Chaudhri* contended that the reported cases relied upon by Mr. *Durga Charan Banerji* were not in point, as they were either cases in which a mortgagee had subsequently to his mortgage acquired the equity of redemption, or cases in which a purchaser of the equity of redemption had redeemed a mortgage. As to the unreported case he admitted that it was in point but contended that it was not supported by authority. He pointed out that it was Bhupal and not Baldeo Das who on the 12th of July 1877 paid the Rs. 500 into Court in satisfaction of the two decrees, and contended that if it was the intention of Bhupal and Baldeo Das, that the prior liens should be kept alive as shields for Baldeo Das, Baldeo Das would have obtained an assignment of the two decrees. The District Judge had in his judgment referred to the case of *Mohesh Lal* v. *Mohant Bawan Das* (2), and applied it by drawing the inferences which their Lordships of the Privy Council drew on the facts of that case, pointing out, however, that there [584] was in that case no intermediate incumbrance. In our opinion that fact made the case of *Mohesh Lal* v. *Mohant Bawan Das* in applicable to this case. In that case their Lordships of the Privy Council, after referring to the rule enunciated by the Master of the Rolls in *Adams* v. *Angell* (3), are reported (at page 71 of the Report) to have said :—"applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who, when he borrowed the money to pay off Lachmi Narain's mortgage, claimed to be the owner of the estate and was stated on the face of the bond to be so,

* Second Appeal No. 1608 of 1886.

(1) 13 A. 432. (2) 10 I. A. 62=9 C. 961. (3) L.R. 5 Ch. D. 634.

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intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance.

It is obvious to us that if there had been in that case an intermediate incumbrance their Lordships would not have held that there must have been any such presumption, and that they would have held that there must, unless the contrary appeared, have been the opposite presumption. The judgment of their Lordships of the Privy Council in *Gokal Dass Gopal Dass* v. *Ram Bux Seochand* (1), appears to place that question beyond doubt.

In this case it was clearly to the interests of Bhupal and Baldeo Das that the liens created by the mortgages of 1865 and 1869 and the decrees upon those mortgages should not be destroyed but should continue for their respective benefits as shields against the mortgage of 1872. There is nothing to show that in satisfying those decrees Bhupal or Baldeo Das intended to destory those liens. Indeed the contrary may be inferred from the statement in the bond of the 10th of July 1877, to which we have referred.

The observations of their Lordships on *Toulmin* v. *Steere* (2) reported at page 133 of L. R. 11 I. A., show that no inference is to be drawn from the fact that there was no formal transfer of the decrees of 1877 and no intention to keep the liens alive ever formally expressed. In *Gokul Doss Gopal Doss* v. *Ram Bux Seochand* (3), their Lordships of the Privy Council are reported (at p. 134), to have [585] said :—" The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life-estate and remainder or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the *corpus* which he has paid."

Such protection as justice, equity, and good conscience, according to the passage just quoted from the judgment of their Lordships of the Privy Council, as applied to the facts of this case, affords to Bhupal or afforded to Baldeo Das, Musammat Tulsa, as the representative of Baldeo Das the mortgagee of 1877, is entitled to.

The plaintiff, so far as the 15 biswansis are concerned, did not admit Musammat Tulsa's right of lien ; what he asked was that the 15 biswansis should be sold. He has not made out a case for the relief which he asked. We, however, have come to the conclusion that the plaintiff should have a decree entitling him to bring the 15 biswansis share to sale upon payment to Musammat Tulsa of the Rs. 500 and interest at the rate of 6 *per centum per annum* thereon with proportionate costs in all Courts. Applying the analogy of the Transfer of Property Act, we allow the plaintiff 90 days from the date when the amount of the principal sum of Rs. 500 and the interest thereon calculated at the rate of 6 rupees *per centum per annum* from the 10th of July 1877 to the date of our decree has been ascertained and our final decree has been received in the Court of first instance for payment of such principal and interest with the proportionate costs of this suit in all Courts. If the payment be not made within such 90 days, this suit will stand dismissed with costs, so far as

(1) 11 I.A. 126 = 10 C. 1035. (2) 3 Mer. 210.

the claim to bring to sale the 15 biswansis is concerned and the plaintiff will be absolutely debarred of all rights to redeem the 15 biswansis in question. To that extent we vary and modify the decree below. As the plaintiff did not seek the proper [586] relief and obsolutely denied Musammat Tulsa's right of lien, we do not allow him any costs as against Musammat Tulsa.

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MAHMOOD, J.—I agree entirely with the first portion of the judgment delivered by the learned Chief Justice, namely, the portion which ends where the decree in the case begins. I also agree with him as to the latter portion of the judgment so far as it deals with the decree to be made in this case, because I understand that the learned Chief Justice and my brother Straight are of opinion that the judgment of the majority of the Full Bench of this Court in Second Appeal No. 1210 of 1888* requires such a decree. I am bound by the majority of this Court, and I therefore agree also in the decretal order.

Decree modified.

* 13 A. 432, *supra*.

1889 JAN. 18. FULL BENCH. 14 A. 1 (F.B.)=11 A.W.N. (1891) 211=11 A. 423.

14 A. 1 (F.B.)=11 A.W.N. (1891) 211=11 A. 423.

[1] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

ASHFAQ AHMAD AND OTHERS (*Plaintiffs*) *v.* WAZIR ALI AND OTHERS (*Defendants.*)* [18th January, 1889.]

Mortgage—Joint Mortgage—Redemption of the whole by one co-mortgagor—Rights of redeeming co-mortgagor as against the others—Limitation—Act XV *of* 1877 (*Limitation Act*), *Schedule* II, *Art.* 148.

Where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by Art. 148 of Sch. II of the Limitation Act (XV of 1877). Such period begins to run from the date when the original mortgage was redeemable and not from the date of its redemption by the aforesaid co-mortgagor. *Nura Bibi* v. *Jagat Narain* (1) and *Raghubir Sahai* v. *Bunyad Ali* (2) followed :—*Umr-un-nissa* v. *Muhammad Yar Khan* (3) distinguished ; *Ram Singh* v. *Baldeo Singh* (4) referred to.

[Diss., 26 B. 500 ; 3 Bom. L.R. 685 (689) ; 9 O.C. 91 ; F., U.B.R. 1892—1896, Vol. II, 490 (491). R., 61 P.L.R. 1904 ; 32 P.R. 1905=39 P.L.R. 1905 ; U.B.R. 1892—1896, Vol. II, 502 ; D., U.B.R. (1897—1901), Vol. II, 469 (472).]

[N.B.—This very case is reported more fully in 11 A. 423, *supra*. *Ed.*]

IN this case one Ahmad Ali, the common ancestor of both parties, mortgaged certain property by a usufructuary mortgage on the 5th July 1822. Ahmad Ali died in 1825 leaving four daughters, who also subsequently died. After this Khwaj Bakhsh, the husband of one of them, redeemed the whole of the property in 1828. On the 5th February 1886, the plaintiffs, who were the representatives of one of the daughters of Ahmad Ali, brought their suit against the defendants, who were representatives of the other three [2] daughters, to recover possession of a ¼ share of the property redeemed by Khwaj Bakhsh. The Court of first instance decreed the plaintiffs' claim. The defendants then appealed, and the lower appellate Court decreed the appeal and dismissed the plaintiffs' suit, on the ground that it was barred by limitation ; holding that, if the plaintiffs claimed on the hypothesis that the defendants, the representatives of Khwaj Bakhsh were representatives of the original mortgagee, then Art. 148 of the second schedule of the Limitation Act applied and limitation began to run from the date of the original mortgage in 1822 ; while on any other hypothesis the possession of Khwaj Bakhsh and his representatives would have been adverse and the suit would be barred under Art. 144 of Sch. II of the same Act. The case came in second appeal before

* Second Appeal No. 403 of 1887.

(1) 8 A. 295.
(2) 6 A.W.N. (1886), 152.
(3) 3 A. 24.
(4) 5 A.W.N. (1885), 300.

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Mahmood, J., who, by his order of the 17th July 1888, directed it to be laid before the Chief Justice for orders as to its being referred to a Division Bench. Subsequently, on the recommendation of Straight and Mahmood, JJ., the case was laid before a bench consisting of Edge, C. J., Straight and Mahmood, JJ.

Mr. *Abdul Majid* and Pandit *Moti Lal*, for the appellants.

Pandit *Sunder Lal*, for the respondents.

JUDGMENT.

EDGE, C. J.—This was a suit for redemption of mortgage. The original mortgage was a usufructuary mortgage of 1822. One of mortgagors redeemed the whole of the property in 1828. This suit was brought against his heirs on the 5th February 1886. The lower appellate Court dismissed the suit on the ground that it was barred by limitation. In my opinion the limitation applicable in a case of this kind is the limitation which would have been applicable if the original mortgagee or his heirs had been the defendants to the redemption suit, that is, if Art. 148 of the Limitation Act applies, the period does not run from the date of the redemption of the whole property by one of the co-mortgagors, but from the time it would have run against the original mortgagee if he had been a defendant in the suit. As I understand the law, when one of two or more co-mortgagors redeems the whole, he, as to the portion which represents the interest of his co-mortgagors, stands in the [3] shoes of the mortgagee from whom he redeems, and, standing in those shoes, it appears to me that he has got the same rights and the same liabilities. If Art. 148 applies, as I think it does, this suit is barred by time. If the ruling of the Full Bench in the case of *Umr-un-nissa* v. *Muhammad Yar Khan* (1) be correct and exhaustive, then also the suit is barred, as more than 12 years have run since the date of the redemption of the mortgage by the ancestor of the defendants: so in either case the plaintiffs' suit must fail. The ruling of the Full Bench above referred to was explained by my brother Straight and my brother Tyrrell in the case of *Nura Bibi* v. *Jagat Narain* (2). It appears from that explanation that the attention of the Full Bench was not drawn to the question whether Art. 148 of the Limitation Act was one applicable to the case. There the attention of the Full Bench having been confined to the article before them, the result arrived at was that Art. 144 was held applicable. This appeal therefore must be dismissed with costs.

STRAIGHT, J.—The facts out of which the question raised by this reference arose are very fully stated in the referring order of my brother Mahmood, and it is wholly unnecessary to repeat them now. The learned Chief Justice has summarized the position of the parties to the litigation, out of which this appeal arose, by saying that this is a suit by the plaintiffs, appellants before us, for redemption of their share of certain property mortgaged in the year 1822 from the defendants-respondents, who are the representatives of one of the original mortgagors, who in the year 1828 redeemed the whole of the mortgaged property. The three questions stated by my brother Mahmood in his referring order are:—

(1) Is this suit governed by Art. 148 or Art. 144 of the Limitation Act?

(2) If by Art. 148, is the starting point of the period of limitation the date of the mortgage of 1822 or the date of the redemption of 1828?

(1) 3 A. 24. (2) 8 A. 295.

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(3) If Art. 144 applies, is the defendants' possession acquired under the redemption of 1828 to be taken as adverse to the plaintiffs' from that date ?

[4] It will be convenient for me at once to deal with the obvious matter that was passing through the mind of my brother Mahmood at the time he made the reference of these questions with regard to the applicability of Art. 144 to facts like those disclosed here. No doubt what was present to his mind was a decision of the Full Bench passed in the year 1880 and reported in I.L.R., 3 All. 24 (*Umr-un-nissa* v. *Muhammad Yar Khan*). I have already, as the learned Chief Justice has observed, taken occasion, in conjunction with my brother Tyrrell, in the case of *Nura Bibi* v. *Jagat Narian* (1) to explain the circumstances under which that particular ruling was delivered by the Full Bench. Having again refreshed my memory by reference to it, I am convinced that I was right in saying that the whole argument of the Full Bench proceeded upon the assumption that Art. 144 of the Limitation Act was the article applicable to those particular facts, and, assuming that particular article applicable, the question was whether, as stated in the order of reference of the two learned Judges, there had been such physical possession as would lay the foundation for finding adverse possession. I am quite convinced that the equitable principle which was then recognized, under which a co-mortgagor redeeming for his other mortgagors was entitled upon redemption of the whole mortgage to hold their share as against them as security for the mortgage, was never referred to or discussed, and there was at that time no statutory provision in force which could have been brought to the attention of the Judges of the Full Bench to show that Art. 148 was the Limitation article applicable. Therefore, in so far as there is anything in that case to militate with the contention now raised, it must be taken that that case never did decide and must not be regarded as an authority for deciding that Art. 148 is not applicable to such facts as we have here. Therefore it must be dismissed from consideration in dealing with the questions submitted to us.

Then arises the question whether Art. 148 is applicable, and if so from what date does the limitation begin to run ? Does it run from the date of the original mortgage, or does it run from the date [5] of the redemption of the whole mortgage by one of the co-mortgagors ? As to Art. 148 being applicable, I have no doubt. I have already committed myself to that view in the case of *Nura Bibi* v. *Jagat Narain* (1) and there have been several other rulings to the same effect ; among others, one reported in the Weekly Notes of 1886, page 152, *Raghubir Sahai* v. *Bunuad Ali*. Further, even before the Transfer of Property Act came into operation, I took the view that a co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee and was entitled to all the rights and incidents connected with his estate. The principle that underlies that is, that he, having paid off the obligation to the creditor, is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or, in other words, he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place. Amongst others he cannot say that a new mortgage transaction commenced from that particular date, but his position as mortgagee stands upon the same footing as it would have if the original mortgage

(1) 8 A. 295.

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had assigned over to him by sale his mortgage interest. Not only do I think that a co-mortgagor redeeming the whole mortgage stands in the position of the original mortgagee, but that time runs from the date of the original mortgage. No doubt this view is inconsistent with one expressed by the late Chief Justice, Sir Comer Petheram, in the case of *Ram Singh* v. *Baldeo Singh* (1). That learned Judge was of the same opinion as I am as to the applicability of Art. 148 to the facts then before him. But it does not appear to have been seriously discussed before him as to what was the precise date from which the limitation would run. Mr. *Abdul Majid* is entitled to use that judgment in his favour, and it is entitled to all the respect which every utterance of the learned Chief Justice deserves. But I cannot myself agree with the view that the limitation runs from the date when the redemption took place. It must, in my opinion, relate back to the date of the original mortgage, and upon this I have explained my reasons in the case [6] of *Nura Bibi* v. *Jagat Narain* (2). The conclusion I have arrived at is the same as that of the learned Chief Justice, *viz.*, that this suit was barred and that this appeal must be dismssed with costs.

MAHMOOD, J.—The facts of the case, as also the points of law raised by the arguments of the parties before me when the case first came up before me in the Single Bench, are fully stated in my order of the 17th July 1888, and I regard what I then said as a portion of my judgment to-day.

That order shows that, at any rate, the case was a fit one for being disposed of by a Bench consisting of more than one Judge, and it was in consequence of that circumstance that the case was laid before my brother Straight and myself; and by our order of the 6th December 1888 it was laid before the learned Chief Justice for consideration as to whether it may not go before a Bench of three Judges. It is in consequence of this circumstance that this is the third time that this Court is hearing the case, and it has not been due to any other cause than my desire to obtain such authoritative ruling upon the points raised in the case as this Court can give.

The points which arise in the case have been so completely dealt with by the learned Chief Justice and my brother Straight that I should be unnecessarily taking up their time if I dwelt upon the same points or made any endeavour to give expression to any exposition of the law which would minutely deal with the various cases that may arise under it. The question, however, upon which the fact of the case turns requires two things: first, that it should be held by us that Art. 144 of Sch. II of the Limitation Act has no reference to suits of this character; and secondly, that suits of this character are governed by Art. 148. Upon both these questions I, who am never content with dealing with any case without dealing also with the *ratio*, *viz.*, the essential steps of reasoning upon which the judgment proceeds, have no hesitation in saying, with all deference, that the judgment of the Full Bench in *Um-un-nissa* v. *Muhammad Yar Khan* (3) proceeds upon a theory of law as to the application of the Art. 144 which I find it impossible to accept. Not-[7]withstanding the clear distinction which my learned brother Straight drew in the case of *Nura Bibi* v. *Jagat Narain* (2) the result of what we have held to-day is to say that the Full Bench ruling need no longer be referred to for the purpose of finding out the periods of limitation for suits.

(1) 5 A. W. N. 1885, 300. (2) 8 A. 195. (3) 3 A. 24.

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Again, it is also clear, and I do not wish to add a single word to what has fallen from my brother Straight upon the subject, that the ruling referred to in my referring order, *viz.*, *Ram Singh* v. *Baldeo Singh* (1) cannot possibly be consistent with the *ratio* upon which our judgment proceeds. The truth is, as I understand the law, that there are various manners and methods whereby a person may stand in the shoes of a mortgagee. There may be a case such as that of an assignee, or there may be a case such as that which the broad principle of equity known as subrogation involves. A co-sharer suing for the redemption of the whole of the property and obtaining redemption thereof is not a person in adverse proprietary possession, as the Full Bench ruling would probably require. He is simply by subrogation on the same footing as an ordinary person would be as representing the mortgagee, or rather the mortgagee's interest in the property *qua* such of his co-sharers as have not either secured redemption or sued for it.

When in a suit the question arises whether or not a co-sharer can obtain his share from a redeeming co-sharer, the case to my mind is a suit such as art. 148 contemplates, and such a suit is governed by the 60 years' period. In the present case the original mortgage was so old as the 5th of July 1822. There was no endeavour made to prove that the redemption which took place in 1828 was other than an ordinary redemption by one co-sharer of other co-sharers' property; the present defendants represent the right of the redeeming co-sharer and they are entitled to rely upon the same limitation as art. 148 would require.

There is, however, because it is on account of that reference of mine that the case has come up before us, one point more that I wish to add.

The reference of course relates to four properties, as [8] mentioned in my referring order, and what we have held with regard to this mortgage renders it unnecessary for us to consider the other mortgages mentioned in the judgment of the Court below. The view we have now taken defeats the whole suit. The result is exactly what the learned Chief Justice and my brother Straight have said, *viz.*, that this appeal stands dismissed with costs.

Appeal dismissed.

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14 A. 8=11 A W.N. (1891) 213.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MARIAM BIBI (*Plaintiff*) v. SAKINA AND OTHERS (*Defendants*).*
[16th February, 1891.]

Pardah-nashin woman—Conditions necessary to the valid execution of a document by.

Where a deed executed by a *pardah-nashin* woman is sought to be set aside, it is for the party wishing to uphold the deed to show affirmatively that the transaction intended to be carried out by the deed was a reasonable one, that the executant was fully cognizant of the meaning and legal and practical effect thereof and that she executed the same with her full and free consent, that is to say, that she had independent advice on the subject and was not otherwise, as, *e.g.*, by reason of bodily or mental infirmity, or by reason of fraud or coercion practised upon her, incapable of giving a rational consent to the transaction.

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* First Appeal, No. 189 of 1889, from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Allahabad, dated the 20th August 1889.

(1) 5 A.W.N. 300.

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One Mariam Bibi a *pardah-nashin* lady of some 70 years of age, and more or less illiterate, executed on the 11th September 1888, a deed which purported to divest her immediately of all her property in favour of her son Murtaza Husen, who was dumb and imbecile, her daughter Sakina, who was named in the deed as guardian of Murtaza Husen, and that daughter's son, Muhammad Yakub. Muhammad Yakub was betrothed to a daughter of one Fakir Husen and one of Sakina's daughters was married to one Shakurul Husen. Those two persons, *viz.*, Fakir Husen and Shakurul Husen were mainly instrumental in procuring the execution of the deed in question. The deed was drafted in very artificial language, and it was not shown that the executant ever understood its contents or effect. The executant was moreover at the time of execution in ill-health and great mental distress, owing to the death of her son, Muhammad Husen, which had happened some months previously. The deed was also executed in the absence of the person who was at that time the executant's chief adviser and the manager of her property. Lastly, it appeared that as soon as the executant came to know what the true nature of the deed was and that proceedings had [9] been initiated in the Revenue Department for mutation of names, she took immediate measures to show her dissent from the provisions of the deed and her disapproval of what had been done thereunder.

Held that under the circumstances above set forth the deed in question could not be considered as having been executed under the conditions necessary in such cases and must be set aside. *Ashgar Ali* v. *Delross Banu Begum* (1) *Mahomed Buksh Khan* v. *Hosseini Bibi* (2), *Behari Lal* v. *Habiba Bibi* (3), and *Kaniz Fatima* v. *Abbas Ali* (4) referred to.

[R., 3 Bom. L.R. 658 ; 3 Ind. Cas. 330 (334)=12 C.L.J. 115 ; D., 2 A.L.J. 436.]

THE facts of this case are sufficiently stated in the judgment of Tyrrell, J.

Pandit *Sundar Lal* and Munshi *Lal Ghulam Mujtaba*, for the appellant.
Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

TYRRELL, J.—The appellant brought a suit to obtain a declaration that a deed executed by her on the 11th September 1888, may be declared null and void, on the ground that it was fraudulently framed so as not to express her intentions in executing it and is therefore inoperative and null. The defendants are her daughter, the minor son of that daughter, and the plaintiff's adult son, who is dumb and imbecile. The suit was instituted on the 22nd February 1889, and was dismissed by the Subordinate Judge of Allahabad on the 20th August 1889. The defence to the suit was that the deed expresses the declared and true intentions of the plaintiff, who with full knowledge of its contents was a party to its registration and to the subsequent application for mutation of names in favour of the defendants under the terms of the deed and to the possession of the defendants in accordance with the deed. The plaintiff is over 70 years of age, and on the 11th September 1888, was the absolute owner in her own right of an 8-anna share in Rahmanpur in the Allahabad district, with groves appertaining to the same, and a house in Rahmanpur, and also of a 2-anna 8-pie *muafi* estate in the village Amwa in the Mirzapur district, and also of certain decrees and outstanding claims for money, the entire property being valued roundly at 10,000 or 11,000 rupees. Half [10] of the 8-annas zemindari share of Rahmanpur was at the time in possession of a mortgagee, but the rest of the property was in the possession of the plaintiff and the plaintiff had acquired this property, not through her deceased husband, but from her own family and otherwise. She had by her deceased husband two sons, the elder, now about 50, being the defendant Murtaza Husen, *alias* Chatar, dumb and imbecile, who

(1) 3 C. 324. (2) 15 C. 684. (3) 8 A. 267. (4) 7 A.W.N. (1887) 84.

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lived with and on his mother, the younger named Syed Muhammad Husen, who died in February, 1888, aged 45 years, and a daughter, the female defendant, whose minor son, the defendant Muhammad Yakub, is engaged to be married to the daughter of Fakir Husen of Sheikhpur, who was the principal agent in the execution of the deed in question. The loss of her second son, who was the prop of his mother's old age and manager of her estate and business, plunged the plaintiff into the deepest grief, and in August, 1888, she fell into severe sickness which made her anxious to dispose of her property before she died. She says in her plaint that her idea was to set apart ⅓ of her estate for religious objects to the spiritual benefit of herself and her deceased son and to devise the remaining ⅔ to her daughter Sakina and her imbecile son, who were to take possession thereof in shares in accordance with their interest under the Muhammadan law of succession after her death. At this time her daughter and the minor defendant, whose place of residence is in the Jaunpur district, were on a visit to the plaintiff, who had recently negotiated the marriage of Musammat Sakina's daughter with one Shakurul Husen, a resident of Sheikpur, and the betrothal of Musammat Sakina's minor son, the defendant Yakub, with the daughter of Fakir Husen, also a resident of Sheikpur in the Allahabad district. In the month of September, 1888, the plaintiff says that her daughter Sakina, in co-operation with this Shakurual Husen and Fakir Husen, under pretence of bringing about the execution of a deed to carry out the above intentions of the plaintiff, took her away from her house in Rahmanpur to their own place, some 7 or 8 *kos* distant, and there made her a party to the execution and registration of the deed of the 11th September, 1888, and to the initiation of proceedings in the local Revenue Office in connection therewith. The plaintiff alleged [11] that she was wholly unaware of the main contents and of the legal ahd actual effect of the deed; that she had no idea that it was a deed which would or could have operative effect in her lifetime; that she was also ignorant of the purport of the application in the Revenue Department and that it was not till late in October, 1888, that she became aware that proceedings were on foot to expunge her name from the public records of title and possession of her Allahabad property. She promptly protested in the Phulpur tahsil office against the proposed alteration in the public record, but without success, and her appeal in this respect to the Collector of the district was disallowed on the 11th February, 1889. In these objections she stated from the first that the respondents had taken advantage of her old age and practised deceit and fraud upon her in the execution and registration of a deed. She derives her cause of action from these proceedings, but declares that no change of possession, in fact, has as yet taken place in respect either of her title or her possession of the property, the subject-matter of the suit. The defendant, Musammat Sakina, for herself and as guardian of her minor son Yakub and her imbecile brother, Murtaza, admitting the execution and registration of the deed and the institution of the mutation proceedings, denied that the plaintiff was ignorant of any of the terms or of the effect of the deed, maintaining that she was made aware of them and was a party to them with the fullest knowledge, notice and assent. The defendants also claimed to have obtained complete possession under the deed.

The issues set down for trial were—

(1) Of possession.

(2) Of the knowledge and notice with which the plaintiff executed the deed, *i.e.*, whether the plaintiff had full knowledge, notice and consenting

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power in respect of all the terms and of the legal effect of the deed, or the execution thereof was procured by or for the defendants through fraud practised on the plaintiff.

The Court below found that the deed was executed with the full knowledge and understanding of the plaintiff, who at the time [12] had full disposing power, and that possession had consequently been delivered to the defendants. I will consider aterwards, as the case was argued before us at length upon all the issues, the evidence and the reasonings which led the Court below to these findings, both of which are in my judgment incorrect. But the main and paramount question raised by the pleadings has not been sufficiently, if at all, taken into consideration in the trial of the case, although it is and must be the real pivot of decision in actions like this for relief from the operation of a deed admittedly executed but challenged on the ground of fraud. This issue of course is whether the Court had reason to be satisfied that the plaintiff-appellant was in the true and full sense of the word a consenting party to the deed of the 11th September, 1888; that the meaning of all the phrases and clauses of the deed were fully explained to the plaintiff; that she knew, not only what she was doing, but also what the legal and practical effect of the deed to her and her estate would be; and that there was evidence of entire good faith (*uberrimae fidei*) in respect of the entire contract and the proceedings consequent thereupon. The law on this subject has been fully explained in many judgments of their Lordships of the Privy Council, notably in the case of *Asghar Ali Delroos Banoo Begum* (1), in which it was laid down as a general rule that "it is incumbent on the Court, when dealing with the disposition of her property by a *parda-nashin* woman, to be satisfied that the transaction was explained to her and that she knew what she was doing, and especially so in a case * * * where, for no consideration and without any equivalent, a lady has executed a document which deprives her of all property."

This and other rulings are referred to in detail in the cases of *Behari Lal* v. *Habiba Bibi* (2) and *Kaniz Fatima* v. *Abbas Ali* (3), in both of which, judgment was delivered by my brother Straight, and in *Mahomoed Bukhsh Khan* v. *Hosseini Bibi* (4) where the Judicial Committee laid down the following tests as being generally applicable to all cases of deeds executed by *pardah-nashin* women in the East, tests, which are still more forcibly applicable to a case like the [13] present where all the circumstances of the plaintiff and the medical evidence on the record raise serious doubts whether she was in the months of September and October 1888 in the true and full sense of the words *compos mentis* for the transactions in question. We have to see whether the arrangements embodied in the deed of the 11th September, 1888, were righteous in their character, whether they were provident or improvident in regard to the old lady, the plaintiff, whether the arrangements were such as to require that she had previous independent advice regarding them, and what was the origin of her intention to act in the ways the document sets out. Now, except in regard to her mental health and the presumbale good will of the parties around her at the time, the Court below has not considered any of these points, and it was frankly admitted at the hearing of the appeal by the learned Counsel for the respondents that the record contains no evidence and no materials for a finding on the paramount question of independent advice. We have

(1) 3 C. 324 at p. 327. (2) 8 A. 267. (3) 7 A.W.N. (1887) 84. (4) 15 C. 684.

an executant far advanced in years, over 70 years of age, shattered in health, and more particularly in her nervous organisation, by an overwhelming calamity which had left her for the first time for very many years without any independent counsellor in her own house. She is evidently a woman of an excitable and morbid temperament. She is illiterate, and she was surrounded by persons who had considerable and conflicting interest in the disposition of her estate. It appears that, though her daughter Sakina Bibi lived mostly with her husband in the Jaunpur district, the plaintiff had been helpful in the nature and education of her young family, the minor son Yakub being educated and cared for at the plaintiff's house. It also appears that the defendant Murtaza was the almost helpless object of the plaintiff's care and support, but under the Muhammadan Law the defendant Sakina and her brother Murtaza would be the sole heirs upon her death of the plaintiff's property, the former presumably taking $\frac{1}{3}$ and the latter $\frac{2}{3}$ of the whole. On the death of her son, Muhammad Husen, one Yad Ali, a nephew of the plaintiff, took his place in the management of her affairs, and we find that his sister is married to the imbecile Murtaza. I noticed above that Shakurul Husen is married to one of Sakina Bibi's [14] daughters, while her minor son Yakub is betrothed to the daughter of Fakir Husen of Sheikpur. Thus it would be to the interest of Shakurul Husen and Fakir Husen that some provision should be made for Musammat Sakina Bibi's son and daughter just mentioned. One of the modes for effecting this would be to cut down the lawful share of the imbecile defendant and to increase that of Sakina Bibi, an arrangement which would be obviously distasteful to Yad Ali, the brother-in-law of the imbecile heir Murtaza. Evidently, then, here was a case peculiarly calling for independent advice. We will see later on how this condition was fulfilled. To apply the other tests mentioned above, it will be convenient now to glance at the deed. It is printed at page 12 of the appellant's book and is No. 6 of the record. It sets out that Mariam Bibi, aged 70 years, desired to divide all her property among her offspring and heirs and to put every one of them in possession of shares and property "*during her lifetime*." I may observe here that the document, which is of considerable length, is couched in technical and artificial phraseology, the terms used being generally foreign in their character, mainly Arabic, such as would not ordinarily, or at least readily, be understood by an old, infirm, illiterate and partially deaf woman. For example, the very important words "during my lifetime" are in the vernacular of the deed "*ba hoyat apne*," whereas a person like the plaintiff would certainly not use such a phrase, but would say "*apni zindagi men*" or *jab tak ki mein zinda rohun*." The property was divided under the deed as follows:—That 8 annas of the Rahmanpur property with the groves and dwelling house should be given and delivered at once to Mir Murtaza Husen and to Muhamad Yakub in equal shares, and that Musammat Sakina should at once have title and possession of all the Mirzapur *m'afi* property and all the plaintiff's decrees and outstanding debts respecting that estate, and that the executant should at once be removed from the Government papers and should have thenceforth no claim to any part of the property. Further, the imbecile defendant Murtaza and his property were placed under the guardianship and protection of Musammat Sakina Bibi. In this way, while half the Allahabad property was given to Sakina Bibi's son Yakub who was not an [15] heir at all, Sakina Bibi took all the *m'afi* property in Mirzapur with the decree and other securities attaching thereto, and, in her

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capacity of guardian of her minor son and imbecile brother, she became practically the mistress of all the Allahabad estate for many years and of Murtaza's half for the full period of his life. The deed was executed in the village of Sheikhpur, closely adjoining the village and tahsil of Phulpur, the plaintiff's name was attached to this deed by the pen of Fakir Husen of Sheikpur, whom I have mentioned above, and her signature professes to have been attested by Muhammad Hanif of Sheikhpur, Muhammad Ishaq of Sheikhpur, Wazir Khan of Sheikhpur, Abdul Ghafur of Sheikhpur and Muhammad Baksh of Sheikhpur. I have said that the execution of the deed purports to have been attested by these men. It will appear further on that not one of these men was present when the plaintiff's name was put to the document. On the same 11th September 1888, between 3 and 4 o'clock the deed was presented for registration in the tahsil of Phulpur by Fakir Husen, the executant at the time lying in her *doli* outside the building. The registering officer recorded that the plaintiff was identified in the *doli* by Fakir Husen and by Abdul Ghafur, one of the attesting witnesses just mentioned, and he wrote that the executant requested that the deed after the registration should be handed over to her relation Fakir Husen," and the document was registered upon that day. Immediately afterwards the plaintiff, through the same Fakir Husen and Abdul Ghafur, put in the petition No. 35 of the record praying for expungement of her name and record of those of Murtaza Husen and Muhammad Yakub, in lieu thereof for the 8 annas zemindari of Rahmanpur, the minor, Muhammad Yakub, to be and to remain under the guardianship of his mother Musammat Yakina Bibi. The plaintiff was again identified in this office by the same Fakir Husen and Abdul Ghafur, and at the same moment a counter-application for record of the names of Sakina, Murtaza Husen and Mahammad Yakub, was put in by Shakurul Husen, son-in-law of Sakina Bibi. When the proceedings had reached this stage the lady was taken to her home in Rahmanpur, where, she said, some weeks afterwards she learned with amazement that she had set proceedings on foot [16] which would divest her of all title to and possession of her Allahabad property. Let us see now what the character of this transaction was. From the plaintiff's point of view, it can hardly be described as a righteous thing that in her old age and infirmities she should have been put entirely at the mercy of her daughter, whose marriage duties required that she should for the most part reside far away from the plaintiff in her husband's house in Jaunpur, while the other person to whom she had transferred everything she possessed in the world were an adult imbecile and a young boy. The improvidence of the transaction requires no statement, and it appears to me that the disposition of property contained in the deed is as remote as possible from the ideas which are shown to have possessed the old lady's mind when her intention to deal with her property in anticipation of her death originated. I have said above that it is conceded that there is no evidence whatsoever that the plaintiff had any independent advice in respect of the execution of the deed, and this would itself be a sufficient reason for reversing the decree below and for giving the relief she seeks. But I may as well briefly consider the bearing of the evidence upon the other features of the case. It is incumbent upon the defendants who set up and rely upon the deed to show affirmatively that the plaintiff entered into it with full knowledge and understanding and disposing power, and that the entire transaction was free from circumstances throwing any shadow of doubt or suspicion on the inception, execution and application of the deed. The evidence of

Yad Ali, whose interest in the case is of a perfectly justifiable and legitimate character, is instructive upon these points. His interest or bias is limited to this, that he objects to see his sister's husband, Murtaza Husen, deprived of his lawful share in the estate under the Muhammadan Law. This desire seems to me to be not only natural, but, looking to the disabilities of Murtaza Husen, commendable also. Yad Ali proved that he was the person best qualified to advise the plaintiff in August-September 1888, about the disposal of her property; that he was the person most accessible to her at the time; that her main desire then was to deal with $\frac{1}{3}$ of the property for the spiritual benefit of herself and her favourite son, the remainder [17] of the property being left to follow the ordinary course of Muhammadan law at her death. He stated that he was absent from Rahmanpur in September when the plaintiff was taken alone to the residence of Fakir Husen in Sheikpur, and that before she left she told him in the presence of Fakir Husen in Rahmanpur that "Fakir Husen agreed in her idea of reserving $\frac{1}{3}$ of the property for religious purposes and leaving the rest to Sakina and Murtaza after her death." He stated that in October he learned by a letter from Sheikphur, written by a person practising in the Phulphur tahsil, what the real contents of the document were, and he also heard in this way of the mutation proceedings. He then told the plaintiff that the document was not written in the way she meant, and that it contained no provision for religious uses. He said that the plaintiff at once ordered him to recall the document and to bring Fakir Husen to her, but that they could not get either the document or Fakir Husen. The witness shortly afterwards lodged formal objections, on behalf of his brother-in-law and of the plaintiff, to the *dekhi kharjij* proceedings. The plaintiff gave similar evidence, and though her testimony contains inconsistencies and contradictions, they appear to me to be due to her peculiar condition at the time when she was ill, nervous, weak, excited and indignant. Her evidence as a whole produced on our minds a strong impression of its substantial truth and honesty. She swore that her wish in August and September 1888, was "to give some property in the name of God and make a mosque for the benefit of myself and my deceased son in the next world, and that the remainder should remain in the name of my dumb son and Sakina during my lifetime." The latter words were cited by the learned Counsel for the respondent in support of the provisions of the deed putting Sakina and Murtaza Husen in possession of a part of the property during the plaintiff's lifetime, but this would not be the same thing as making over the property in proprietary possession to any one, and further, however this might be, it is utterly divergent from the terms of the deed, which reserve nothing whatsoever for spiritual uses, and devise part of the property to the minor defendant, Muhammad Yakub. The plaintiff added that the foundation of the mosque had been laid by [18] her, and that she was preparing bricks for building it. She swore that when she was taken to Fakir Husen's house and the execution of the deed was proposed to her, she bade them send for Yad Ali, but was put off by Fakir Husen, who said that he was at Allahabad. She swore that Fakir Husen never explained the deed to her, nor read it to her, nor gave it to her. She swore that she had no conversation with the attesting witness Muhammad Hanif, and that she never saw the other attesting witness Wazir. She went further and swore that she did not tell any person in Sheikbpur to witness the deed. She added that she keeps *pardah* from the attesting witness Muhammad Ishaq and she disowned all knowledge of the proeedings after registration at the tahsil of Phulpur. She challenged Fakir

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Husen, who was present during her examination, "to stand up and say in her presence and in that of the Commissioner taking her evidence that he had explained anything to her." She declared that the moment she heard in October 1888, of the fraud practised upon her, she ejected Sakina Bibi and her family from her house in Rahmanpur. As against this evdence the defence relied on a deposition of the plaintiff made in the Revenue Department on the 10th November 1888, which was admitted in evidence by the Court below against the plaintiff, and to which she took no objection. She then said, "I have executed the deed of partition," which no doubt she had, in so far as she authorized Fakir Husen to affix her name to the paper purporting to be the deed of partition of the 11th September 1888; but this admission does not help the respondents, more particularly when we find it accompanied by the statement that the deponent had no wish that any change whatever should be made in respect of her property during her lifetime. The statements of Yad Ali and of the plaintiff as to her intentions prior to the execution of the deed are strongly corroborated by the apparently independent and respectable evidence of the witness Dawar Husen, who is related to the plaintiff and has no apparent interest in this controversy either way. I will now examine the evidence which the respondents rely on in defence of the deed. Fakir Husen of course is the leading witness. I have shown how he was interested in the peculiar provision for the defendant, [19] Muhammad Yakub, who had no title to the plaintiff's inheritance under the Muhammadan law. He deposed that the draft of the document was read over to the plaintiff, but there is no evidence of this fact. He said that "since the execution of the document the defendants are in possession of the property," but I believe this statement to be absolutely untrue. He said that "it was the plaintiff's desire that the document should be completed away from her home in Rahmanpur to avoid the opposition of Yad Ali." There is nothing to support and much to contradict this statement. He said that he handed over the document to the plaintiff after he had affixed her name to it, and he implies that it did not again come to his hands till after registration. I believe this statement to be incorrect for reasons which will appear below. And lastly, this witness had to admit that he was taking an active part in conducting and supporting the respondents' case, and that Ata Husen, their leading witness on the issue of possession, was closely related to him by marriage. The remaining witnesses belong to the group directly connected with the execution and registration of the deed. Muhammad Hanif was not present when the deed was signed by the plaintiff. He says that he was subsequently asked to make attestation and did so. He makes the surprising statement that "he had read this deed of gift and had read it over to the plaintiff in a loud voice. All the contents of the deed were admitted by the plaintiff." He gives no reason for this unusual proceeding. His attestation, such as it was, was limited to this, that the plaintiff told him she had previously executed the deed. What then would be the need for or likelihood of this *ex post facto* recitation and admission? This is, I think, the first time in many years that I have heard of a marginal witness of this sort being expected or allowed to read a deed to the executant. The witness was no relation or close friend of the plaintiff. He is a brother-in-law of his co-witness Muhammad Ishaq. He is in no way connected with the defendants or with Fakir Husen, but is in a position to swear that this document "was not executed nor any draft of it made with the advice of Kazi Pir Bakhsh, Shakurul Husen and Fakir Husen." But in this he is directly

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contradicted by the independent witness Muhammad [20] Bakar, who "wrote out the deed from the draft brought to him for that purpose by Kazi Pir Bakhsh, Shakurul Husen and Fakir Husen." He had no idea, he says, where and when the document attested was executed. He said that the plaintiff had never taken his advice on any matter except on this occasion, and he adds the significant statement that there was no one in the room during the interview when he was reading the document to her. I do not believe this witness. The next is Muhammad Ishaq. He also was no witness to the execution of the deed. He says:—"the plaintiff asked me to sign, and so I signed. The deed had already her signature before I attested it." He did not read the deed, but, strange to say, the plaintiff told him its provisions. This witness is the brother-in-law of the preceding witness, and the nephew of Shakurul Husen, son-in-law of the respondent Sakina Bibi. When the witness was asked how he knew that the contents of the deed were in conformity with the executant's wishes he pretended that he read the document after registration and found that it tallied with what the executant had told him. I do not believe this witness. Next in order comes the attesting witness Wazir Khan, a Kanwal or itinerant bard, whom the witness Eakir Husen described as "belonging to a high caste." He professes to know and come into the presence of the plaintiff, which she indignantly denied. He says that he was called into the plaintiff's sitting room and near her beside he read the deed from beginning to end and then attested it. At this interview also no one but the witness was present. The remaining marginal witnesses were not examined, or at least their evidence has not been brought before us, although one of them was Abdul Ghafur who professed to identify the plaintiff in the registration of the deed and in the mutation department.

I find it difficult to understand how upon such evidence as this, contrasted with that of the plaintiff, of Yad Ali, and of Dawar Husen, the Court below persuaded itself that the deed was executed with the full knowledge and comprehension of the plaintiff on her part and without fraud or undue advantage of any sort practised on the other side. The rest of the evidence is devoted to showing on [21] the one hand, that the plaintiff never for a day parted with possession of her property, and, on the other, that the defendants after the mutation of names obtained possession of all the property, except such as was in the hands of a mortgagee. It is enough to say on this point that I find that balance of testimony largely in favour of the plaintiff; the few insignificant instances of rent alleged to have been paid to the respondents on the Mairzapur property being evidently manufactured for the purpose of this suit, and not being such, even if they occurred, as to indicate any real or practical possession in defeasance of the plaintiff's posession. I will now only notice briefly the reasons which influenced the Court below. The learned Subordinate Judge made a point against the plaintiff out of the 4th paragraph of her plaint in which she, a *Sunni*, professed an intention of providing a *wakf* for "*Imambara* and *Majlis* in honour of the two Imams," whereas such a dedication of property would be made by a *Shia* Muhammadan only, but the Subordinate Judge himself had noticed that the intention of the plaintiff, as described in her own evidence and in that of her witnesses, was to build a mosque, which it appears was in course of erection during the trial of the suit below, while the development about the *Imambara Majlis* appears for the first time in the plaint. I think it is more fair to judge the plaintiffs by her proved wishes in August-September, 1888, then by the

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colouring they received in her plaint in February 1889, which was drawn up by her *Shia* friend and karinda, Yad Ali. However this may be, the deed would remain equally divergent from her expressed wishes, whether they referred to a mosque only or to *Imambara* and *Majlis* purposes also. The Court below was wrong in finding that the registration endorsement on the deed shows that the contents were read out to the executant. On the contrary, it shows that the contents of s. 82, Act III of 1877, were explained to the executant, which is a very different thing. It is not evident, as the Court below said, "from the testimony of Muhammad Hanif, Muhammad Ishaq and Fakir Husen that the contents of the deed were read out to plaintiff, and the purport of the deed was also explained to her." As I pointed out above, Fakir Husen did not prove that the con-[22]tents were read out to the executant. I explained why I disbelieve that Muhammad Hanif or Muhammad Ishaq read the paper at all, and no witness pretended that he or any one else explained the deed to the plaintiff. The learned Subordinate Judge's remark "that the plaintiff's object would have been frustrated if she had embodied it in a will instead of a deed of gift, because a will operates as regards one-third only of the property," is misleading, because he overlooks the limitation to the rule in the case of consent of heirs. The Court below derived a further presumption against the plaintiff from the fact that "she remained silent for a long time after she had come to know that the deed had been executed contrary to her wishes." But he did not do so. Sometime in October, probably early in the month, Yad Ali got a hint of the facts of the case and told his employer, who took the promptest action possible in the matter by at once ejecting Sakina and her family from her house and society. She did not do this immediately on her return from Sheikhpur to her home, as the Court below thought, but sometime afterwards when her suspicions were roused as to the honesty of the transaction.

It is needless to consider the rest of the judgment upon the legal aspect of the sort of possession requisite to make a gift good under the Muhammadan law, as I am satisfied that possession did not pass at all. For the reasons which I have stated above I hold that the plaintiff should have got a decree, not only on the sufficient ground that she had been led into this deed disposing of her property under suspicious circumstances and without independent advice, but also because she has in my opinion furnished good reasons for holding that she was deceived into putting her name to that deed under the impression that its contents were substantially different from what in fact they are. Allowing the appeal I would reverse the decree of the Court below and decree the appellant's claim with costs of both the Courts.

STRAIGHT, J.—I entirely concur in the judgment of my brother Tyrrell.

Appeal decreed.

14 A. 23 = 11 A.W.N. (1891) 205.

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APPELLATE CIVIL.

14 A. 23 = 11 A.W.N (1891) 205.

[23] APPELLATE CIVIL.

Before Mr. Justice Mahmood.

SABRI (*Plaintiff*) v. GANESHI (*Defendant*).* [20th June, 1891.]

Civil Procedure Code, s. 566—Remand—Court to which remand is made not competent to delegate its functions in respect of such remand.

When a case is remanded under s. 566 of the Code of Civil Procedure to the lower appellate Court for findings on certain issues, it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto.

[F., 29 A. 660 = 4 A.L.J. 603 = A.W.N. (1907), 209.].

THE facts of this case are as follows :—

One Hira Lal died in 1881 leaving surviving him a widow, Musammat Darbo, two daughters, Musammat Sabri and Musammat Ganeshi, and a daughter-in-law, Musammat Kuar, widow of a deceased son. On his death his widow, Musammat Darbo got possession of his property and her name was entered against it on the revenue records. Musammat Darbo died in 1885, and Musammat Kuar was then put into possession of the property. Musammat Kuarsold the property on the 23rd December 1887 to one Rukha. Thereupon Musammat Sabri sued her and her vendee to set aside the sale of the 23rd December 1887, and toget possession of the property. In this suit she succeeded, and obtained possession. On the 10th January 1889 Musammat Ganeshi brought this present suit against Musammat Sabri, claiming exclusive possession of the property in question on the ground that he was indigent and unprovided for, while her sister, the defendant, Musammat Sabri, was in good circumstances. The Court of first instance and the lower appellate Court both agreed in holding that the plaintiff was entitled to succeed. The defendant then appealed to the High Court. The appeal came before Mahmood, J., who, on the 25th February 1891, remanded issues as to the respective means of the plaintiff and the defendant for determination by the lower appellate Court. The subsequent facts sufficiently appear from the judgment of Mahmood, J.

Mr. *W. M. Colvin* and Pandit *Moti Lal*, for the appellant.

Mr. *Amir-ud-din* and Munshi *Sukh Ram*, for the respondent.

JUDGMENT.

[24] MAHMOOD, J.—For the reasons stated in my order of the 25th February 1891, this case was remanded under s. 566 of the Code of Civil Procedure to the lower appellate Court for clear findings upon certain issues therein mentioned.

The learned Subordinate Judge of Saharanpur, as the Judge of lower appellate Court, by his *rubkar* of the 13th March, 1891, delegated the trial of the remanded issues to the Munsif of Muzaffarnagar with the consent of both the parties.

The Munsif accordingly tried the issues and recorded findings in his proceedings, dated the 28th March 1891. Upon the issues he came to the following conclusions :—

"Both the sisters are, in my view of the evidence, possessed of scanty subsistence, both are unprovided for, and both indigent."

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* Second Appeal, No. 1092 of 1889, from a decree of Babu Mata Prasad, Subordinate Judge of Saharanpur, dated the 28th June, 1889, confirming a decree of Maulvi Iziat Rai, Munsif of Saharanpur, dated the 4th March, 1889.

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These findings of the Munsif appear to have been sent back to the Subordinate Judge, who, on the 9th April 1891, fixed the 13th of that month to hear parties on such findings.

Accordingly on the 13th April 1891 the findings of the Munsif coming on for decision before the Subordinate Judge, that officer contended himself by simply expressing the view that he concurred in the opinion of the Munsif as to the findings recorded in the proceeding, dated the 28th March 1891, and referred to above.

The findings of the Munsif were thus adopted by the Subordinate Judge, and it appears that the pleaders for neither party raised any objection to such a course.

Thereupon the Subordinate Judge, accepting the findings of the Munsif, has returned those findings to this Court, as if they were the findings of his Court, as the Court of first appeal, to which the case had been remanded for determination of certain points of facts under s. 566 of the Code of Civil Procedure.

I am of opinion that the procedure of the learned Subordinate Judge was entirely erroneous, that the order of this Court of the 25th February 1891, directed as it was to the lower appellate Court, was to be carried out by that Court, and that the learned Subordi-[25]nate Judge in delegating his functions to the Munsif by his order, dated the 13th March 1891, acted *ultra vires* and without jurisdiction.

I am further of opinion that the findings of the Munsif recorded in his proceeding, dated the 28th March 1891, did not satisfy the requirement of his Court's order of remand, dated the 25th February 1891.

As has already been observed, the Subordinate Judge acted without jurisdiction, and the whole proceeding is illegal and *ultra vires*.

Under these circumstances, following the uniform practice and rulings of this Court, I am constrained to hold that there are no findings such as would satisfy the remand order of the 25th February 1891, and it is my duty to remand the case again to the learned Subordinate Judge for clear findings upon issues mentioned in my order of the 25th February 1891, with reference to the observations I have made.

I order accordingly. Upon receipt of the findings ten days will be allowed to the parties for objections.

Cause remanded.

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14 A. 25 = 11 A.W.N. (1891) 170.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* HUGHES.* [1st August, 1891].

Jury, misdirection of—What amounts to misdirection—Act XLV *of* 1860, *ss.* 361, 366.

In a trial with a jury under s. 366 of the Indian Penal Code the Judge on the question of intent charged the jury in the following words :—" It remains only to consider the questions of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the facts."

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* Criminal Appeal, No. 607 of 1891.

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APPELLATE CRIMINAL.

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[26] *Held*, that this amounted to a misdirection of the jury. The question of intent was a pure question of fact, but the way in which it had been put to the jury left them no option but to adopt the view taken by the Judge.

THE facts of this case sufficiently appear from the judgment of Straight, J.

Babu *Parbati Charan Chatarji* for the appellant.

The Government Pleader, Munshi *Ram Prasad* and Mr. *J. Simeon*, for the Crown.

JUDGMENT.

STRAIGHT, J.—In this case John Michael Hughes was tried in the Sessions Court before the Sessions Judge and a jury for the offence of kidnapping one Claudia Caleb, the daughter of John James Caleb, a girl aged 13 years and 7 months, from the keeping of her lawful guardian, with the intent that she might be compelled, or in order that she might be forced or seduced, to illicit intercourse. Along with Hughes was tried a man of the name of David Baptist, who was charged with the abetment of the above offence. The last-mentioned person was acquitted, but Hughes was convicted and sentenced to a period of seven years' rigorous imprisonment. It has been objected here on appeal that upon the question of intent the learned Judge misdirected the jury in such a way as to cause prejudice to the accused, Hughes, and upon that ground I am invited to set aside the proceedings and direct a new trial.

Now the offence provided for by s. 366 of the Penal Code involves two ingredients. First, there must be kidnapping or abduction, as defined in ss. 361 and 362, and next, the act of kidnapping or abduction must be done with either an intent or a knowledge, or with the object, that certain things may happen which are mentioned within the four corners of s, 366. In the present case the intent charged was as I have already indicated, and it is in reference to the learned Judge's remarks upon that head that I am invited to intervene. Now I should be the last person to be too technical as to the language used by a learned Judge in charging a jury. At the same time it is essential, so long as this latter institution has allocated to it in certain cases the duty of determining questions of facts, to draw a very broad line between what the duty of a Judge [27] is and what the duty of a jury is, and to see that the Judge has not intruded himself and his views into the province of the jury in such a way as to lead them to form an opinion expressed by him that that is the only opinion which could be arrived at from the evidence. In other words, in this case, for example, it was competent for the learned Judge to recapitulate the evidence which bore upon the question of intent, and to express for the gudiance of the jury what seemed to be the reasonable and rational conclusion to be drawn from that evidence. But I have read the learned Judge's remarks in this case. It does not appear to me that he left the jury any alternative, and practically what he told them was that upon the evidence there was only one conclusion they could arrive at, namely, that the intent charged was proved. It seems to me that that is going beyond the duty that a Judge has to discharge. The question of intent was a pure question of fact, and the mischief that has followed, is that, having very carefully examined all the evidence in this case, I doubt if there was any satisfactory or proper proof from which the jury were entitled to draw the inference that the learned Judge told them they were bound to draw. His remarks were these :—"It remains only to consider the question of intent. The charge

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was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other interference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the facts." I differ from the learned Judge. I think that upon the facts of this case there was much more reasonable ground for the inference that this man had kidnapped this girl for the purpose of going to the father and insulting him by telling him that he had taken his daughter away and that he might do his worst. There is not a particle of proof that any indecent words were spoken by this man either before or at the time he kidnapped the girl, and it is a striking circumstance that after he had sent her away in an ekka to the Christian village, Beli, he then [28] himself went into the father's house and told him in specific terms what he had done, whereupon he was seized by the father and handed over to a police constable. Another circumstance is that neither at the time of kidnapping nor subsequently was there slightest act of indecency practised, or a single word spoken, and in the result the girl was only absent for a period of about two hours. It is perfectly clear upon the evidence in this case that there was extremely bad feeling between the prosecutor on the one hand and this young man on the other. The appellant had undoubtedly made himself most obnoxious and offensive to Mr. Caleb, who had had on many occasions to remonstrate with him for his conduct. I have no doubt that he is one of those ill-conditioned persons who dislike remonstrance or advice, or warnings at the hands of persons in the position of Mr. Caleb, the pastor of the Church to which he belonged. Mr. Caleb's remonstrances with him had very much aggravated him and he was determined to resent them by doing something which was most degrading and insulting to Mr. Caleb. But that falls very far short of supplying that adequate and very satisfactory proof from which a jury would be entitled to draw the very serious inference that is required for the purpose of proving the intent, knowledge, or object contemplated by s. 366. I think myself the terms of the learned Judge's judgment did amount to a misdirection to the jury. I further think that that misdirection did prejudice the accused, and, therefore, the only question which remains is, are the circumstances such as to constrain me to order a new trial? I have pointed out that the offence under s. 366 of the Indian Penal Code involves, first of all, the offence of kidnapping. Putting aside a great deal of irrelevant matter that appears in this record, I am satisfied that the jury were right in holding that this man did kidnap this girl, the object being that which I have indicated, namely, to put the father in great distress of mind and to put a slur and degradation upon him and subject him to a grave public insult. I think therefore, I am entitled to hold as the Judge might have left for the jury to find, had he thought proper to do so, that, although the intent is not proved as required by s. 366, nevertheless the simple offence of kidnapping [29] is proved, and it would have been competent for the learned Judge to have told the jury in this case that, assuming that they were not satisfied as to the proof of intent, they might convict the accused of the lesser offence under s. 361. I therefore shall deal with this case as if that direction had been given to the jury, and I shall treat the verdict, to the extent that it finds kidnapping against the accused, as a good verdict.

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I then have to consider whether the sentence should be allowed to stand. or whether I should disturb it. I regret to say that I find upon this record some evidence that never ought to have been admitted as to the character of the prisoner. The prisoner himself never put his character in issue, but, despite that, a witness was allowed to be examined as to his being of a bad and dissolute character. It cannot be too distinctly understood, and I cannot say too emphatically that, where a man is being tried upon a specific charge, unless within the four corners of the law, proof of a previous conviction is allowed for the purposes of proving guilty knowledge, or whatever it might be, no question ought to be sanctioned and no evidence ought to be allowed to show generally that he is a man of bad and dishonest character. That is forbidden by law; but if an accused at his trial chooses to put in issue the question of his good character, it is then competent to rebut that evidence by giving evidence of general evil reputation. The learned Judge explains the sentence that he passed upon this man upon the ground that he was generally a person of bad or dissolute character. We have nothing upon this record, except the general statement of a witness who gives no details or particulars, to prove this. We do not know in what direction his character is bad or dissolute, and I myself wholly object to a Judge allowing his mind to be influenced by any vague statements of that kind. If the man had been charged with and convicted of a criminal offence, such as rape, it may be that the Judge might have allowed proof of this to be given. But there is no such allegation here. At the same time, it is quite plain to my mind from the action of this man in this case that he is a very audacious and daring person, who deliberately sought to put a grave affront and indignity upon the pastor of his Church, because that pastor had remonstrated with him as to his behaviour, [30] and had found fault with him for his conduct generally. I have considered this matter very carefully and I have come to the conclusion that the proper measure of punishment is that he be rigorously imprisoned for a term of two years and six months. I think it right to add that I see no reason to doubt the truth of Mr. Caleb's statement in the main. In one or two matters there may be discrepancies, but they are only slight. It does not seem to me that there is the slightest foundation for the suggestion that he had lent himself to a false case for the purpose of punishing the appellant.

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14 A. 30 = 11 A.W.N. (1891) 174.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

CHEDA LAL (*Plaintiff*) v. MULCHAND (*Defendant*).
MINDAI (*Judgment-debtor*) v. KUNDAN SINGH (*Decree-holder*).*
[1st August, 1891.]

Attachment—Small Cause Court—Standing crops—Immoveable Property, Act I of 1868 (General Clauses Act)—Civil Procedure Code—Act IX of 1887 (Small Cause Courts Act), sch. ii, cl (6).

Standing crops are immoveable property in the sense of the General Clauses Act (I of 1868), and of cl. (6) of the second schedule of the Small Cause Courts Act (Act IX of 1887), and of the Civil Procedure Code. *Madayya* v. *Yenkata* (1) approved.

[F., 15 A. 391 = 13 A.W.N. 145; 11 C.P.L.R. 89; **Rel. on, 9 Ind. Cas. 133 (134); R., 22 C. 877; 14 C.L.J. 515 (524) = 16 C.W.N. 540 (547) = 11 Ind Cas. 729 (734).**]

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* Reference under s. 617 of the Civil Procedure Code, Miscellaneous No. 47 of 1891.

(1) 11 M. 193.

1891 AUG. 1. — REVISIONAL CIVIL. — 14 A. 30 = 11 A.W.N. (1891) 174.

THIS was a reference under s. 617 of the Code of Civil Procedure made by the Munsif of Bareilly, sitting as a Small Cause Court Judge, in the following terms:—

Suit No. 79 of 1891.	Miscellaneous No. 160 of 1891.
CHEDA LAL.—Plaintiff	MINDAI.—Judgment-debtor
v.	*v.*
MULCHAND.—Defendant.	KUNDAN SINGH.—Decree-holder.

"These are two cases of different nature, but the points at issue, on which I entertain some doubt, are common to both. They have therefore been taken up together for the purposes of this reference, which I beg leave to make to the Honourable the High Court under the provisions of s. 617 of Act XIV of 1882,

[31] "The suit No. 79 is for the recovery of Rs. 36-2 6 due under a bond by enforcement of lien on the hypothecated sugarcane crops, which are still standing in the fields. The defence, *inter alia*, is that the standing crops are immoveable property, and that a Court of Small Causes is not competent to try a suit for enforcement of lien in respect of the same.

"The Micellaneous Case No. 169 contains an objection on behalf of a judgment-debtor as to the propriety of attachment and sale of certain standing crops, such as wheat, barley, &c., which were effected under the provisions of s. 269 of Act XIV of 1882, in the execution of a decree by order of this Court, on the Small Cause Court side. The judgment-debtor urges that the procedure laid down in ss. 274, 287 and 289 *ibid* should have been followed, as the growing crops are immoveable property, and that the Small Cause Court had no jurisdiction to proceed against the same under s. 269. The points for determination are :—

1. Whether the standing crops are moveable or immoveable property for the purposes of the Small Cause Court and the Code of Civil Procedure?

2. Can such a Court pass a decree for enforcement of lien against them?

3. Can it make a valid attachment and sale of the same in execution of its decree?

A reference was formerly made by the Small Cause Court Judge of Agra asking for the opinion of the High Court as to whether trees and growing crops could be attached and sold in execution of a decree as moveable property by a Small Cause Court. The Honourable Court therefore gave a decision as regards the trees, but expressed no opinion in respect of the standing crops. See *Umed Ram* v. *Daulat Ram* (1). It was there held that trees were immoveable property within the definition given in cl. (5) of s. 2 of Act I of 1868, and, as such, were not liable to sale or attachment by a Court of Small Causes under Act XI of 1865, notwithstanding that [32] they were classed as moveable property in the later Acts III of 1877 and IV of 1882.

"A somewhat similar question relating to the standing sugarcane crops was again raised in the Honourable Court in *Kalka Prasad* v. *Chandan Singh* (2), but the points there discussed and decided were not exactly like those involved in the present cases. It appears to have been ruled there (see pp. 21, 23) that, although the standing crops were moveable property not only under Act III of 1877 and IV of 1882, but also under cl. (6) of s. 2 of Act I of 1868, yet a suit for enforcement of lien against such crops was not cognizable by a Court of Small Causes under Act XI of 1865 with

(1) 5 A. 564. (2) 10 A. 20.

reference to a previous ruling *in re Surajpal Singh* v. *Jairam Gir* (1), which laid down that such Court was incompetent to entertain any suit for enforcement of lien against any moveable property whatever.

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"The Act XI of 1865 has since been repealed. Under art. (6) of sch. ii of Act IX of 1887 the jurisdiction of the Small Cause Court is excluded from trying suits for enforcement of lien as regards immoveable property only. Such Court now appears to be competent to dispose of suits for enforcement of lien against moveable property. The precedent *in re Surajpal* v. *Jairamgir* (1) which was based upon the repealed Act does not appear to be in force any longer. The effect of the ruling *in re Kalka Prasad* v. *Chandan Singh* (2) would therefore be that a Court of Small Causes under Act IX of 1887 can try suits for enforcement of lien against standing crops and can attach the same in execution of its decree, treating them as moveable property.

"In my humble opinion the case of a tree is distinguishable from that of standing crops. A tree is generally planted with the intention of being kept and preserved for ever, though it may be cut off and removed at pleasure. The case of a tree resembles in all respects that of a house which may likewise be demolished at one's will. Both are equally permanently fastened to the earth and therefore fall equally within the definition of immoveable property under clause (5) of s. 2 of Act I of 1868. Standing crops are [33] never cultivated with the intention of being kept permanently, but they are intended from the very beginning to be reaped after a few months. Their case, and particularly grain crops when they are in ear, resembles that of fruit on trees, and, as such, they are moveable property. It has been ruled that fruits, even when they are attached to trees which are permanently fastened to the earth, are moveable property, and suits relating to them are cognizable in a Small Cause Court [*Nasir Khan* v. *Karamat Khan* (3)]. It is true that by a wide interpretation of clauses 5 and 6 of s. 2 of Act I of 1868 everything attached to the earth, whether permanently or temporarily, is immoveable property, so long as it is not severed from the earth, but, by a qualified and reasonable construction of these clauses with reference to the natural and ordinary course of affairs, the things which are really moveable shall not be classed with the immoveable property simply because they are partially attached to the earth. If the definition given in clause 5 be strictly construed, every moveable thing, such as utensils, furniture, clothes, &c., would become immoveable property if a portion of the same is sunk under the ground. In that case nothing will ever be attachable in execution of a Small Cause Court decree, as the judgment-debtors, after being aware of this interpretation, would make everything of their household as immoveable property as soon as they receive intimation of the issue of writ of attachment. I would therefore find the issues under reference against the defendant and the judgment-debtor.

"There is, however, a recent ruling of the Madras High Court in their favour [*Madayya* v. *Venkata* (4)]. There the issues now raised were directly discussed and decided after referring to the Allahabad cases *in re Nasir Khan* v. *Karamat Khan* (3) and *Umet Ram* v. *Daulat Ram* (5) above alluded to, and after considering two other cases, *Pandah Gazi* v. *Jennuddi* (6) and *Sadu* v. *Sambhu* (7), but without any reference to the ruling *in re Kalka Prasad* v. *Chandan Singh* (2) which apparently enunciates a conflicting view. [34] As the matter is of some importance

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(1) 7 A. 855. (2) 10 A. 20. (3) 3 A. 168. (4) 11 M. 193.
(5) 5 A. 564. (6) 4 C. 665. (7) 6 B. 592.

1891 AUG. 1. — REVISIONAL CIVIL. — 14 A. 30 = 11 A.W.N. (1891) 174.

and daily occurrence, I consider it desirable to solicit a clear decision of our own High Court thereon for my present and future guidance.

"It will not be out of place perhaps to mention that according to the practice that prevails in this Court from several years past, standing crops are invariably treated as moveable property for the purposes of attachment and sale. I believe such is the practice in many other Courts of these Provinces. In regarding them as immoveable property both parties will often be put to great inconvenience and loss in their attachment and sale, as was pointed out in detail by the referring officer in the Madras case. In many instances all steps taken under ss. 274, 287 and 289 of Act XIV of 1882, all delays occurring between the dates of attachment and sale and all expenses incurred for an inquiry under the High Court's Circular Order No. 4. of 1881, for the issue of sale proclamations, and for the care and custody of the crops since attachment will become useless when they are ripe enough and reaped long after the attachment, but a few days before the date fixed for sale; because after they have been severed from the ground they will have to be sold as moveable property. It will be a mere technical procedure and also an anomaly to treat the crops as immoveable property so long as they are standing in the fields and afterwards as moveable property in the course of the same execution proceeding."

The reference came before Edge, C. J., and Tyrrell, J., who gave the following opinion thereon :—

OPINION.

EDGE, C. J., and TYRRELL, J.—Our answer to this reference is that we agree with the opinion expressed by the High Court at Madras in *Madayya* v. *Yenkata* (1), and, we hold that standing crops are immoveable property in the sense of the General Clauses Act (I of 1868) and of clause (6) of the second schedule of Act IX of 1887 and of the Code of Civil Procedure.

Return the papers.

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14 A. 35 = 11 A.W.N. (1891) 192.

[35] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

JWALA DEI (*Petitioner*) *v.* PIRBHU (*Opposite Party*).*
[4th August, 1891.]

Guardian and Ward—Guardian ad litem—*How long appointment of guardian* ad litem *remains in force—Change of guardian on application of ward—Act VIII of* 1890 (*Guardian and Wards Act*, s. 10.

Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant, the Court will appoint the guardian so named in the absence of any special and valid objection to such person.

[R., 22 M. 187; 2 A.L.J. 489; 5 C.L.J. 434; 1 N.L.R. 128.]

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* First Appeal, No. 13 of 1891 from an order of F. E. Eliot, Esq., District Judge of Allahabad, dated the 16th December 1890.

(1) 11 M. 193.

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A HINDU boy, named Pirbhu or Rabi Shankar, aged about 15 or 16 years, having become a convert to Christianity, his adoptive mother, Musammat Jwala Dei, applied to the District Judge under s. 10 of Act VIII of 1890 to be constituted his legal guardian. The application was resisted on behalf of the minor and was ultimately refused by the District Judge. Musammat Jwala Dei, then appealed to the High Court, the minor being represented by his guardian *ad litem* in the lower Court, the Rev. J. M. Alexander. In the High Court, however, the minor completely changed his attitude and expressed his readiness to go to his adoptive mother, Musammat Jwala Dei, and to accept her as his guardian.

Pandit *Ajudhia Nath* and Kuar *Parmanand*; for the appellant,

Mr. *C. Ross Alston*, for the Rev. J. M. Alexander as guardian *ad litem* to the respondent.

JUDGMENT.

STRAIGHT, J.—This is an appeal from an order of the District Judge of Allahabad, dated the 16th December 1890. The matter before him originated in an application preferred under the Guardian and Wards Act of 1890. The mother of one Rabi Shankar, a minor, being the applicant, she prayed that she might be declared by order of the Court the guardian of the person of such minor son. At the time that application was filed, the minor appears to have been under the religious influence of the Rev. Mr. Alexander, and was [36] in the custody and control of some other persons. For the purposes of the proceedings before the District Judge, Mr. Alexander was appointed guardian *ad litem*, and that proceeding was contested, and in the result the learned Judge refused to make any order to appoint the applicant guardian. It is wholly unnecessary for the purposes of this judgment to enter at length into the reasons given by the learned Judge. It is enough to say that he found that Rabi Shankar was a minor, and further that he had attained a knowledge and discretion which entitled him to judge for himself; that he was well able to take care of himself, and that it was unnecessary to appoint a guardian. From that decision of the District Judge an appeal was preferred to this Court by Musammat Jwala Dei, the mother of the minor, and it originally came before my brother Mahmood in Single Bench, and he, being of opinion upon the points raised that it might become necessary to re-consider the ruling of himself and myself in *Sarat Chandra Chakarbati* v. *Forman* (I.L. R., 12 All. 213), thought it well to guard against such a contingency by requesting that I should be associated with him to form a Division Bench to hear the appeal. It has now become unnecessary to enter into the matter at large. In the proceedings before the District Judge the minor took up and occupied through his guardian *ad litem* a hostile and antagonistic position to his mother, but since those proceedings closed, he has wholly altered his attitude, and, according to the terms of a petition filed by him on the 21st March last, which he has in Court before me admitted to have signed and presented to this Court, declared his wish that his mother should be appointed his guardian and that he should remain under her custody and control, to which, he further states, he has now returned.

Mr. *Alston* has been instructed to appear for the Rev. Mr. Alexander, the guardian *ad litem*. Some question at first arose as to whether he could properly be regarded as a party to the present appeal. Mr. *Alston's* contention at first being that the appointment of a guardian in a proceeding of this sort in the Court below only enures for the term of the proceeding in that Court.

1891 AUG. 4. — APPELLATE CIVIL. — 14 A. 35= 11 A.W.N. (1891) 192.

[37] I am strongly indisposed to adopt that view, and indeed the learned counsel himself has very fairly and properly resiled from that position, and is now prepared to admit that his client is the respondent in this appeal as the guardian *ad litem* of the minor. But I should like to add this, that where a person is appointed as the guardian of a minor for the purposes of a *lis*, that means of such *lis* in all its ramifications, and so long as it subsists, whether in the Court of first instance or in the Court of appeal, unless he takes the necessary steps to have himself discharged from that position which has been put upon him by the Court. If any other view were to be entertained not only the gravest inconvenience will be caused, but the interest of the minor might be very seriously imperilled and prejudiced. Consequently we have, in my opinion, before us a properly constituted appeal *qua* the array of appellant and respondent. Therefore, Mr. *Alston* appearing for the Rev. Mr. Alexander, the guardian *ad litem*, properly represents the interests of the minor, Rabi Shankar. He does not contest or question the propriety of this appeal, and, as he very properly observed, it would be absurd for him to do so, in view of the deliberately expressed wish of the minor, recorded and registered in his petition filed in this Court of his desire and wish that his mother should be his guardian and should have the custody and control of his person. Moreover, in a proceeding of this kind a Court having to deal with it would, in my opinion, be bound by the wish expressed by a minor, unless it saw that the guardian he asked to be appointed was an undesirable and unsuitable person, to give effect to that wish and to invest with power the person he wished to be his guardian. This appeal therefore succeeds and the order of the learned Judge must be set aside, and I direct that the order do pass declaring that Musammat Jwala Dai is the guardian of the person Pirbhu *alias* Rabi Shankar, her minor son, and that she be invested with all the powers under the Act that appertain and belong to a person of that kind. The parties will pay their own costs in all the Courts.

MAHMOOD, J.—I am entirely of the same opinion as my brother Straight, but since he has been good enough to consent to sit with me [38] in this case in consequence of my order of the 20th April 1891, I only wish to add that when the case was before me in the Single Bench upon that day, there appears to have been some confusion in the argument on behalf of the petitioner when it assailed the concurrent ruling of my brother Straigat and myself in *Sarat Chandra Chakarbati* v. *Forman* (1). That was an application under a totally different statute to the one in this case, namely, the application here appears to be such as is contemplated by Chapter II of Act VIII of 1890. I may say, therefore, that the ruling to which I have referred has no application to this case. If it had, it would be a matter for serious consideration for me, so far as I am concerned, to alter the view and the rule of law which was laid down in that case. There are some circumstances in this case which amply go to indicate that it has no relation to questions of custody in the sense which Act IX of 1861 would involve. As a matter of fact, there is no such question, and as my brother Straight has said enough to show that, at any rate, the ruling in *Sarat Chandra-Chakarbati* v. *Forman* (1) is not one which applies here, I agree also in the decree which my brother has made.

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(1) 12 A. 213.

14 A. 38=11 A.W.N. (1891) 176.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

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APPELLATE CRIMINAL.

14 A. 38=11 A.W.N. (1891) 176.

QUEEN-EMPRESS *v.* NIDDAH.*
[5th August, 1891.]

Attempt to commit murder—Facts necessary to constitute such attempt—Act XLV of 1860, *ss.* 299, 300, 307, 511.

Section 511 of the Indian Penal Code does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307 of the said Act.

A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only prevented by some cause independent of his volition.

[F., 9 C.L.J. 432=10 Cr. L.J. 57=2 Ind. Cas. 593 (596); R., 9 C.P.L.R. 14 (17) Cr.; 30 P.R. 1904 (Cr.); U.B.R. (1892—1896), Vol. I, 191.]

THE facts of this case sufficiently appear from the judgment of Straight, J.

[39] Mr. *C. Ross Alston* (at the request of the Court), for the appellant.

The Government Pleader, Munshi *Ram Prasad*, for the Crown.

JUDGMENT.

STRAIGHT, J.—This is an appeal from a judgment and sentence of the learned Judge of Agra, dated the 10th January 1891, under the following circumstances. Ram Lal and Niddha, Chamar, were absconding criminals against whom a warrant had been granted for their arrest upon a charge of dacoity. On the 8th November 1890, certain chaukidars having received information of the whereabouts of these persons went to a field accompanied by some other persons for the purpose of taking them into custody. The following facts are found by the learned Judge, and they are amply proved by the evidence. He says: "As soon as Ram Lal and Niddha perceived the men advancing they jumped up, and Ram Lal fired a gun straight at them. This missed. Niddha then brought up a sort of blunderbuss he was carrying, a sort of half carbine, half horse pistol with a bell-mouth, known as a karabin, to the hip and pulled the trigger. The witnesses swear that the cap exploded but the charge did not go off." Thereupon, after some struggle, into which I need not go, Niddha was arrested and was subsequently tried for attempted murder. It is in regard to that trial that this appeal has arisen, and it will be convenient to set out fully what the learned Judge had to say with regard to the legal aspects of the evidence against Niddha. A remarks: "As to Niddha, the point is raised that even conceding the facts to be correctly stated, they cannot amount to attempted murder under s. 307, Indian Penal Code. * * * * As to Niddha, the question is, did he, by pulling the trigger of a gun or pistol which he knew to be loaded, commit an offence which amounts to an attempt to murder? The witnesses swear that the hammer fell and there was a distinct detonation of the cap. It is proved that the karabin was loaded when captured. No cap was found, but the hammer fitted very imperfectly on the nipple, and in the scuffle the exploded cap might easily have been knocked off. There is a case in the Bombay High Court Reports, Vol. IV, p. 17 Crown Cases (*Regina* v. *Francis*

* Criminal Appeal No. 222 of 1891.

1891 AUG. 5. — APPELLATE CRIMINAL. — 14 A. 38 = 11 A.W.N. (1891) 176.

[40] *Cassidy*, in which it was held that in order to constitute the offence of attempt to murder under s. 307, Indian Penal Code, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events. In that case, Francis Cassidy presented an uncapped rifle, believing it to be capped, at the Drum Major of his corps, but was prevented from pulling the trigger. The Court held that he could not be convicted under s. 307, Indian Penal Code, but that a conviction would hold good under s. 511 read with ss. 299 and 300 of the Indian Penal Code. In this case I have no doubt that the accused Niddha pulled the trigger knowing the gun to be loaded and intending it to go off. There is doubt as to whether it was capped, as the cap was not found, and the snap of the hammer on the nipple might be mistaken for a detonation. The Court concurs with the assessors, who find that the accused Niddha fired, or rather tried to fire, the carbine with intent to cause death or grievous hurt, but, altering the section from s. 307, Indian Penal Code, to s. 511 read with ss. 299 and 300, directs that Niddha be rigorously imprisoned for five years."

When this appeal came before me and I had looked into the case of Cassidy, I asked Mr. *Alston* to argue it on behalf of the appellant, who was unrepresented, and on a subsequent date I had the great advantage of hearing an admirable discussion of the points involved on both sides and have now taken time to consider what view I ought to adopt.

Although in one aspect the case of *Queen* v. *Cassidy* (1) does not necessarily interfere with the conclusions upon the merits at which I have arrived in this case, in another, it is necessary for me to consider whether, having regard to the language of the Indian Penal Code, it is competent for me, as the learned Judges who decided that case held it was competent for them, to convict of attempted murder upon s. 511 taken in connection with ss. 299 and 300 of the Indian Penal Code. It will be convenient to consider that portion of the judgment of the Bombay Court which deals with that **[41]** matter first. I am of opinion that s. 307, Indian Penal Code, is exhaustive, and that within the four corners of that section are to be found the whole provisions of the law relating to attempts to murder. I am led to this conclusion by an examination of the terms of s. 511, Indian Penal Code. They are as follows :—

" Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence." Now it appears to me that the attempts which are limited by s.511 are attempts to commit offences which by the Code itself are punishable either with " transportation or imprisonment. " It cannot properly be said that the offence of murder is punishable with either of those things. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would, before the word transportation, have inserted the word " death." But, again, the section goes on and says that certain things being done, the person who does those acts shall, "where no express provision is made for the punishment of such attempt," be punished in a particular way. As I have pointed out by s. 307, Indian Penal Code, there is express provision made in the Code itself for the punishment of an attempt to murder. It seems therefore to me that when the framers of s. 511 drew it up in the terms that they have drawn it up, they especially meant to exclude those attempts to commit offences

(1) 4 B.H.C.R. Cr. 17.

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14 A. 38 = 11 A.W.N. (1891) 176.

which in the various preceding sections of the Code were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive, and that no Court has any right to resort to the provisions of ss. 299 and 300 read with s. 511 for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307, Indian Penal Code. I need only add that the maxim *expresso unius, &c. &c.*, should be applied in construing a penal statute of this kind, and, apart from that, it is obvious that any other view would introduce the greatest possible inconvenience and a vast con-[42]flict of opinion as to what would constitute an attempt to commit murder within the meaning of the Penal Code.

So far, therefore, I am constrained to say that I differ with the view expressed by the learned Judges in the case of *Queen* v. *Cassidy* (1). But I have before remarked upon the facts as disclosed in that case, and in this case I do not think that the view of the learned Judges formed on those facts would in any way preclude me from adopting the view that I am about to take in this case, *viz.*, that there was a good attempt to commit murder within the meaning of s. 307, Indian Penal Code. In the case of *Cassidy* the man presented an uncapped gun at another, he believing it to be capped. He never pulled the trigger, because he was prevented from doing so, and in reference to what I am about to say as to the facts of this case and the view I take of the law bearing upon it, I do not feel called upon to say, one way or the other, whether upon those facts there was a sufficient attempt. But in the present case the matter is wholly different. The appellant was an absconding criminal in the company of another absconding criminal. It is obvious, upon the evidence and the finding of the learned Judge, that he was determined in conjunction with that person to resist his lawful apprehension, and that for the purpose of doing so he was armed with a loaded blunderbuss and that in the direction of the persons who were seeking to arrest him, he presented the weapon, pulled the trigger, the hammer fell on the nipple, and it was only owing to the circumstance that the cap did not explode, that the gun failed to go off and consequently no harm was done.

Now the difficulty is made in the Bombay case to which I have referred by the words of s. 307 which say :—"whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder." The learned Judges of Bombay lay very great stress upon the words "under such circumstances." With the utmost respect for them, I think they have attached too much importance to those words. The words "under such circumstances" have in my opinion no other [43] meaning than this, that the act must be done, in such a way and with such ingredients that if it succeeded, and death was caused by it, the legal result would be murder according to ss. 299 and 300. The same words are used in the section dealing with the attempt to commit culpable homicide, and I cannot read them as requiring me to go the length of Sir Richard Couch in the second paragraph of the judgment delivered by him in the case of *Cassidy*. Still it may be that the learned Judge's remarks were applied to the particular facts of that particular case, and possibly they ought not to be read as having any application beyond the facts that were then before the Court.

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(1) 4 B.H.C.R. Cr. 17.

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For the purpose of constituting an attempt under s. 307, Indian Penal Code, there are two ingredients required, first, an evil intent or knowledge, and, secondly, an act done. I guard myself by saying that not every act done would be sufficient, as has been pointed out in the well-known case of *Regina* v. *Brown* (1). No one would suggest that if A intending to fire the stack of B, goes into a grocery shop and buys a box of matches, that he has committed the offence of attempting to fire the stack of B. But if he, having that intent, and having bought the box of matches, goes to the stack of B and lights the match, but it is put out by a puff of wind, and he is so prevented and interfered with, that would establish in my opinion an attempt.

It seems to me that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because, his own set volition and purpose having been given effect to their full extent, a fact unknown to him and variance with his own belief intervened to prevent the consequences of that act which he expected to ensue, ensuing.

[44] For my own part, I think any other doctrine would be a most dangerous one to lay down, and it is some satisfaction to know that similar views have been expressed in the Crown Cases Reserved, *Regina* v. *Brown* (1), in which it was shown that the case of *Queen* v. *Collins* (2), which all criminal lawyers long doubted as sound authority, has been discarded as no authority, and further that the cases of *Regina* v. *St. George* (3) and *Regina* v. *Lewis* (4), which have also been seriously questioned, will in all probability be at the very first opportunity overruled.

In the present case, looking to all the facts, I have no doubt that the appellant had had his carbine capped; that at the time he pulled the trigger and the hammer fell he believed it to be capped; that, whether it was or was not capped at that time, the failure to discharge the weapon was wholly independent of any action of his; and that not only did he have the intent to shoot the chaukidar and his party who were attempting to arrest him, but that he did the last proximate act that he could do to the completion of the full act that was within his intention and knowledge.

It is of course obvious that one might refer to many instances and examples, some of which would be within this rule and some would not, but I do not myself think that any useful purpose will be served by my prolonging this judgment. I have very carefully considered the words I have used above, and I think, as far as I am competent to put the matter into a clear and explicit form, that they lay down the true legal rule by which the determination of a question of this short should be guided. I am of opinion therefore that the learned Judge might properly have convicted this appellant upon s. 307, and that he wrongly convicted him under ss. 299 and 300 read with s. 511.

I direct that the conviction be recorded under s. 307, Indian Penal Code, and I order that the sentence of five years' imprisonment stand.

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(1) L. R. 10 Q. B.D. 381.
(2) L. and C. 471=33 L.J. M.C. 177.
(3) 9 C. and P. 483.
(4) 9 C. and P. 523.

14 A. 45=11 A.W.N. (1891) 179.

1891 AUG. 31.

REVISIONAL CRIMINAL.

14 A. 45= 11 A.W.N. (1891) 179.

[45] REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

IN THE MATTER OF THE PETITION OF DAULAT SINGH.*
[31st August, 1891.]

Criminal Procedure Code, s. 55—Subsequent treatment of persons arrested under the provisions of s. 55.

Where a person is arrested by the police under the provisions of s. 55 of the Code of Criminal Procedure he should always be given the option of release on reasonable bail being supplied.

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Meerut. The facts of the case sufficiently appear from the judgment of Knox, J.

JUDGMENT.

KNOX, J.—The learned Sessions Judge of Meerut has sent up this case for revision of the order passed by the District Magistrate of Bulandshahr under s. 118 of the Code of Criminal Procedure. It appears that Daulat Singh *alias* Dulla, the petitioner in this case had been proved, either to the police in charge of the station within the circle of which the applicant resided, or to the Magistrate in charge of the district, to be an habitual robber and a generally a bad character. The police professed to have arrested him under the powers vested in the police officer in charge of the station by s. 55 of the Code of Criminal Procedure, and the objection which the learned Sessions Judge takes to the order passed in the case is that such arrest was illegal, that upon such arrest the applicant was not admitted to reasonable bail, as he should have been, that he was detained in custody for some twenty days without proper information being given him as to the cause for which he was detained, and that this procedure had materially prejudiced the applicant in rebutting the allegation made against him, that he is a man of a notorious bad character. The second objection the learned Judge takes is that the evidence, or a considerable portion of the evidence, is of a character which cannot at present be believed in the Bulandshahr district. Over and above all this, the learned Sessions Judge is of opinion that the security demanded from the applicant is excessive.

[46] As I have already remarked in cases of this kind, the powers with which officers in charge of police stations and District Magistrates have been armed under the Code for the purpose of restraining bad characters are exceptional powers. They provide very strong remedies, and should never be put in force by either the officer in charge of a police station or the Magistrate of a district, without the greatest deliberation, and except upon evidence which convinces the Magistrate that in the interests of public welfare it is absolutely necessary to demand from the person before him security to be of good behaviour.

Still there can be no doubt that the Code of Criminal Procedure contemplated that cases would occur, though they might be rare and exceptional cases, in which it would be the clear duty of the officer in charge of a police station to arrest or cause to be arrested any person within the limits of his station, who is by repute an habitual

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* Criminal Revision No. 519 of 1891.

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robber, house-breaker or thief, &c. It would and will be a clear dereliction of duty in such a case for police officers in charge of the station to abstain from arrest. While, on the one hand, any case in which the section was put into force without care and good faith would call for the strongest measures against the police officers so offending, on the other hand, the officer who has the courage honestly to act in a case of necessity under the powers given to him by the section is acting faithfully to the trust reposed in him. Comparing, however, s. 55 of the Code of Criminal Procedure with the provisions contained in s. 112 and the following sections, I think there is little doubt that s. 55 was intended, as the learned Judge rightly points out, for suppression of habitual bad characters whom an officer in charge of a police station suddenly finds within his circle, or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under s. 112. That, at any rate, would be a safe way of using the powers given by the section. Looking to the explanation given by the Magistrate of Bulandshahr, while I am not prepared to say that the arrest by the police was illegal, I do think that it was unnecessary, and that it would have been better for the District Magistrate to have used *suo moto* the proce- [47] dure laid down in Chapter VIII of the Code. I am distinctly of opinion that when the police do act under s. 55 they are bound to give the person arrested the option of bail, and that bail shall be, as the Code requires, not excessive and in accordance with the position in life occupied by the person arrested. As regards the action of the Distsict Magistrate, I am of opinion that the order in writing setting forth the substance of the information upon which he professes to act should always, except in cases in which action has been taken under s. 55 of the Code, accompany the summons issued under s. 114, and in no case should a Magistrate acting under s. 112 issue a warrant of arrest except upon the clearest grounds for belief that unless he issues such warrant a breach of the peace is inevitable. It is the intention of the Code that any man called to meet the exceptional procedure laid down in Chapter VIII, should at his own house have the fullest information compatible with the circumstances of the case as to the reasons why his liberty is in danger of being interfered with. Only where a breach of the peace is imminent should the action taken under Chapter VIII be of a prompt and vigorous nature. To deprive any person of his liberty is a most serious step to take, and it is hardly too much to say that every step in the process should show extreme deliberation and care, and if a person has to be arrested previous to inquiry, he should be given the option of release upon proper bail. Now comes the question whether in this case the arrest by the police, the neglect to pass an order allowing bail being given, and the recording of information while the accused was under detention, have been of such a nature as to materially prejudice the accused. Upon this point I have examined the case with very great anxiety. I find from the record that on the 5th June, Daulat was clearly asked what cause he had to show why he should not give sureties to be of good behaviour. It is unfortunate that at this point the Magistrate did not clearly tell him the amount of the bond he would be required to enter into, the time for which it would be in force, and the number, character and class of sureties which would be required. Had it been done the applicant might have shown that a bond of Rs. 1,000 and two sureties, zemindars, in the sum of Rs. 500 each, [48] were wholly out of proportion to

his means. I think there can be no doubt that, so far as this point is concerned, Daulat has been prejudiced to an extent which I cannot overlook. I do not find, however, that he was ignorant of the nature of the proceedings taken against him, or that any difficulties were put in his way of citing persons to depose to his character. He was given till the 12th June, as a first opportunity, and till the 23rd June, as the second opportunity for producing evidence as to good character and to rebut that which had been given against him. Not less than six witnesses were cited by him, and not one of those six, if the record can be trusted, was able to say with confidence that Daulat was a man of good repute. On the contrary, two of them deposed to his repute being distinctly bad. I have already remarked in previous cases that Magistrates of the District must and should be trusted as to the evidence on which they act. Where the record shows that they have been neglectful or careless or have been wanting in discretion I should be the first to interfere, but in the present instance twelve witnesses have deliberately sworn that the accused is an habitual thief and bad character. The evidence seems to have been carefully taken, and I do trust the Magistrate when he puts on record that he fully believes the information to be good and trustworthy. I do not therefore propose to interfere in the Magistrate's order further than to direct that Daulat execute a bond in the sum of Rs. 250 and furnish two sureties, zemindars, in the sum of Rs. 250 each, to be of good behaviour for the space of one year, and that in default of giving such security he suffer rigorous imprisonment until such security be given or the year expires, whichever event first occur. It is much to be regretted that the language used by the District Magistrate in the explanation which he furnished is not of a judicial and becoming nature. I allude particularly to the paragraph marked "seventhly" in his memorandum. Explanations of this kind are not intended as channels for criticism of the Court to which, for this purpose, a District Magistrate is subordinate. They should be brief and aim at pointing out facts which appear to have been overlooked by or to have been misrepresented to the Judge, when they travel beyond this they are impertinent and improper.

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14 A. 49 = 11 A.W.N. (1891) 182.

[49] REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

IN THE MATTER OF THE PETITION OF ABDUL AZIZ.*
[25th September, 1891.]

Security to keep the peace—Power of the Magistrate of a district to call upon a person residing in another district to furnish security—Criminal Procedure Code, s. 107.

Section 107 of the Criminal Procedure Code does not empower a Magistrate to issue process under it to a person not residing within his jurisdiction.

In the matter of the petition of Jai Parkash Lal (1) followed, *Rajendro Chunder Roy Chowdhry* (2) and *Dinonath Mullick* (3) approved.

[F., 23 B. 32 (35).]

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Gorakhpur. The facts of the case, so far

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* Criminal Revision No. 494 of 1881.

(1) 6 A. 26. (2) 11 C. 737. (3) 12 C. 133.

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as they are necessary for the purposes of this report, are contained in the referring order, which is as follows :—

"This is an application praying for revision of an order of Mr. Hose, District Magistrate, directing applicant to find two sureties for Rs. 1,000 each to keep the peace for one year.

"The applicant has property in the Gorakhpur district, but he is a resident of mauza Nanduar, police station Mendhawal, in the Basti district, and the chief contention is based on the ruling of a Full Bench of the Allahabad High Court in the case of *Jai Parkash Lal* (1), where it was decided that a Magistrate acting under s. 107, Criminal Procedure Code, has no jurisdiction over a person residing beyond his local jurisdiction, and this view of the law has also been adopted by the Calcutta High Court in the cases of *Rajendro Chunder Roy Chowdhry* (2) and *Dinanath Mullick* (3).

"Under these circumstances, without entering into the merits of the case, I am compelled to find that the Magistrate's order was *ultra vires*, and the record will be forwarded to the Hon'ble High Court with the recommendation that the order of the Magistrate, dated the 16th June 1891, be set aside."

On this reference, the following order was made by Knox, J.

ORDER.

KNOX, J.—The order of the Magistrate was *ultra vires* and must be set aside at once. The applicant and his sureties, if any, will be released from any bond into which they may have entered.

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14 A. 50 = 11 A.W.N. (1891) 219.

[50] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Knox.

RADHA PRASAD SINGH (*Plaintiff*) *v.* MATHURA CHAUBE (*Defendant*).*
[9th November, 1891.]

Act XII of 1881 (*North-Western Provinces Rent Act*), s. 189—*Act XIV of* 1886 *amending Act* (*XII of* 1881), s. 5—"*Rent payable by the tenant*"—*Appeal.*

The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent.

Where a zemindar sued a tenant for rent of certain alluvial land, the amount claimed not being above Rs. 100, and the tenant objected that there was a custom in the village by which rent was paid in case of alluvial land only on the culturable portion, and that during some of the years in suit a less portion of the land than that for which rent was claimed had been culturable :—*Held* that in such a suit the rate of rent was in dispute and an appeal would therefore lie. *Radha Prasad Singh* v. *Pergash Rai* (4) followed : *Peyag Sahu* v. *Matadin* (5) overruled.

[F., 16 A. 51 ; R., 21 A. 247.]

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* Second Appeal, No. 1030 of 1889, from a decree of F. W. Fox, Esq., District Judge of Ghazipur, dated the 29th May 1889, confirming a decree of Maulvi Muhammad Wasi, Deputy Collector of Ghazipur, dated the 31st May 1888.

(1) 6 A. 26. (2) 11 C. 737. (3) 12 C. 133.
(4) 13 A. 193. (5) 10 A.W.N. (1890) 229.

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APPELLATE CIVIL.

14 A. 50 = 11 A.W.N. (1891) 219.

THE facts of this case were as follows :—

The plaintiff-appellant sued in the Court of the Deputy Collector to recover from the defendant-respondent a sum of Rs. 54-11-6, alleging the same to be due as rent of certain land from 1292 to 1295 fasli together with interest on the same. The defendant pleaded limitation as to one year and as to the rest that the land in question was a *diara*, and according to local custom rent was only payable on the culturable portion, which, he alleged, was during those years less than it was stated by the plaintiff to be. The Deputy Collector found that the claim as to 1292 fasli was barred, that the interest claimed was correct, and, allowing apparently the validity of the defendant's contention as to the area of the land, decreed the plaintiff's claim in part. The plaintiff thereupon appealed to the District Judge who dismissed the appeal on the ground that—"The value is below Rs. 100. There has been no determination of proprietary right or of the rate of rent payable." The plaintiff then [51] appealed to the High Court. The appeal came before Mahmood, J., who, in view of certain conflicting rulings of the Court, referred the case to a Bench of three Judges.

The Hon'ble Mr. *Spankie*, for the appellant.

Mr. *J. Simeon*, for the respondent.

JUDGMENT.

EDGE, C.J., TYRRELL and KNOX, JJ.—This appeal has arisen out of a suit brought by a zemindar against his tenant to recover alleged arrears of rent and interest amounting to Rs. 54-11-6.

The third plea in defence in effect was that by the custom of the *ilaka* and of the particular *mahal* the tenant was entitled to a deduction from the rent in respect of the land which became submerged or in which the seed had not been germinated, and that, according to the custom, in order to ascertain the rent payable the land had to be measured annually. We need not trouble ourselves with the question as to whether in fact there was such a custom or not in conflict with the agreement between the zemindar and his tenant. Those are matters yet to be decided, amongst others, by the lower appellate Court, if an appeal lay to that Court. An appeal was brought to the lower appellate Court and that appeal was dismissed by that Court, on the ground that the amount or value of the subject-matter did not exceed Rs. 100, and that the rent payable by the tenant within the meaning of s. 189 of Act XII of 1881, was not a matter in issue. From that decree the plaintiff has brought this second appeal. It came on to be heard before a Single Bench, and the Single Judge being pressed with the contention that there was a conflict between a decision of Mr. Justice Young [*Payag Sahu and others* v. *Matadin and others* (1)] and a concurring judgment of our brother Straight and Mr. Justice Young [*Ratha Prasad Singh* v. *Pergash Rai* (2)] referred the appeal to this Bench. The case as presented to us involves two questions, one as to the construction of s. 189 of Act XII of 1881, so far as the meaning of the words "rent payable" is concerned; the other, whether the "rent payable" was a matter in dispute [52] and to be determined in this suit within the meaning of that section. It has been held in the case to which we have lastly referred that the words "rent payable" in the section mean a rate of rent, and that is the view which we take of the section. In our opinion the rent payable in that section

(1) 10 A.W.N. (1890) 229.

(2) 13 A. 193.

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means the rate of rent payable, and that is the view which was adopted in an unreported judgment to which one of us was a party along with Mr. Justice Brodhurst. When s. 189 was amended we do not think it could have been the intention of the Legislature to have given an appeal in those rent cases where the only question in dispute was how much of an agreed rent had been paid or not, if the matter in dispute was under Rs. 100. In other words, they could not have intended, for example, that there should be a series of appeals over a question as to whether the tenant had in fact paid Rs. 16, portion of an admitted rent. It is a wholly different matter where the question of the rate of rent is concerned. The determination of the question of the rate of rent might affect the parties as landlord and tenant for a great number of years, and consequently the Legislature in our opinion intended that when the rate of rent was in dispute and had to be decided there should be an appeal. In the case to which we first referred, Mr. Justice Young was clearly of opinion that if the point had been merely what was the actual amount which the tenant in that case had paid in liquidation of his rent, the appeal would not be under s. 189, but he seems to have put too narrow a construction on the expression "rate of rent." He seems to have thought that to ascertain the rate of rent it would never be necessary to ascertain the area of the land. It appears to us that where the dispute is as to the rate of rent that dispute may be raised in many different ways, as for example, where the landlord said the rent payable was Rs. 100 and the tenant said it was Rs. 50 a year, then there would be a dispute as to the rent payable. It might in another case be necessary to ascertain the area in order to find what was the rent payable or rate of rent for any particular year under the terms of a particular contract, or according to the custom which prevailed. Here, in our opinion, there was a dispute as to the rate of rent. The tenant said that by reason of the custom the rent [53] payable for those particular years was not the rent alleged by the zemindar. The appeal in our judgment lay to the Court below.

We allow the appeal, set aside the decree below and remand the case under s. 562 of the Code of Civil Procedure, and order the case to be reinstated on the list of pending cases and disposed of according to law. The costs of this appeal will abide the result.

Cause remanded.

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14 A. 53 = 11 A.W.N. (1891) 222.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

CHAIN SUKH RAM AND ANOTHER (*Plaintiffs*) *v.* PARBATI AND ANOTHER (*Defendants*) AND MANSA RAM AND ANOTHER (*Plaintiffs*) *v.* SUNDAR AND OTHERS (*Defendants*).* [28th November, 1891.]

Hindu Law—Custom—Adoption of sister's son—Bohra Brahmans.

Amongst the Bohra Brahmans of the northern districts of the North-Western Provinces, there exists a valid and legal custom in virtue of which a person of that caste can adopt his sister's son.

[R., 17 A. 294 (310) (F.B.); 19 B. 428; 110 P.R. 1906 = 31 P.L.R. 1907 = 59 P.W.R. 1907; 107 P.L.R. 1901.]

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* First Appeal Nos. 154 and 162 from the decrees of Munshi Madho Lal, Subordinate Judge of Saharanpur, dated the 11th August, 1889.

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14 A. 53 = 11 A.W.N. (1891) 222.

THESE were two suits which both related to the same property and raised the same question of law, *viz.*, as to the possibility of a person of the caste known as "Bohra Brahmans" making a valid adoption of his sister's son. The appeals were heard together and one judgment pronounced in both. The facts of these cases so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Babu *Rajendro Nath Mukerji*, for the appellants, Pandit *Ajudhia Nath*, Munshi *Kashi Prasad*, and Pandit *Sundar Lal*, for the respondents. } in F. A. No. 154.

Mr. *Conlan* and Mr. *D. Banerji*, for the appellants. Pandit *Ajudhia Nath*, Munshi *Kashi Prasad*, Pandit *Sunder Lal* and Babu *Rajendro Nath Mukerji*, for the respondents. } in F. A. No. 162.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—In these two first appeals which have been heard by us we thought it advisable to deliver a written [54] judgment, as the questions upon which the appeals in our judgment depend are questions of very great importance to a considerable portion of the Hindu community in some of the northern districts of these provinces.

The suits out of which these appeals have arisen were suits in which the possession of property was claimed.

First Appeal No. 154 of 1889 was from a decree of the Subordinate Judge of Saharanpur dismissing the original suit No. 151 of 1885. In that suit the plaintiffs alleged that one Prem Sukh Das, deceased, became the owner and possessor of certain property specified in the plaint under a will made in 1875 by one Baldeo Sahai, who had been the proprietor. The plaintiffs alleged that on the death of Prem Sukh Das without issue, on the 3rd of December, 1879, his estate devolved according to Hindu law on the descendants of Ishar Das, and that one Mangal Ram, who was one of such descendants, by a deed, dated the 30th of July, 1885, gave his one-third share to the plaintiffs. The plaintiffs sought by their suit to recover such one-third share from the defendants, Musammat Parbati and Musammat Sundar, who are the widows of Baldeo Sahai and are in possession.

First Appal No. 162 is from a decree of the Subordinate Judge of Saharanpur, which dismissed the original suit No. 30 of 1886. In the latter suit the plaintiffs, who are two of the descendants of Ishar Das, claimed certain shares in the same property, which had been of Baldeo Sahai, alleging that Prem Sukh Das took that property under the will of Baldeo Sahai of 1875, and that on the death without issue of Prem Sukh Das, on the 3rd of December, 1879, the property devolved according to Hindu law on the descendants of Ishar Das.

The plaintiffs in original suit No. 30 of 1886 sought to recover the shares to which they alleged that they were entitled from Musammat Parbati and Musammat Sundar, the widows of Baldeo Sahai. The plaintiffs in original suit No. 151 of 1885 were made *pro forma* defendants in original suit No. 30 of 1886.

[55] In each suit mesne profits were claimed.

The main defence relied upon by Musammat Parbati and Musammat Sundar in each suit was that Prem Sukh Das had been adopted in 1871, as a son by Baldeo Sahai, and that Prem Sukh Das having been so adopted took the property of Baldeo Sahai as such adopted son and not under the will of 1875, and that according to Hindu law the property

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of Prem Sukh Das as the adopted son of Baldeo Sahai did not devolve on his death, or at all upon the descendants of Ishar Das, and that the widows of Baldeo Sahai were not only in possession but were entitled as the mothers of Prem Sukh Das to the possession of all the property claimed.

Prem Sukh Das was the son of Chajju Ram, who was a grandson of Ishar Das. Prem Sukh Das' mother was a sister of Baldeo Sahai. Baldeo Sahai was not descended from Ishar Das. Baldeo Sahai and Chajju Ram were Bohra Brahmans. On behalf of the defendants-respondents, Musammat Parbati and Musammat Sundar, it was not contended that according to the Hindu law, apart from custom, Baldeo Sahai could legally have adopted his sister's son, Prem Sukh Das, but it was contended that, according to a general custom of Bohra Brahmans in the part of the country in which Baldeo Sahai and Chajju Ram resided, a Bohra Brahman could legally and validly adopt his sister's son. On behalf of the plaintiffs-appellants in First Appeal No. 154 of 1889 it was contended before us that Baldeo Sahai never did in fact adopt Prem Sukh Das, and further, that if Baldeo Sahai did in fact adopt Prem Sukh Das, the custom alleged by Musammat Parbati and Musammat Sundar was not proved to exist, and if it did exist it could not control or vary the Hindu law, and that the alleged adoption was consequently illegal and void.

On behalf of the plaintiffs-appellants in First Appeal No. 162 of 1889, the fact that Baldeo Sahai had adopted Prem Sukh Das was not disputed, but it was contended that no such custom as alleged had been proved, or, if proved, could control or vary the Hindu law, and that the adoption was consequently illegal and void.

[56] On behalf of Musammat Parbati and Musammat Sundar it was further contended that by reason of Art. 118 of ths second Schedule of the Indian Limitation Act (Act XV of 1877) neither the fact nor the validity of the adoption of Prem Sukh Das could now be questioned. In support of this last contention the decision of their Lordships of the Privy Council in *Jogadamba Chowdhrani* v. *Dakhina Mohun* (1) was relied upon. Being of opinion, for reasons presently to be stated, that the fact of the adoption and the custom relied upon in support of the validity of that adoption have been proved, and that the custom which has been proved is a valid custom, we do not intend to express any opinion upon the question of limitation or on the other questions which it would become necessary to consider if we were of opinion that the adoption had not in fact taken place or was invalid. It is common ground that if Prem Sukh Das was validly adopted by Baldeo Sahai, the plaintiffs-appellants in each appeal, have no title to the property, or any of it, in dispute.

We shall first deal with the question as to whether such a custom as that alleged can legally exist, and can control and vary the Hindu law applicable to adoption amongst Brahmans. On behalf of the plaintiffs-appellants, it was strongly contended that the point was concluded by the judgments, of their Lordships of the Privy Council in *Sundar* v. *Parbati* (2), in which case their Lordships, at page 193 of the Report, are reported to have said :—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sisters's son." In that case in which the suit was between the now defendants-respondents,

(1) 13 I.A. 84=13 C. 308. (2) 16 I.A. 186.

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Musammat Parbati and Musammat Sundar, and by which Musammat Sundar sought a decree for partition of the property now in suit, the question as to whether such a custom as is now alleged could be valid was not before their Lordships of the Privy Council or before this Court when that case was before this Court, on appeal from the decree of the 27th of February 1884 of [57] the Subordinate Judge of Sharanpur, although it has, during the arguments of these appeals, been stated, but whether correctly or not we have nothing on these records to show that evidence of the alleged custom was tendered in the Court of the Subordinate Judge in that case. The validity of such a custom by which a sister's son may be adopted amongst Nambudri Brahmans in Malabar, and of a similar custom by which a daughter's son may be adopted amongst the Brahmans of Tanjore, Trichinopoly and Tinnevelly have been judicially recognized by Full Benches of the Madras High Court in the cases *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (1) and *Vaiydinada* v. *Appu* (2). The validity of a custom by which, amongst certain tribes of Brahmans in the Punjab, a sister's son or a daughter's son may be adopted has been judicially recognized by the Chief Court of the Punjab. The cases relating to the Punjab are collected in the notes to pages 341 and 342 of Golap Chandra Sarkar's Hindu Law of Adoption (Tagore Law Lectures, 1888). That the generally accepted rule of the Hindu law which prohibits amongst the twice-born classes the adoption of a sister's or a daughter's son has been in many parts of India controlled and varied by custom, or possibly never followed, may be gathered from the cases collected in the notes to paragraph 124, pages 137 and 138 of the 4th edition of Mayne's Hindu Law and Usage. In Mandlik's Hindu Law of Mayukha and Yajnavalkya at pages 478 *et seqq.*, grave doubts are raised to the authenticity of the alleged principle of Hindu Law that the person to be adopted must be one who, by a legal marriage with his mother, might have been the legitimate son of the adopter. Mr. Mandlik in his valuable treatise contends that the grafting on to Hindu Law of that principle is the result of wrong analogies and unwarranted generalization founded on imperfect translations of original texts. Mr. Mandlik, at page 478, speaking of the Bombay Presidency, says ; "In like manner is the adoption of a sister's son common among the Hindus in this Presidency amongst all castes and classes. Still more common is the adoption of a dauhetra (daughter's son)." The [58] question as to whether Mr. Mandlik's views as to the origin and authenticity of the principle referred to are correct or not must now be left for the decision of their Lordships of the Privy Council. Fortunately for us, we need not in the appeals now before us express any opinion on that subject. Assuming for present purposes that the rule laid down by Mr. Sutherland in 1821 that "The first and fundamental principle is that the person to be adopted be one who by a legal marriage with his mother might have been the legitimate son of the adopter," is the correct rule of Hindu law applicable to the three superior or twice-born classes of Hindus, we need only say that we agree with the learned authors of West and Buhlers' Digest of Hindu Law that the Hindu Law is "subject, even without a statutory provision, to modification by custom, which indeed may be regarded as the basis, for all secular purposes, of the Hindu Law itself. Thus when a custom is proved it supersedes the general law so far as it extends, but the general law still regulates all that lies beyond the

(1) 7 M. 3. (2) 9 M. 44.

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scope of the custom." (West and Buhler's Digest of Hindu Law, 3rd Edition, Vol. I, pp. 1 and 2).

Their Lordships of the Privy Council have recognised the fact that Hindu Law may be varied by custom in such important matters, amongst others, as the descent in a family and the partibility of ancestral property.

We entertain no doubt that a custom amongst Bohra Brahmans generally or among Bohra Brahmans of a particular part of the country that a sister's son may be adopted, if proved, is a valid custom and legalises such an adoption.

We shall now proceed to consider whether or not such a custom has been proved so far as the Bohra Brahmans of that part of the country within which and in the neighbourhood of which Baldeo Sahai and Chajju Ram resided are concerned.

The Bohra Brahmans came into the northern districts of these Provinces from Palli or Pali in Rajputana. They are a caste of trading Brahmans, as the name of the caste indicates. According to Fallon's Hindustani- English Dictionary, at page 283, "bobra" means "a village banker or money-lender," and also according to [59] Fallon "the Bohras appear to have originated in Guzerat, where they became converts to Muhammadanism, but they are settled in many parts of Central and Western India and in the North-Western Provinces.

In that part of the Statistical Description and Historical Account of the North-Western Provinces of India, prepared under the orders of the Government of India, which relates to the district of Muzaffernagar, volume III, part 2, page 494, we find it stated that "the Rahitis or Bohras are sometimes classed amongst the subdivisions of the Gaur tribe of the great Gaur division under the names of Palliwals, but they are now so completely separated from the Brahmans as a body that they are usually regarded as one of the miscellaneous tribes of Brahmanical origin. Other names for this trible are Athwariya, Barhar and Kaniya. These Bohras are emigrants from Marwar, and are called Palliwal from their original seat, Palli. They are the great usurers and pawnbrokers of the Upper Duab, &c."

In the course of the arguments before us the evidence recorded in each suit was read by those who appeared for the different parties as evidence in both suits. It was stated by Pandit *Ajudhia Nath*, who appeared for Musammat Parbati and Musammat Sundar in First Appeal No. 154 of 1889, but disputed by those who represented the other parties, that in the Muzaffarnagar and neighbouring districts the priests of the Banias were Bohra Brahmans. There is no evidence before us on the point, and we merely mention the statement as an explanation which was offered of the fact that there is much evidence on the records in the appeals before us of a custom amongst those of the Bania cases of that part of the country by which a sister's son may be adopted.

In support of the existence of the custom amongst Bohra Brahmans there were, amongst others, a great number of Bohra Brahman witnesses called. At least ten of those Bohra Brahman witnesses were from the Muzaffarnagar district, seven were from the Meerut district, whilst others of them were from Bulandshahr, [60] Aligarh, Delhi, Saharanpur, Muttra, Etawah and Cawnpore. All of those witnesses spoke to the present existence of the custom, many of them gave instances of adoptions of sisters's sons and many of them said that they had been informed by their fathers and ancestors that the custom existed. So far as has been brought to our attention there were only two cases of such adoption in which it

was shown that the adopted son had not succeeded to the property of the person who had adopted him, and in one of those two cases the adopted son had received from the other members of the family a substantial sum in money. We agree with the Subordinate Judge that the custom was proved. We see no reason for thinking that all those Bohra Brahman witnesses, to whom we have referred, committed perjury. We were much pressed with the fact that Baldeo Sahai had in 1875 executed a will in favour of Prem Sukh Das. It was contended from that fact that Baldeo Sahai had never, in fact, adopted Prem Sukh Das, and that if he had, in fact, adopted Prem Sukh Das, he knew that the adoption was invalid, and on the latter point the evidence in cross-examination of Musammat Parbati (document No. 448) was also relied upon. In cross-examination Musammat Parbati said "Baldeo Sahai had executed the will also in favour of Prem Sukh. I had asked Baldeo Sahai why he was executing the will. He told me that it was not allowed in the Shastras to adopt a son of a sister. Baldeo Sahai was under the impression that it was not allowed in the Shastras to adopt a nephew." It is very possible that Baldeo Sahai may have been under the impression that such an adoption was invalid according to the Shastras and that the custom amongst the Bohra Brahmans might not be held by the Courts as sufficient to validate the adoption. One thing which is obvious is that Baldeo Sahai intended, in the event of a son or sons being subsequently born to him, to secure by his will to Prem Sukh Das a greater share of the property than Prem Sukh Das would under such circumstances take as an adopted son.

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Whatever may have been the opinion, the doubts or objects of Baldeo Sahai in 1875, it is in our opinion beyond doubt that [61] Baldeo Sahai in 1871 did, in fact, adopt Prem Sukh Das, and did so under circumstances of the greatest publicity. To witness the ceremony of that adoption large numbers of Bohra Brahmans were invited, and at that ceremony many of them attended. The fact of the adoption having taken place was well known amongst the brotherhood and amongst the Bhora Brahmans of that part of the country. When Baldeo Sahai died, mutation of names took place in favour of Prem Sukh Das, and in those mutation proceedings Prem Sukh Das was described as the adopted son of Baldeo Sahai. He was so described in the mutation proceedings or in the village papers relating to at least eleven villages. This appears by the documents numbered 820, 821, 822, 823, 824, 825, 826, 827, 829, 830, and 831.

The will was made in 1875. After the making of the will Prem Sukh Das, suing under the guardianship of Baldeo Sahai, was in his two petitions of the 5th of December 1877 (documents Nos. 818 and 819) described as the adopted son of Baldeo Sahai. The will of 1875 affords evidence of the adoption. There is a passage in it which, correctly translated, is as follows:—

"Prem Sukh, son of Chajju Ram, my own sister's son, whom I have brought up and educated like my son from his childhood, *whom I have made, by performing the usual ceremonies of investiture with the sacred thread, &c., my heir, representative and successor*, and who has from of old lived with me, shall, after me, be the proprietor and heir of all the properties, &c."

On the 26th of February 1879 a certificate of guardianship of the estate of Prem Sukh Das was granted by the Subordinate Judge of Saharanpur to Kanhai Ram and two others. That Kanhai Ram is one of the plaintiffs-

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appellants in First Appeal No. 162 of 1889, and in that certificate Prem Sukh Das is described as the adopted son of Baldeo Sahai, deceased.

It has been pressed upon us that in the suit between Musammat Sundar and Musammat Parbati the latter lady denied the adoption.

[62] In the suit Musammut Parbati, who was the senior widow, was attempting to exclude the junior widow Musammut Sundar, from a share in the property, and with that object in view she was bound in the then view of the legal rights of those ladies *inter se* to deny the adoption. Musammat Parbat in that suit alleged that she alone was in possession. Whatever Musammat Parbati's contention was in that suit, she, during the lifetime of Prem Sukh Das, on the 11th February 1879, joined Musammat Sundar in a petition (document No. 19) presented to prevent the property being brought under the Court of Wards, and in that petition described Prem Sukh Das as the adopted son of Baldeo Sahai. In that petition the ladies state that they had appointed Lala Sukh Lal, Kanhai Ram, "the own paternal uncle of Prem Sukh Das," and Raghunath, *sarbarahkar* and managers, and had applied for the grant of a certificate of guardianship to them. That petition was presented through Tara Chand, who was a mukhtar of Musammat Parbati and Musammut Sundar. Tara Chand's mukhtarnama is dated the 11th of February 1879, and is document No. 20. It was witnessed by Chain Sukh Ram, who is one of the plaintiffs-appellants in First Appeal No. 154 of 1889, and who on the 11th of February 1879 described himself as "Chain Sukh, servant of Prem Sukh Das," as in fact he was.

There are many other documents on the records of these two appeals to which, if it were necessary, we might refer in support of our opinion that Prem Sukh Das had in fact been adopted by and had been openly treated and acknowledged as the adopted son of Baldeo Sahai. We may mention that on the death of Prem Sukh Das his funeral obsequies were performed by one Nathu, who was of the gotra of Baldeo Sahai, and consequently competent to perform those obsequies. He appears to have performed them on behalf of Musammat Parbati and Musammat Sundar. If there had been no valid adoption of Prem Sukh Das his obsequies would have been performed by one of the gotra of Chajju Ram, and Nathu would have been incompetent to perform them.

On an examination of the oral and documentary evidence we have no doubt that Prem Sukh Das was, in fact, adopted by Baldeo [63] Sahai, and that his adoption was by reason of the custom a valid and legal adoption.

Before concluding our judgment it may be interesting to see how this present litigation arose.

In 1871 Baldeo Sahai adopted Prem Sukh Das. In December 1878 Baldeo Sahai died. On the death of Baldeo Sahai, Prem Sukh Das succeeded to the property. Prem Sukh Das died on the 3rd of December 1879. He was then 16 years old. On the death of Prem Sukh Das, Musammat Parbati and Musammat Sundar took possession of the property as his heiresses, a fact which appears not only from other evidence but also from some *bujharat* statements of 1290 Fasli, where they are recorded as "Mothers of Prem Sukh Das." Disputes having subsequently arisen between them, Musammat Sundar brought her suit against Musammat Parbati for partition. In that suit Musammat Parbati alleged, that she alone was in possession, and denied any title in Musammat Sundar. In first appeal in that suit this Court on the 12th of June held that the adoption of Prem Sukh Das was, by reason of his being the sister's

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son of Baldeo Sahai, invalid, and holding that the Musammats had no title in law, and that the suit for partition was not maintainable merely by reason that they were in possession, dismissed Musammat Sundar's suit. On the 30th of July 1885 Mangal Ram, the grandson of Ishar Das, is alleged to have executed the deed of gift in favour of Chain Sukh Ram and Ghazi Ram, the plaintiffs-appellants in First Appeal No. 154 of 1889, upon which they rely. On the 4th of September 1885 those plaintiffs-appellants brought their suit. Mangal Ram was not related to Chain Sukh Ram or to Ghazi Ram. Chain Sukh Ram had been in the employment of Prem Sukh Das; he is married to a sister of Musammat Parbati, and is and was an agent of hers. Gazi Ram is the minor brother of Musammat Parbati. Mansa Ram and Kanhai Ram, the plaintiffs-appellants in First Appeal No. 162 of 1889 and descendants of Ishar Das brought their suit on the 18th of January 1886. None of those plaintiffs-appellants could have any title to the property if the adoption of Prem Sukh Das was a valid adoption. Neither Mansa Ram, Kanhi Ram [64] nor Mangal Ram appears to have raised any claim to the property or to have questioned the validity of the adoption until after the decision of this Court of the 12th of June 1885, although Prem Sukh Das had died on the 3rd of December 1879. One may infer that the descendants of Ishar Das and relations of Chajju Ram, the natural father of Prem Sukh Das, never thought, until that decision of this Court, that the validity of the adoption of Prem Sukh Das could be questioned.

We dismiss, with separate sets of costs to Musammat Parbati and to Musammat Sundar, First Appeal No. 154 of 1889, and affirm the decree below. We dismiss with separate sets of costs to Musammat Parbati and to Musammat Sundar, First Appeal No. 162 of 1889 and affirm the decree below.

Appeal dismissed.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

KISHAN SAHAI (*Objector*) *v.* ALADAD KHAN AND ANOTHER (*Decree-holders*).* [2nd December, 1891.]

Civil Procedure Code, s. 13, Expl. II—Res judicata—*Execution of decree—Principle of* res judicata *as applied to execution proceedings.*

Where a person on his own application was added as a party respondent to an appeal, and on the case in appeal being remanded under s. 562 of the Code of Civil Procedure for re-trial on the merits, practically took no steps whatever to defend the suit.—*Held* that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it. *Ram Kirpal* v. *Rup Kuari* (1) referred to.

[D., 19 B. 821 (825).]

[N.B.—This is an off-shoot of 10 A. 289 *supra*.—Ed.]

THE facts of this case sufficiently appear from the judgment of the Court.

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* First Appeal, No. 9 of 1890, from a decree of Rai Piari Lal, Subordinate Judge of Meerut, dated the 12th November 1889.

(1) 6 A. 269.

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Mr. *T. Conlan* and Pandit *Sundar Lal*, for the appellant.
Mr. *Abdul Raoof*, for the respondents.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This is an appeal arising out of the execution of a decree. One Aladad Khan brought his suit against Ismail Khan and others in which he claimed possession of [65] his share of his father's estate. His suit was dismissed in the first Court on the finding that he was illegitimate. It finally came in appeal before this Court. Aladad Khan was the appellant, and during the pendency of the appeal in this Court, Lala Kishen Sahai, who is the appellant in this execution-appeal, presented a petition on the 11th May 1887 to this Court, alleging that he was the purchaser of the property in suit, and asking to be made a respondent in the case, the case being the appeal. On the same day this Court passed an order under ss. 372 and 582 of the Code of Civil Procedure, adding him as a respondent in the suit. The result of the appeal here was that on the 7th April 1888 this Court allowed the appeal, holding that the plaintiff, Aladad Khan, was legitimate, and the suit was remanded under s. 562 of the Code of Civil Procedure for trial on the merits. Now, as we have said, that order of remand was made on the 7th April 1888. Kishan Sahai was a party to that order of remand. The 29th January 1889 was fixed in the Court below, we assume, for the hearing of the case, and on the 12th of that month Kishan Sahai presented an application (document No. 11) in which he asked for two months' time on the ground that he had not his documentary evidence ready. On the 15th January 1889 the Subordinate Judge passed an order allowing Kishan Sahai one month's time and fixing the hearing for the 6th March 1889. The day before 6th March, *viz.*, on the 5th March, Kishan Sahai presented an application alleging that he had been induced by false representations of the plaintiff, Aladad Khan, to advance the money on the property, and asking that he might be brought in as a party to the suit under s. 32 of the Code of Civil Procedure, and be allowed to put in a defence, and that issues might be framed and the case tried as against him. On the 6th March 1889, the Subordinate Judge rightly held that as the High Court had made him a party to the suit, by its order to which we have referred, he must be regarded as a party until his name should be struck off, and that his position was not that of a party merely to the appeal, and refused the application. Now Kishan Sahai, if he had chosen to do so, could long before the 5th March 1889 have filed a written statement raising any defence which he [66] had or thought he had. The suit as against him commenced from the time when he was made a party to it, and, for the matter of that, if he had been so disposed, he might have filed his written statement in this Court even during the pendency of the appeal. Kishan Sahai does not appear to have taken any steps prior to the 5th March 1889 to file a written statement, either in this Court or in the Court below, and it is to be observed that in the petition which he presented to this Court upon which the order of the 11th May 1887 was passed, he merely alleged his title as that of a purchaser holding a sale-certificate. Ultimately, the Subordinate Judge, on the re-trial of the suit under the order of remand of this Court, decreed the plaintiff's claim for possession. When the plaintiff proceeded to execute that decree, Lala Kishna Sahai filed objections, seven in number, only one of which, namely, No. 6,

* See 10 A. 289.—ED.

is relied on here; indeed, there is nothing in the other objections. Now as to that, Lala Kishan Sahai should have raised as a defence the matter alleged in that paragraph 6, if it amounted to a defence at all. He should have done so either in this Court when the case was here or at the latest in the Court below in proper time. Under the circumstances, we are of opinion that it is a case which falls within the principle of explanation ii of s. 13 of the Code of Civil Procedure. Although s. 13 may not in terms apply, by reason of the matter not having been decided in another suit, still, the Privy Council in an analogous case has told the Courts in India that the principle of law underlying s. 13 is to be applied to proceedings in the execution of decrees. The case to which we refer is *Ram Kirpal* v. *Rup Kuari* (1). In fact, until the Subordinate Judge was on the eve of deciding the suit before him on remand, Lala Kishan Sahai never suggested apparently any such defence as that shadowed forth in paragraph 6 of his objections. We dismiss this appeal with costs.

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Appeal dismissed.

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[67] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood, and Mr. Justice Knox.

BENI PRASAD (*Plaintiff*) v. HARDAI BIBI AND ANOTHER (*Defendants.*)*
[4th February, 1892.]

Hindu Law—Benares School—Adoption—Adoption of only son—Maxim, quod fieri non debuit † factum valit.

According to the Benares School of Hindu Law, the giving in adoption of an only son is sinful, and to that extent contrary to the Hindu Law; but the adoption of such a son, having taken place in fact, is not null and void; and the maxim *quod fieri non debuit † factum valet*, is applicable and should be applied to such an adoption.

So *held* by the Full Bench. *Hanuman Tiwari* v. *Chirai* (2) approved and followed.

[R., 17 A. 294; 24 B. 367; 1 Bom. L.R. 144 (152); 3 O.C. 129 (135).]

IN this case the following questions were referred to the Full Bench by Mahmood and Young, JJ.:—

"1. The adoption of an only son having taken place in fact, is such adoption null and void under the Hindu law?

"2. If so generally, does subsequent birth of sons to the natural parents of the adopted son, have retrospective effect of validating the adoption?

"3. Does the circumstance that the adopted son is a *Sagotra*, or descended from one common ancestor with the adoptive father, render his case an exception to the general rule of prohibition against adoption of only sons?"

It was stated in the order of reference that, in consequence of doubts having been cast on the correctness of the ruling of the Full Bench in *Hanuman Tiwari* v. *Chirai* (2), it was desirable that that ruling should be reconsidered by the whole Court.

Mr. *Dwarka Nath Banerji* and Munshi *Juala Prasad*, for the appellant.

Mr. *Jogindro Nath Chaudhri* and Munshi *Kashi Prasad*, for the respondents.

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* First Appeal No. 35 of 1888.
(1) 6 A. 269.

† For "debuit" read "debet."
(2) 2 A. 164.

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JUDGMENTS.

[68] EDGE, C.J.—Three questions have been referred for the opinion of the Full Bench. I propose to consider the first question, and that only. It is, "The adoption of an only son having taken place in "fact, is such an adoption null and void under the Hindu Law?"

The adoption in question was one in the *dattaka* form, and the parties were Agarwala Banias of Benares.

The question is one as to which there has been and is much difference of opinion in the Courts in India. It is not suggested, and, indeed, I am satisfied that it could not be suggested, that there is, apart from the written sacred law of the Hindus, any custom which would make such an adoption void. Nor is it suggested, that the texts of the Hindu Law, or the passages in the books of the Hindu commentators, which have been regarded by some as imperatively prohibiting the adoption of an only son, were founded on a custom. No custom in Banares to make such an adoption has been alleged. Consequently, the answer to the question in this case does not depend on any custom, and must be sought for in the written law of the Hindus. The question is one surrounded by much difficulty. The difficulty mainly consists in ascertaining what is the true and reasonable construction to be put on certain texts of the sacred law of the Hindus, and upon certain passages in the works of Hindu commentators, and further in ascertaining how far such passages can safely be taken as expressing what the Hindu Law, as accepted by the School of Benares, is on this subject. The difficulty is enhanced by the fact that the texts and passages are in Sanskrit, and that some Sanskrit scholars are of opinion that the earlier translations into English of some of those texts and passages are incorrect and are in fact misleading.

In dealing with the question as to whether those texts and passages in Sanskrit have been incorrectly translated, I must say at once that I am entirely ignorant of Sanskrit; but having to express an opinion on the subject I must do so, having formed it as best I could upon the apparent reasonableness or unreasonableness of the criticisms of those competent to make them.

[69] Briefly stated, the contentions on the question as to whether the adoption in this case is null and void are as follows:—On the one side it is said that the giving and receiving in adoption in the *dattaka* form of an only son are absolutely and imperatively prohibited by the Hindu Law, and consequently that such an adoption would be void *ab initio* and the principle *quod fieri non debuit* factum valet* could not be applied to such an adoption. We all are agreed that if the adoption of an only son in the *dattaka* form is according to Hindu Law void *ab initio*, the principle expressed by that maxim cannot be applied.

On the other side it is said that the adoption of an only son is not absolutely or imperatively prohibited by the Hindu law, and that the reliable texts of that law express only a religious recommendation, and not an imperative prohibition, against the adoption of an only son, and consequently, altough the making of such an adoption would be sinful, it would not be void, and the principle *quod fieri non debuit* factum valet* would apply, and the adoption once made would be valid. We all are agreed that, if such an adoption is merely sinful and not void *ab initio*, that maxim applies.

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* For "debuit" read "debet."

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It is beyond doubt that the Code of Manu, in which adoption is treated of and recommended in the case of a sonless Hindu, does not contain any prohibition or recommendation against the adoption of an only son. So far as I have been able to ascertain, it is nowhere said in express language in any of the books of the sacred law of the Hindus or in any of the Hindu commentaries that the adoption of an only son is void.

The earliest text upon which this contention, which we have to consider, has arisen is one of Vasistha. It is mainly on that text, or, more correctly speaking, as I hope to show, on a part only of it, and partly on a text of Saunaka that those Hindu commentators who have regarded the adoption of an only son as imperatively prohibited, have relied.

As translated in Colebrook's Digest, Vol. 2, page 387, Vasistha's text is, so far as is material, as follows. 'A son formed of seminal fluids, and of blood proceeds from his father and mother **[70]** 'as an effect 'from its cause; both parents have power, *for just reasons*, to give, to sell, 'or to desert him; but let no man give or accept an only son, since he 'must remain to raise up a progeny for *the obsequies of* ancestors. Nor 'let a woman give or accept a son, unless with the assent of her lord,' &c. That text of Vasistha is thus translated by Mr. Mandlik at page 499 of his Vyavahara Mayukha of 1880 (which I shall hereafter refer to as Mandlik's Hindu Law) thus, "man produced from virile seed and uterine blood 'proceeds from his father and his mother as an effect [from its cause]. 'Therefore his father and mother have power to give, to sell, or to abandon 'their son. But no one should give or receive an only son, for he saves 'the man [from *put* or *hell*].' Except in so far as Mr. Colebrooke has interpolated the words "*for just reason*" in his translation, the two translations, although differing slightly in the words used, appear to me to convey the same meaning.

The question is how is the text of Vasistha to be construed. It must clearly be construed according to the rule for the construction of the texts of the sacred books of the Hindu Law if authoritative rules on the subject exist. That rules for the construction of the sacred texts and law of the Hindus do exist cannot be disputed, although those rules have been frequently overlooked or not referred to by Judges or English text-writers, probably because they are in Sanskrit and have, so far as I am aware, not yet been translated. That they are rules of the highest authority is obvious from the manner in which they have been referred to by Mr. Colebrooke. Mr. Mandlik also vouches for them and so does Golapchandra Sarkar in his Hindu Law of Adoption. (Tagore Law Lectures of 1888). Those rules of construction are to be found in the Mimansa of Jaimini. Jaimini, as we have been informed by counsel in the course of the argument, lived in the thirteenth century of the Christian era. He was consequently subsequent in date to the Mitakshara and anterior in date to the Dattaka Mimansa and the Dattaka Chandrika, a fact which, in my opinion, has some bearing on the question which we have to consider, particularly **[71]** if we find that those rules are consistent with the construction put by the author of the Mitakshara upon the text of Vasistha, and that in commenting upon that text the authors of the Dattaka Mimansa and the Dattaka Chandrika ignored the rule of the Mimansa of Jaimini which is applicable to it. Let us see what was Mr. Colebrooke's opinion of the Mimansa of Jaimini. It is to be found in the Transactions of the Royal Asiatic Society, Volume I, page 457. As I have not a copy of the Transactions before me, I shall quote the passage from them which is set

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out at page 74 of Golapchandra Sarkar's Hindu Law of Adoption. As to the Mimansa philosophy of Jaimini, Mr. Colebrooke said—

'The disquisitions of the Mimansa bear, therefore, a certain resem-'blance to juridical questions, and, in fact, the Hindu law being blended 'with the religion of the people, the same modes of reasoning are appli-'cable, and are applied to the one as to the other. The logic of the 'Mimansa is the logic of the law; the rule of interpretation of civil 'and religious ordinances. Each case is examined and determined 'upon general principles; and from the cases decided the principles 'may be collected. A well ordered arrangement of them would con-'stitute the philosophy of law; and this is, in truth, what has been 'attempted in the Mimansa . . . . Instances of the application of reason-'ing, as taught in the *Mimansa*, to the discussion and determination 'of juridical questions, may be seen in two treatises on the Law of 'Inheritance, translated by myself, and as many on Adoption, by a 'member of this Society, Mr. Sutherland. (See *Mitakshara*, on Inheri-'tance, 1, 1, 10 and 1, 9, 11, and 2, 1, 34; *Jimuta Vahana*, 11, 5, 16-19. '*Datt. Mim.*—on adoption 1, 35-41 and 4, 65-66 and 6, 27-31. *Datt 'Chand* 1, 24 and 2, 4.)' Golapchandra Sarkar in his Hindu Law of Adoption, page 74, gives much useful information as to the Mimansa of Jaimani and also as to the Vedanta. He there says, Mimansa, 'however, is the name of a School of Hindu philosophy founded by Jaimini, 'the object of which is to establish the cogency of precepts contained 'in the Scripture, and to furnish maxims of interpretation, by means 'of the rules of reasoning.' [72] And further on at page 74 he says, 'The Vedanta School of philosophy the founder of which is Vyasa, is 'also denominated Mimansa, and in order to distinguish it from Jaimini's 'philosophy, the Vedanta is called the Uttara or posterior Mimansa; 'and the other, the Purva or prior Mimansa. This division is similar 'to that between the Vedas and the Upanishads and based upon the 'same principle; the Mimansa of Jaimini deals with the practical or 'ceremonial precepts; whereas that of Vyasa relates to the theroetical 'or theological precepts contained in the Upanishads. But as the school 'founded by Vyasa has a distinct name of its own, the word Mimansa 'when used without qualification means Jaimini's philosophy. The later 'Mimansa is supplementary to the prior; and they are parts of one 'whole. The two together comprise the complete system of interpre-'tation of the precepts and doctrines of the Scriptures, both practical and 'theological. The rules furnished by them are followed by the commen-'tators as authoritative while discussing doubtful questions of law.' I have referred thus at length, by giving the above quotations, to the Mimansa of Jaimini or the Purva Mimansa, as it is desirable to keep in mind that the rules of the Purva Mimansa, although they may sometimes have been over looked or not attended to by Hindu as well as English commentators and text-writers and by English translators, are no new rules of construction but are authoritative rules for the construction of texts of the sacred law of the Hindus.

We have been referred in the course of the argument in this case to the Mimansa of Jaimini, which, as I have said, is in Sanskrit. So far as I could judge from the translation made during the argument, Mr. Mandlik has correctly given the effect of the rule at page 499 of his Hindu Law in the passage which I shall now quote.

After giving his translation of the text of Vasistha, which I have already quoted, Mr. Mandlik says—' This text on the most approved principles

'of criticism must also be treated as a recommendatory one, inasmuch 'as it contains a precept that is intended [73] for a certain specified 'purpose. It is a rule of the Purva Mimansa that all texts supported by 'the assigning of a reason are to be deemed not as *vidhi* but simply as '*artha-vada* (recommendatory). When a text is treated as an *artha-vada*, 'it follows that it has no obligatory force whatever. Sabara Svamin con-'structs an *adhikarana* (a topic) on this head, which he calls *hetumanni-* '*gadadhikarana* (a topic in regard to texts which contain a clause contain-'ing the reason of the precept) out of five *sutras* of Jaimini, &c.'

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Page 500 and the following pages of Mr. Mandlik's book contain much valuable matter bearing on the subject, and the question as to the legality of the adoption of an only son.

Applying the rule of construction of the Mimansa of Jaimini to the text of Vasistha, I am of opinion that that text, so far as it applies to the adoption of an only son, is to be construed as a religious recommendation and not as a positive and imperative prohibition, as we find the reason given in the text for the precept.

If the continuation of the text of Vasistha which I have been considering is correctly translated by Mr. Colebrooke as 'nor let a woman give or accept a son, unless with the assent of her lord' or if the more correct translation is 'a woman *shall* not give or accept a son except with the assent of her husband,' it is to be noticed that according to the rule of construction to which I have referred the text as to a woman not giving or taking a son in adoption gives no reason for that precept, and hence that precept might be construed as a positive and imperative prohibition against a widow adopting a son to her deceased husband without authority from him, as it has been construed by this Court in *Tulshi Ram* v. *Behari Lal* (1). In that case I declined to express any opinion on the question as to the legality of the adoption of an only son.

Besides the consideration to which I have already referred, there are other considerations, apart from those which may be gathered from judicial decisions to which I shall now refer, which [74] also lead me to the conclusion that the text of Vasistha must be regarded as containing a religious recommendation only, and not an imperative prohibition.

According to Mr. Mandlik 'Manu is the oldest law giver of the Indian 'Aryas. His mention by the Sruti is evidence of his antiquity. From 'the Vedas down to the Puranas, Manu and his Dharmasastra are always 'appealed to as the chief guides.' (Hindu Law by V. N. Mandlik, introduction, p. XLVI). According to Mr. Mayne, 'The Code of Manu has 'always been treated by Hindu sages and commentators, from the earliest 'times, as being of paramount authority; an opinion, however, which does 'not prevent them from treating it as obsolete whenever occasion requires' (Mayne's Hindu Law and Usage, 3rd edition, paragraph 20).

The Code of Manu which has come down to us is one of great antiquity. I am not aware that any authority has placed it later than the year 200 B. C. Manu, if he was not a mythological being, but a man who actually existed, may have lived at any time prior to the year 200 B. C. and as far back as, if not further back than, the time of Moses of the Hebrews.

It is impossible to be certain now to what extent the Code of Manu, as we have it, is an abridgment of the original, or whether those texts which it now contains are exactly as they were when it was first

(1) 12 A. 328.

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promulgated; but of its antiquity and of its pre-eminent authority amongst the Hindus there can be no doubt. It appears to me that sitting here as a Judge to decide a question of Hindu Law, it is not for me to consider whether Manu was a mythological or real being, and that I must, as far as possible, approach the subject with which we have to deal in the frame of mind of an orthodox Hindu.

According to Manu himself, he was a son of Brahma, and received from Brahma the Code which he communicated to the ten sages, by one of whom, Bhrigu, it was recited and handed down to posterity. Mr. Mandlik is of opinion that a considerable time must have elapsed between Manu and his compiler, Bhrigu. According [75] to the Hindus, Manu was the first and principal of the Rishis or sages and lawgivers who composed the Smritis, which are believed to contain the precepts of the Divinity as handed down by memory and tradition and recorded from the recollection of the sages. The Smritis are not supposed to contain the *ipsissima verba* of the Divinity as directly imparted by the Divinity to the Rishis, but those words as they were remembered and handed down by tradition.

Whether the Code of Manu was the result of divine inspiration to him, or was the record of tradition, or was partly one and partly the other, intermixed or not with precepts originated by himself, or whether it is or is not now as it originally was, it is most remarkable that although it deals with the subject of adoption, it contains no prohibition against the adoption of an only son, and that so far as has been suggested in argument before us or I have been able to ascertain, such prohibition, if on the true construction of the text of Vasistha such text is a prohibition, appears first in that text of Vasistha. If the Code of Manu, as we now have it, is in an abridged form, it is to the highest degree improbable that those who abridged the original Code would have left out a portion of the original text containing a prohibition so important to the souls of Hindus from the point of view of those who contend that the adoption of an only son is void, if such a prohibition in fact was to be found there. By those who contend that such an adoption is void, it is not suggested that the imperative prohibition, if there is one, is the result of any custom which grew up after the time of Manu, but it is insisted that it is and has always been a vital and fundamental principle of the Hindu sacred law, any infraction of which carries with it the terrible consequences of depriving not only the giver and the acceptor of the only son in adoption, but the souls of their respective ancestors of all means of attaining to the ultimate heaven of the Hindus. So far as I can ascertain, there is nothing in Vasistha, the Mitakshara or elsewhere to indicate that the Code of Manu ever contained any such prohibition. It is difficult to understand that Manu when recommending and authorising adoption should have omitted any [76] reference to a prohibition to the adoption of an only son if according to the Divine law, as revealed or known to him, such an adoption was illegal and fraught with such momentous consequence to the souls of Hindus as it is contended it has. Vasistha does not appear to have been a contemporary of Manu, who is frequently quoted by Vasistha. Mr. Mandlik is of opinion, and apparently on good grounds, that the Smriti of Vasistha is very ancient and was composed before the compilation by Bhrigu of the present Code of Manu. (Mandlik's Hindu Law, pages 328 and 329.) If that view be correct it is still more difficult to understand why, on the assumption that the text of Vasistha contains a positive and imperative prohibition against the adoption of an only son, the compilation by Bhrigu of the

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Code of Manu should contain no reference to what would be and must then have been known to be a fundamental prohibition of the Hindu divine law. The Smriti of Vasistha was known to Bhrigu (see Mandlik's Hindu Law, page 329). The only conclusion to which I can come is that the original texts of Manu did not contain any prohibition against the adoption of an only son, aud that no such prohibition had been revealed to or was known to him.

Vasistha undoubtedly was one of the Rishis, and his texts are of very great authority as presenting divine precepts recorded from memory or tradition, but in the words of Vasistha, and not in the actual words of the Divinity.

Having regard to the fact that Manu nowhere records any prohibition against the adoption of an only son, and that if such a prohibition existed it must, from the consequences which would follow from the infraction of it, have been a vital and fundamental prohibition of the divine law of the Hindus, I am further led to conclude that the text of Vasistha must be construed as a religious recommendation and not as a positive and imperative prohibition.

I am well aware that the later Smritis contain texts which do not appear in earlier Smritis, and that the Hindu sacred law has developed in the course of ages, partly no doubt the result of customs which sprang up and partly due to the introduction of texts by the [77] Rishis and to glosses and interpolations of Hindu commentators which have been accepted by the Hindus as authoritative and correct. Such glosses and interpolations must not be lost sight of when one is attempting to construe ancient texts, and I shall consider them later on. One of the lower Rishis was Saunaka. He is not referred to by the author of the Mitakshara on the question of adoption. The author of the Mitakshara bases his commentary, so far as this question of adoption is concerned, on the text of Vasistha. I think that fact is of importance, as there is no more authoritative commentary than the Mitakshara recognised by the School of Benares.

Mr. Sutherland translates the text of Saunaka thus:—"By no man having an only son (*eka-putra*), is the gift of a son to be ever made. By a man having several sons (*bahu-putra*), such gift is to be made, on account of difficulty (*prayatnata*)." That translation is to be found in Mr. Sutherland's translation of Section IV, paragraph I of the Dattaka Mimansa at page 571 of Stokes's Hindu Law Books.

Mr. Mandlik's translation of and his comments on the texts of Saunaka are to be found at pages 497, 498 and 499 of his Hindu Law. His translation is as follows:—"One having an only son should never give him in adoption; one having several sons should give a son (in adoption) with every effort."

Mr. Mandlik points out that the Sanskrit word which he has translated in both instances in that text as "should" is capable of meaning 'should be done," "must be done" or is "proper to be done," and he points out that if that Sanskrit word means "must" in that portion of the same text which relates to the adoption of an only son, it ought to read as "must" in that portion of the same text which relates to a man having several sons. It has never been suggested, so far as I am aware, that the Hindu Law imposes any imperative duty on a father to give one of his sons in adoption. Mr. Mandlik at pages 498 and 499 adduces a further and apparently a strong argument to show that Saunaka himself regarded the precept as to the adoption of an only son as purely directory.

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[78] Golapchandra Sarkar in his Hindu Law of Adoption at page 285 has made some valuable comments on the meaning which, according to the author of the Dayabagha, attaches to the Sanskrit word which Mr. Mandlik has translated as "should" in the text of Saunaka.

I next come to the commentary known as the Mitakshara, which, according to Mr. Mayne, following West and Bühler (Mayne's Hindu Law and Usage, 3rd edition, paragraph 26) was written about the latter part of the eleventh century, and consequently many centuries before the appearance of the Dattaka Mimansa of Nanda Pandita.

Mr. Colebrooke's translation of the passages in the Mitakshara bearing on this question, is as follows:—'10. By specifying distress, it is intima-'ted that the son should not be given unless there be distress. This 'prohibition regards the giver (not the taker). 11. So an only son must 'not be given (nor accepted). For *Vasistha* ordains, "Let no man give '"or accept an only son." '12. Nor, though a numerous progeny exist, 'should an eldest son be given,' &c. The words in parenthesis were incorporated by Mr. Colebrooke from Balam-bhatta's commentary. Now the author of the commentary known as Balam-bhatta's, who has frequently been assumed to have been a man and a Pandit, was in fact a lady of Benares of modern times, whose commentary, although it has frequently been mentioned in the course of arguments in cases before me in this Court, has never been relied upon in those cases by any counsel or vakil as of any authority in these provinces, in which the Benares School of Hindu Law prevails. The Sanskrit words "*na deyah*," which Mr. Colebrooke in passage 11 has translated as "must not," have been translated by him in passages 10 and 12, that is, in the prior and subsequent passages of the group, as "should not" in one case and as "nor should" in the other. Unless Mr. Colebrooke, as is suggested by Golapchandra Sarkar at page 288 of his Hindu Law, was influenced by the gloss in Balam-bhatta's commentary, it is difficult to understand why in his translation he introduced an [79] important interpretation and translated "*na deyah*" as "must not," in passage 11, particularly when, as has been admitted by the learned counsel for the appellant, who is familiar with Sanskrit, the word in Sanskrit which Mr. Colebrooke translates in passage 11 as "so" means "similarly." Passage 12 commences with the same Sanskrit word, but Mr. Colebrooke in his translation of passage 12 has certainly failed to give effect to it. Golapchandra Sarkar at page 286 of his Hindu Law of adoption gives the translation of those three passages thus:—"By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver. Similarly, an only son should not be given." For Vasistha ordains, "let no man give or accept an only son." Similarly, though more than one son exist, the first-born son should not be given, for he chiefly fulfills the office of a son, as is shown by the following text of Manu, "By the first-born son, as soon as born, a man becomes the father of male issue."

It will be noticed that although the author of the Mitakshara cities only a portion of the particular text of Vasistha, omitting that portion of the text which gave the reason for the precept, his use of the word which as translated means "similarly" and his use in all three passages of the words "*na deyah*" show, when one examines the second of the three passages in conjunction with the first of them, that he construed the text of Vasistha as the rules of the Mimansa of Jaimini require it to be construed, and read the text of Vasistha as giving a religious

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recommendation only and not as imposing an imperative prohibition against the adoption of an only son.

The only justification which I can conceive for translating "*na deyah*" as "must not" in that passage in the Mitakshara would have been the finding that the actual text of the Mitakshara imperatively forbade the *accepting* as well as the *giving* of an only son in adoption; but it does not, nor, as I understand it, does it even imperatively forbid the *giving* of an only son in adoption.

The Hindu Law must, so far as it depends on its written law, with which alone we have to do in this reference, be ascertained [80] from a consideration of the text of that law and of the authoritative commentaries, and not by attempting to construe the mistaken and misleading translations or unauthorised interpolations of English translators, otherwise the sacred law of the Hindus would be the law of the English translator and not the law as contained in the sacred books or authoritative Hindu commentaries. Neither a Judge nor a translator has any authority to make Hindu sacred law. The very idea is ridiculous. The duty of the one is to translate correctly, with power to make such spearate comments on the text as he thinks fit, the duty of the other is to interpret the texts or correct translations of them to the best of his ability. Shortly after I took my seat in this Court, the late Pandit Ajudhia Nath, who was one of the ablest and most accomplished lawyers who has practised in this Court in my time, and who had made the study of the Hindu Law a speciality, told me, in conversation and without reference to any particular case, that in his earlier days in the profession, he had from trusting to judicial decisions, English translations and English text writers, formed very incorrect views on many points of Hindu Law, which were only removed when he latter applied himself to a consideration of the original texts.

The opinions and arguments of Golapchandra Sarkar, at pages 286, 287, 288 and 289 of his Hindu Law of adoption, as to what is the correct translation of the three passages in the Mitakshara, to which I have referred, are instructive and should be read carefully.

I entirely agree with Golapchandra Sarkar (page 289) that in considering Hindu Law—"It should be borne in mind that a transaction "may be perfectly valid in law, however blameable, reprehensible or "sinful it may be represented." It is perfectly true, as pointed out in the note (*b*) at page 915 of West and Bühler's Hindu Law, 3rd edition, that 'It is not opposed to Hindu notions that a man should benefit spiritually by moving another to an act which in him is sinful.' The importance of that fact in determining the question as to whether, according to the text of Vasistha or the Mitakshara, the adoption of an only son is void, is shown by the attempts which have [81] been made to read those texts as if they not only prohibited the *giving* but also the *accepting* of an only son in adoption.

The importance of ascertaining and attending to the correct translation of the passage in the Mitakshara cannot be exaggerated, and I hope to show later on, when I come to deal with judicial decisions on this important question, that Markby, J., in Calcutta, Westropp, C. J.. in Bombay, and Turner, J., in these Provinces, were very materially influenced by what I believe to be the incorrect and misleading translation by Mr. Colebrooke of the passage in the Mitakshara to which I have referred.

In my opinion the Mitakshara correctly translated leaves the text of Vasistha as it stood, and having regard to that text and to the preceding

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and succeeding passages in the Mitakshara, the inference is that the author of the Mitakshara did not understand that the adoption of an only son was imperatively prohibited by the text in Vasistha or by the Hindu sacred law as he knew it, but understood the contrary.

I now pass on to the Dattaka Mimansa of Nanda Pandita. Referring to that commentary and to the Dattaka Chandrika, Mr. Mayne says—"The two special works on adoption, *viz.*, the Dattaka Chandrika and the Dattaka Mimansa, possess at present an authority over other works on the same subject which is, perhaps, attributable to the fact that they became early accessible to English lawyers and Judges from being translated by Mr. Sutherland." I have quoted from paragraph 30 of Mayne's Hindu Law and Usage, 3rd edition. The whole paragraph is worthy of attention when one is considering the authority of either of the commentaries to which Mr. Mayne is referring.

Their Lordships of the Privy Council in *The Collector of Madura* v. *Moottoo Ramalinga Sethupaty* (1) appear to have referred in guarded language at page 437 of the report to the authority of the Dattaka Mimansa and the Dattaka Chandrika, and again at page 438 to the authority of the Dattaka Mimansa.

[82] The comments of Golapchandra Sarkar on the Dattaka Mimansa and the Dattaka Chandrika (Hindu Law of Adoption, pages 120 to 125 inclusive) deserve careful perusal; for not only do they afford ground to doubt that any special authority should be attached to the Dattaka Mimansa, but they afford ground for doubting that the Dattaka Chandrika may not heave been a forgery. See the representation as to authorship made by the author of the Dattaka Chandrika in verse 2 of section 1 of that treatise.

The Dattaka Mimansa came into existence within the last three hundred years, and is no doubt on some questions considered as a high authority in the School of Benares, but not on any question of the weight which is attached to the Mitakshara. In my opinion it puts upon the text of Vasistha a construction at variance with that which is put upon it by the author of the Mitakashara and which is not justified by the rule of the Mimansa of Jaimini. The importance of the Dattaka Mimansa to my mind on the question with which we are concerned consists in this, that it and the Dattaka Chandrika most materially influenced, and I might even say biassed, the judgment of Mitter and Jackson, JJ., in *Upendra Lal Roy* v. *Srimati Rani Prasanna Mayi* (2). The Dattaka Mimansa, the Dattaka Chandrika and Mr. Colebrooke's translation of the text of the Mitakshara to which I have referred together with the judgment of Mitter, J., in 1 Beng. L. R. 221 appear to have had the same effect upon the judgment of Markby, J., and Garth, C. J., in *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (3) and not to have been without considerable influence on Westropp, C. J., in *Lakshmappa* v. *Ramava* (4).

In the judgment of Mitter, J., at pages 223 and 224 of 1 Beng. L.R. is given what purports, as I infer from the footnotes of reference, to be a translation of verses 1, 3 and 4 of section 4 of the Dattaka Mimansa. Where Mitter, J., got that translation from I have been unable to ascertain, unless it was his own condensation of the translation of Mr. Sutherland. I give in full the passage as it appears in his judgment. It is as follows:—"By no man having an only **[83]** son (*eka-putra*) is the gift of a son to

(1) 12 M. I. A. 397. (2) 1 B. L. R. A. C. 221. (3) 3 C. 443. (4) 12 B. H. C. R. 364.

" be ever made" (verse 1). " He who has an only son, or one having an " only son, the gift of that son must never be made." For as Vasistha " declares, " an only son let no man give." Therefore a prohibitioa against acceptance is established by the text in question. Accordingly Vasistha " says let no man give or accept," &c. (verse 3). 1892 FEB. 4.

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" To this he subjoins a reason. 'For he is destined to continue the " line of his ancestors.' His being intended for lineage being thus " ordained in the gift of an only son, the offence of extinction of lineage " is implied. Now, this is incurred by the giver and the receiver also " (verse 4)."

Mr. Sutherland's translation (Stoke's Hindu Law Books, pages 571 and 572) of verses 1, 2, 3 and 4, of section 4 of the Dattaka Mimansa is as follows:—

" 1. Next, in reply to the question, as to the qualification, of the " person to be affiliated, Saunaka declares: 'By no man having an " only son (*eka-putra*), is the gift of a son to be ever made. By a "man having several sons (*bahu-putra*), such gift is to be made, on "account of difficulty (*prayatnatas*).' "

" 2. He, who has one son only, is '*eka-putra*,' or one having "an only son: by such a one, the gift of that one son must not be made; for a text of Vasistha declares, 'an only son, let no man give,' &c."

" 3. Since the word 'gift' means the establishing another's pro- " perty after the previous extinction of one's own: and another's pro- " perty cannot be established without his acceptance: the author " (Saunaka) implies this also, in his text in question. Therefore a " prohibition likewise against acceptance is established by that very " text. Accordingly Vasistha says: 'an only son let no man give " or accept, &c., &c."

" 4. To this he subjoins a reason, 'for he is [destined] to " continue the line of his ancestors.' " " His being intended for line- " age, being thus ordained: in the gift of an only son, the offence " of extinction of lineage is implied. Now, this incurred by both " **[84]** the giver and adopter also. For the [reason in question], is sub- " joined, after both (verbs: *viz.*, 'give' and 'accept')."

It will be noticed that the author of the Dattaka Mimansa not only goes far beyond the author of the Mitakshara and treats the text of Vasistha as imposing an imperative prohibition against the adoption of an only son, but in construing that text of Vasistha ignores the rule of the Mimansa of Jaimini as to construction, to which I have referred, and that notwitstanding that in other cases according to Mr. Colebrooke he had followed rules of construction of the Mimansa of Jaimini. The author cf the Dattaka Mimansa also, it is to be noticed, relies on this question of adoption on Saunaka, whom on that question the author of the Mitakshara ignores.

Mr. Sutherland's Preface to his translation of the Dattaka Mimansa and the Dattaka Chandrika should be carefully read by those who are disposed to attach great importance to those commentaries.

That Preface shows further that Mr. Sutherland thought that in translating the Dattaka Chandrika he was translating a work by Devanda Bhatta, who was the author of the Smriti Chandrika. On this latter point also it is advisable to consult paragraph 30 of Mayne's Hindu Law and Usage, 3rd edition.

It is not to be assumed that the whole of a commentary is to be relied upon, because it is found that in some parts it is consistent with the

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practices of the Hindus or the texts of the sacred books and to that extent has been considered as authoritative. The work of the wildest and most inaccurate reasoner on sacred texts would probably be found to be on many points in accord with the popular views, with same texts which he quoted, and with some of the opinions of other commentators.

The translation relied upon in the same judgment of Mitter, J., of the passage in the Dattaka Chandrika is "By no man, 'having an only son is the gift of a son to be ever made" (sec. I verse 29).

Mr. Sutherland's translation of that verse (Stokes' Books of Hindu Law, page 636) is as follows:—"In answer to the question—[85] 'by whom is a son to be given ?' Saunaka declares—'By no man having an only son is the gift of a son to be ever made. By a man having several sons, such gift is to be anxiously made."

This shows that the author of the Dattaka Chandrika was making his comment not upon Vasistha, but upon the text of Saunaka, to which I have already referred. It is to be observed that neither the text of Vasistha nor that of Saunaka says that the gift of an only son is an offence which will cause an extinction of lineage in either the giver or the receiver, and that that gloss was first put upon Vasistha's text by the author of the Dattaka Mimansa.

According to Jagannatha and others the adoption of an only son is not imperatively prohibited, and the texts relating to the adoption of an only son are to be read as containing a religious recommendation only.

As to the process of reasoning by which, apart from the gloss of the Dattaka Mimansa, it has been contended that on the adoption of an only son the lineage of the giver and the acceptor must become extinct, I shall next deal. Before proceeding to consider the more important judicial decisions on this question of the legality of the adoption of an only son, I wish to point out that, as it appears to me, much of the argument according to which such an adoption must be considered as imperatively prohibited is of that kind of argument known as the argument in a circle. It is said, "such an adoption is illegal because it deprives the giver and the receiver of lineage, or in other words, of descendants to offer the funeral cake," &c. When the question is asked, "Why should not the giver "of an only son be on the making of the gift in the position of a sonless "Hindu and therefore competent to adopt a son to himself, "the answer is, "Because the giving in adoption of an only son is illegal according to Hindu "Law and one who commits such an infraction of the Hindu Law must be "incompetent to adopt a son." When the question is put, "Even if the "giver of an only son becomes thereby precluded from all chance of lineage by adoption or by subsequent procreation, why does not the only son given in [86] adoption become a son to the acceptor," the answer is, "Because "such an adoption is illegal according to Hindu Law and therefore void." When I put the question, "Then, if the adoption is void why does not the only son continue to be for all purposes the son of his natural father ?" the only answer I received was, "the natural father 'had committed an act so sinful and illegal that he thereby lost his son." Whether or not it is considered that such a penalty is a just one upon the natural father, it appears to me that if such a view of the Hindu Law be correct, a very unjust measure would be meted out to the unfortunate only son, who, by reason of his age at the time generally prescribed for an adoption, must be considered as an innocent and unoffending party, who had no voice in the transaction, and still harder would be the fate of the souls of those

of the ancestors who died prior to such an adoption and who consequently could have had no voice in the matter of the adoption. The adopted son would according to such an argument have lost one father without gaining another. If I were one of the Judges who will have to decide this appeal after this reference to the Full Bench is answered, I would, before deciding against the legality of the adoption of the respondent, Ram Prasad, enquire whether he, Musammat Hardai Bibi, and his natural father, had been outcasted on account of the adoption of Ram Prasad. I believe it is over twenty years since the adoption took place. If those persons were not outcasted I should require to have explained to me how it happened, if the adoption was such a sinful and illegal act in the eyes of the Hindu law, they were not outcasted, particularly as they belong to a caste, the members of which are such sticklers for caste and for keeping their caste pure as are the Agarwala Banias of Benares, where the principles of the Benares School of Hindu Law are supposed to be understood and followed.

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I now proceed to consider the latter leading judicial decisions in India on this question. I do not propose to offer any separate criticisms on the earlier judicial decisions, which are referred to in the later cases, because, owing to the incomplete condition of this Court's library, there are few of those earlier decisions to which I have [87] access, and it might lead to a wrong impression as to my views and method of dealing with the subject if I were to criticise some only of the earlier decisions and pass others of them by in silence.

The first decision to which I shall refer is that in *Upendra Lal Roy* v. *Srimati Rani Prasanna Mayi* (1). That decision, as I have already pointed out, is almost, if not entirely, based on the passages from the Dattaka Mimansa and the Dattaka Chandrika, referred to in the judgment in that case. It was asserted in the judgment of Mitter, J., in that case "that the adoption of an only son is prohibited by the Hindu Shastras, is beyond 'all controversy.'" In support of that assertion none of the Hindu Shastras are cited, but what are apparently incomplete translations of passages from the Dattaka Mimansa and the Dattaka Chandrika are given. Manu, as given in the Dattaka Chandrika, is referred to in that judgment in support of what I agree with Markby, J., in considering to be a wholly incorrect proposition as to Hindu Law. I shall refer to this later. Whether or not Mitter and Jackson, JJ., who were without doubt Judges with well-deserved reputations as lawyers, consider that the Dattaka Mimansa and the Dattaka Chandrika were Hindu Shastras may be a doubtful point on a perusal of their judgment. Whatever they took them to be, they accepted their texts, or, more correctly speaking, the translations which they gave of them, as correct expositions of the Hindu Law on the subject of adoption. There is no trace in their judgment of their attention having been drawn to the authoritative rules of construction to be found in the Mimansa of Jaimini, or to the fact that the text, the meaning of which is disputed, first appeared in Vasistha. They saw no distinction in construction between the text which prohibited a woman adopting a son to her husband without his authority and that portion of the text which deals with the adoption of an only son. They said, referring to the passage cited by them from the Dattaka Chandrika as to a woman not adopting to her husband without his assent, "Can it be said that such an adoption would be valid in law? It will " be observed that the language

(1) 1 B.L.R.A.C. 221.

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employed in the preceding text [88] is "precisely similar to that employed in the text prohibiting the adoption of an only son." Those learned Judges, if they had paid regard to the rule of the Mimansa of Jaimini and applied it to the full text of Vasistha to which I have referred, could not have made that assertion. If they had had their attention drawn to the three passages in the Mitakshara which are commented on by Golapchandra Sarkar at pages 286 and 287 of his Hindu Law of Adoption, they would probably have come to the conclusion that in the view of the author of the Mitakshara the text of Vasistha relating to the adoption of an only son was one containing a moral or religious recommendation, and not a positive and imperative prohibition which would make such an adoption illegal and void. Those learned Judges nowhere refer to the Mitakshara, possibly because they may not have been aware of the pasages in the Mitakshara to which I have referred; but more probably because the Dayabhaga took the place of the Mitakshara in Lower Bengal; but neither do they refer to the Dayabhaga in support of any of the views set forth in their judgment. Possibly the Dayabhaga contained nothing which would support them. Further on in their judgment, referring to the adoption of an only son, they say—"It is to be borne in mind that the prohibition in question is "applicable to the giver as well as to the receiver, and both parties are "threatened with the offence of 'extinction of lineage' in case of violation." "That was, as I think I have shown, nothing but pure and unadulterated Dattaka Mimansa. Those learned Judges also relied upon cases numbered 3&18 at pages 178&179 of Vol. 2 of Macnaghten's Principles and Precedents of Hindu Law, 3rd edition. The passages printed by Sir William Macnaghten were apparently questions and answers put to and given by a Pandit. In support of the answer in case 3, no authority is cited. In support of the answer in case 18, Vasistha, as interpreted in the Dattaka Mimansa and the Dattaka Chandrika, was relied upon. It would appear from paragraph 30 of Mayne's Hindu Law, 3rd edition, that Sir William Macnaghten, at the date of his work Mr. W. H. Macnaghten, had not a very accurate idea of the authority to be allowed to the Dattaka Mimansa or the Dattaka Chandrika, or a correct opinion as to the authorship of the latter treatise.

[89] I have only one more comment to make on the judgment of Mitter and Jackson, JJ. It is that I entirely agree with Markby, J., (1) in his comment upon the passage in the judgment of Mitter and Jackson, JJ., in which at page 224 they are reported to have said, "An Act of "adoption is to all intents and purposes a religious act, but one of such a "nature that its religious and temporal aspects are wholly inseparable." With that proposition I entirely disagree, and for reasons similar to those given by Markby, J.

I now proceed to consider the judgment of Markby, J., in *Manick-Chunder Dutt* v. *Bhuggobutty Dossee* (2). Many of the reports referred to in that judgment are not in this Court's library, and I am consequently unable to test the accuracy of the criticisms passed upon the cases reported in them. I can however point out that Markby, J., in his criticism upon the case of *Musammat Tikday* v. *Hurree Lal* (3), at page 454 of the report, clearly shows that his mind was influenced by the Dattaka Mimansa. He there said, "The cardinal reason, therefore, why an only son, "cannot be adopted, namely, that the lineage of his family is thereby "extinguished, and the ceremonies can no longer be performed which are

(1) 3 C. 458. (2) 3 C. 443. (3) W. R. 1864, Gap. No. 133.

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"necessary for the salvation of his ancestors, does not apply." In that criticism Markby, J., was assuming the correctness of one of the disputed contentions on which he had to decide. It might be asked why, if the giver in adoption of an only son is to be treated as a man who has no son, should his ancestors be in a worse position than they would have been in if he had died without having had a son born to him and without having adopted one, and why should not others, who are authorized according to Hindu Law to perform the ceremonies for a sonless Hindu and his ancestors, perform the ceremonies necessary for the salvation of the souls of the ancestors of a giver in adoption of an only son, or why it should be assumed that subsequently to the adoption the natural father of the adopted son could not have a son born to him, or why the natural father having given his only son in [90] adoption should not, like any other sonless Hindu, be competent to adopt a son.

According to Markby, J., at page 460 of the report, there were only four cases in which it was clear that the point as to the legality of the adoption of an only son arose and was decided, namely, two cases at Calcutta which were against the adoption of an only son, and two cases, one at Madras and the other at Bombay, which supported such an adoption. Of the two cases at Calcutta one was that to which I have already referred, in which Mitter and Jakson, JJ., held that such an adoption was invalid. According to Markby, J., at the same page, five English text writers thought such an adoption illegal and one " backed no doubt by the important but solitary opinion of Jagannatha amongst Hindu text writers" thought it valid. In connection with the passage in the judgment of Markby, J., to which I have just referred, I cannot forget the statement of Mr. Mayne in paragraph 30 of his Hindu Law, 3rd edition, that " The two " special works on adoption, *viz.*, the Dattaka Chandrika and the Dattaka " Mimansa, possess at present an authority over other works on the same " subject, which is, perhaps, attributable to the fact that they became " early accessible to English lawyers and Judges from being translated by " Mr. Sutherland," and avoid wondering whether the circumstance of their early translation and consequent accessibilty to English lawyers and English Judges, coupled with a neglect to observe the rules of construction of the Mimansa of Jaimini, which owing to that Mimansa being in Sanskrit may have been little, if at all, known to English lawyers and English Judges, may not account for the views expressed in the two judgments and in some of the English text-books upon which Markby, J.,partly relied.

The Hindu text-writers upon whom Markby, J. relied were the authors of the Dattaka Mimansa and the Dattaka Chandrika, although he does also refer to the Mitakshara. In my opinion the Mitakshara does not support his view. In referring to the Mitakshara, Markby, J., did that which Mitter and Jackson., JJ., had omitted to do in their judgment upon which I have commented. [91] Referring to the Dattaka Mimansa, the Dattaka Chandrika and the Mitakshara, Markby, J., at page 459 of the "report said, " The authors of these treatises all quote the same text of "the sage Vasistha, which is the foundation of the whole doctrine." I thoroughly agree with Markby, J., that the doctrine, whichever is the true one, must be deduced from the text of Vasistha, but not from a part only of that text, but from the whole text read together, I, however, thoroughly disagree with him in thinking that the doctrine upon which he relied is to be found in the Mitakshara, or is reasonably to be deduced from the text of Vasistha, construed as I construe it by the rule of the Mimansa of Jaimini.

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Markby, J., at page 455 of the report states what I believe, from my experience of old cases, to be a very sound principle. Referring to the "opinions given by certain Pandits he said, "But it does not appear that "these opinions were ever submitted to any Court, nor is it said upon "what texts they were based, and I believe it to be a clear principle, "understood and acted upon ever since our Courts have been established, "not to accept as authority the opinions of Pandits unconfirmed by judicial "decision and unsupported by texts."

I have not had the advantage of seeing the opinions of the Bengal Pandits which Markby, J., states were unanimous, and I do not know what were the texts, if any, which those Pandits gave in support of them. We have, however, been referred in the course of the argument in this case to three opinions of Pandits given in cases in the Sadr Diwani Adalat of these provinces. They are Bywastha No. 9, Bywastha No. 24 and Bywastha, No. 25 to be found at pages 6, 16 and 17 of Bywasthas, Vol. I, Part I, published at Agra in 1861. The two latter appear to be those referred to by Westropp, C.J., in his judgment, upon which I shall presently make some comments. The first of those three Bywasthas relates to a question as to the adoption of an only son of a sister. The answer relates to the adoption of an only son and "Bishisht," the Dattaka Chandrika and Dattaka Mimansa are cited as the authorities. The second relates to the adoption of an eldest son, and no authority is [92] cited. Whilst in the third the Dattaka Chandrika was the only authority given. Whether the latter Pandit was not aware of or did not approve of the Dattaka Mimansa I know not, nor have I been able to trace the cases in which those opinions were given. As Markby, J., was of opinion that there was only one case in the Sadr Diwani Adalat, *viz.*, that of *Nundram* v. *Kashee Pandey* (1) in which the question as to the legality of the adoption of an only son properly arose and was decided, the opinions of the Pandits in the other cases in the Sadr Diwani Adalat would according to his rule be of little value.

I shall now consider the judgment of Westropp, C.J., in *Lakshmappa* v. *Ramava* (2). That was an important judgment, for although Westropp, C.J., was not deciding the question as to whether the gift in adoption of an only son by his father was in the Bombay Presidency void, and in fact assumed for the purposes of the suit in its then stage that such an adoption would not be void and that the texts in relation to it were directory only, and that if such an adoption were made in opposition to those texts the principle *quod fieri non debet factum valet* should be applied to it (see pages 375 and 391 of the report), yet I think it can be gathered from the judgment that the opinion of Westropp, C.J., was against the validity of such an adoption.

Westropp, C.J., at pages 377 and 378 of the report assumes that Mr. Colebrooke's translation of the three passages in the Mitakshara, to which I have already referred, was correct, and at page 378 lays much stress on the fact that Mr. Colebrooke in rendering those passages, employs, with regard to the only son, the expression "must not," and with regard to the eldest son the expression "should not." I have already pointed out that the propriety of Mr. Colebrooke in those passages rendering the same Sanskrit word in two of the passages as "should" and in that relating to the only son as "must" requires explanation. Westropp, C.J., apparently relied to some extent upon the authority of Balambhatta's

(1) 4 Sel. Rep. 70.

(2) 12 B.H.C.R. 364.

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commentary, the Dattaka Mimansa, the Dattaka [93] Chandrika and the text in Saunaka (Caunaka) to which I have already referred. Westropp, C.J., then refers at pages 380, 381, 382, 383, 384, 385, 386, 387 and 388 to several reported cases, to only three of which owing to the condition of this Court's library have I access. Some of those cases were apparently in favour of the adoption of an only son being valid or at least not void. It does not appear whether the Vyavasthas referred to as in Mr. Justice West's MS. were accompanied by texts in support of them or were sanctioned by judicial decision. The two Vyavasthas mentioned at page 391 of the report as having been given to the Sadr Diwani Adalat of the North-Western Provinces are two of the Bywsthas I have already referred to.

In *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (1) all that the Full Bench decided is best expressed in their own words which are, "But, although this course may be fairly open to a critic "of the decisions of the Court, it is, in our opinion, very important, "with a view to uniformity of decisions, that this Court should, in the "absence of a very cogent reason to the contrary, not depart from the "standard it has uniformly applied in appreciating the value of the different "text-writers. Under these circumstances, it is sufficient, in our opinion, "to say that the question has been determined by a Full Bench after full "discussion against the validity of such an adoption, and that for the last "ten years such an adoption has been regarded by the legal profession "as being, in the view of this High Court, in contravention of Hindu Law, "and that no reason which could properly be entertained, with due regard "to the long established authority of Full Bench decisions, has been "assigned which could justify our interference with that decision. We "must, therefore, answer the question referred in the negative."

The referring judgment of Jardine, J., and the judgment of that Full Bench are, notwithstanding the manner in which that reference was decided, interesting and instructive. The Full Bench decision which the Full Bench in the case in I. L. R., 14 Bom. 249, declined to reconsider is unfortunately not reported, and apparently [94] no judgment was written in that Full Bench case, so that it would be mere speculation to consider what were the reasons of the Judges respectively for holding in that case that the adoption of an only son by a Lingayet was invalid. The Judges in that case apparently thought that a custom, if established, amongst Lingayets of making such adoptions would validate such an adoption amongst them. It does seem to me curious how, if the adoption of an only son is so sinful, so absolutely prohibited by the Hindu religion, and so destructive to the souls of Hindus as it is contended that it is, a local custom or a custom amongst particular Hindus could have the effect of overruling and setting aside the divine Hindu law on so material a point and avoiding the difficulties in which the soul of the giver in adoption of his only son and the souls of his ancestors would otherwise be left.

The latest decision on this question of the adoption of an only son in Madras, of which I am aware, is that in *Narayanasami* v. *Kuppusami*(2). In that case Collins, C.J., and Muttusami Ayyar, J., said, "We are "not prepared to depart from the course of decisions in this Presidency, "and we hold then that the adoption of an only son, if actually made, is "valid, however sinful the act may be on strict religious considerations."

(1) 14 B. 249.

(2) 11 M. 43.

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One of the cases to which those learned Judges had referred was *Chinna Gaundan* v. *Kumara Gaundan* (1) in which Scotland, C.J., had given a judgment which was much criticised by Markby, J., in *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (2) and was referred to without criticism by Westropp, C. J., in *Lakshmappa* v. *Ramava* (3). I regret to say that I have not access to the reports of the cases upon which Markby, J. founded his criticism of the judgment of Scotland, C.J., and I must only assume that his criticism was correct so far as those cases went. It is however to be observed that Scotland, C.J., also relied upon the Raja of Tanjore's case.

In the case in the Punjab of *Adjoodhia Pershad* v. *Musammat Dewan* (4) Simpson, J., held, agreeing with a previous decision of that [95] Court that the adoption of an only son having once been made cannot be annulled, and that the validity of such an adoption depends rather upon local usage than upon the strict rule of Hindu Law upon the subject. In the same case Lindsay, J., held that the texts of Hindu Law relating to the adoption of an only son could not fairly be considered as directory only, and that such an adoption was invalid; but that a custom to make such an adoption having been proved the particular adoption was good, on the ground, as stated by him, that "custom overrules the law."

I now come to the Full Bench decision of this Court in *Hanuman Tiwari* v. *Chirai* (5) from which we are asked to dissent. In that case the majority of this Court, Stuart, C.J., Pearson, Spankie, and Oldfield, JJ., held that the adoption of an only son was sinful and blameable only and not void, and that such an adoption having taken place the principle *quod fieri non debuit* factum valet* applied, and the adoption could not be disturbed. Of the contrary opinion was Turner, J., who relying upon Mr. Colebrooke's translation of the passage in the Mitakshara in which he translates as "must" the same word which in the preceding passage and in the subsequent passage he translates as "should," and also relying upon the Dattaka Mimansa, the Dattaka Chandrika, and Saunaka, held that the adoption of an only son was invalid and that the maxim *quod fieri non debuit* factum valet* could not be applied. In conclusion Turner, J., said, "The consequence of the contrary ruling would be, according to Hindu "Law, to inflict a penalty not only on the giver and receiver, but on the "collaterals of the receiver, whose property might descend to a person "solely entitled to claim it on account of benefits she is presumed to "confer, but which he could not possibly confer." I think it is obvious that it was the Dattaka Mimansa which was mainly responsible for the conclusion of Turner, J. The criticism on the constructions of the original of the passage in Saunaka cited by Turner, J., I have already referred to.

The position of this question as to the legality or illegality of the adoption of an only son stands thus, so far as the latest [96] decisions of the four High Courts in India and the Chief Court of the Punjab are concerned. A Division Bench of the High Court of Calcutta and a Full Bench of the High Court of Bombay have held that such an adoption is illegal and void. A Division Bench of the High Court of Madras has held that though such an adoption is sinful it is not void. A Full Bench of this High Court, Turner, J., dissenting, has held that although such an adoption is sinful, it is not void, and that the principle *quod fieri non debuit* factum valet* applies to such an adoption actually made

* "*debuit*" is wrongly printed for *debet*.

(1) M.H.C.R. 54. (2) 3 C. 455. (3) 12 B.H.C.R. A.C. 378, 388.
(4) 18 P.R. 1870, p. 56. (5) 2 A, 164.

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The Chief Court of the Punjab holds that such an adoption is valid when a custom to make such an adoption is proved.

The question has never, so far as I am aware, been expressly decided by their Lordships of the Privy Council. But nevertheless there are some indications, slight though they may be, that their Lordships do not consider that the adoption of an only son is plainly void and the principle *quod fieri non debuit* * *factum valet* could not apply. In *Nilmadhub Doss* v. *Bissumbhur Doss* (1) their Lordships of the Privy Council said, "Again "if there is, on the one hand, a presumption that Gooroproshad Doss would "perform the religious duty of adopting a son, there is, on the other, at "least as strong a presumption that Purmanund would not break the law "by giving in adoption an eldest or only son, or allowing him to be adopted "otherwise than as a *Dwyamushyayana*, or son to both his uncle and his "natural father. This latter kind of adoption would not sever the connec- "tion of the child with his natural family." I infer from the report in 13 Moo. I. A., that Ramlochan Doss, who was alleged by the respondents to have been adopted by Gooroproshad Doss, was at the time when he was adopted the only then surviving son of his father Purmanund Doss. At page 87 of the report it is stated that Rajiblochan Doss who was eldest and the full brother of Ramlochan Doss, was dead at the time of the alleged adoption. He was the eldest son of Purmanund Doss. At page 89 of the report it is stated that "the appellant filed a written statement by way "of answer, and stated that Ramlochan Doss was the step-brother of the "appellant, and that [97] Gooroproshad Doss had never adopted him nor "performed the *Pootrashee* (initiatory ceremony of adoption) and that, in "fact, Ramlochan Doss, at the time of the alleged adoption, was the only "son of their father, Purmanund Doss, and that he and his wife did not "give in adoption his eldest and only living son," &c. At page 93 of the report I find that Sir Roundell Palmer, in arguing the case for the appellant, contended that "Ramlochan Doss was not, and indeed could not, have been "legally adopted or given, inasmuch as at the time of such alleged adop- "tion he was the only son of his father and, therefore, ineligible," and in support of that contention he cited the Dattaka Chandrika, sec. 1, pla. 20, 21, 27 (Sutherland's translation), and Strange's Hindu Law, Vol. 1, 85, 2nd edition. I may mention that Sir Barnes Peacock, C. J., and Bayley and Kemp, JJ., had held, but on what finding of facts or law I do not know, that the adoption of Ramlochan Doss by Gooroproshad Doss did, as a fact, actually take place, and that it was a good and valid adoption. It is obvious from the passage which I have quoted from the judgment of their Lordships of the Privy Council, that their Lordships were dealing with the case on the basis of Ramlochan Doss having been at the date of the alleged adoption the only then living son of his father Purmanund Doss. If their Lordships had accepted the contention of Sir Roundell Palmer, which I have quoted, it would not have been necessary for them to have considered whether the alleged adoption had in fact taken place. On the contrary, their Lordships indicated plainly that such an adoption, if it had taken place, would not have been void, for in pointing out the distinction between the adoption alleged, and a Dwyamushyayana adoption, they said, "this latter kind of adoption "would not sever the connection of the child with his natural family," and they inferred that if Ramlochan Doss's father would have given him in adoption at all, it would have been in that form which would not have

* For "debuit" read "debet."

(1) 13 M.I.A. 85.

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separated him from his natural family. Their Lordships never suggested that if Ramlochan Doss had been given in the *Dattaka* form the adoption would have been void. I am entitled to infer that they did not think it would have been.

[98] The only other case from which may be inferred what the opinion of their Lordships of the Privy Council was as to the legality or illegality of an adoption of an only son, of which I am aware, is that of *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (1). In that case their Lordships of the Privy Council, referring to a contention at the Bar, said, at page 53 of the report: "It was urged at the Bar that the maxim "*quod fieri non debuit* * *factum valet*, though adopted by the *Bengal* School, "is not recognised by other schools, and notably by that of *Benares*. "That it is not recognised by those schools in the same decree as in "*Bengal*, is undoubtedly true. But that it receives no application except "in *Lower Bengal* is a proposition which is contradicted not only by the "passage already cited from Sir *William Macnaghten's* work, but by "decided cases. The High Court of Madras in *Chinna Gaundan* v. *Kumara* "*Gaundan* (2) and the High Court of Bombay in *Vyankatrav* v. *Anandrav* "*Nimbalkar* v. *Jayavantrav Bin M. Ranadive* (3) acted upon it; and did so "in reference to the adoption of an only son of his natural father, on which "the High Court of Calcutta in *Opendur Lall Ray* v. *Ranee Bromo Moyee* (4) "has refused to give effect to it, considering that particular prohibition "to be imperative."

It is obvious from the passage which I have just quoted that their Lordships of the Privy Council were quite alive to the fact that in the Court in India there was a difference of opinion as to whether the adoption of an only son was void, in which case the maxim *quod fieri non debuit* * *factum valet* could not apply, or such an adoption was merely sinful and not void *ab initio*, in which case that maxim might be applied if such a principle as that expressed in the maxim was recognised by the particular school, and yet their Lordships, although giving those examples of cases in which the maxim had been applied, did not suggest that in those cases that maxim was inapplicable. If the maxim was inapplicable in the cases which their Lordships cited as cases in which the maxim had [99] been applied, I would have expected that their Lordships would have said so and not have left it to be inferred that the propriety of applying the maxim in the cases to which they referred, merely depended on whether the particular school recognised such a maxim or not. It is most improbable that in support of Sir William Macnaghten's opinion, in which apparently they agreed, their Lordships would have referred to cases in which the maxim had been judicially applied, if in their opinion the maxim was inapplicable in those cases, and it must have been inapplicable if the adoption of an only son was void.

I am satisfied that although the giving in adoption of an only son is according to the Hindu Law sinful, and to that extent contrary to the Hindu Law, yet that adoption of an only son so given is not void, and that the principle of *quod fieri non debuit* * *factum valet* may be and should be applied to such an adoption in these provinces. I may say that before I came to look into this subject in this case I was under the impression

* For "debuit "read "debet."

(1) 5 I. A. 40. (2) M.H.C.R. 54. (3) 4 B.H.C R.A.C. 191. (4) 10 W.R. 347.

based on the judgments of Westropp, C. J., and Turner, J., already referred to that an adoption in the *Dattaka* form of an only son was void. In conclusion, I ought to say that I thoroughly agree with the Full Bench of the High Court of Bombay, that a High Court should not, except for very cogent reasons, reconsider or question the ruling of a Full Bench of its own Court. This case is a very fair example of the mischief which may arise from departing from cases fully considered and decided by a Full Bench. The Full Bench decision of this Court in the case of *Hanuman Tiwari* v. *Chirai* (1) was given as long ago as the 24th of February 1879, and it is impossible to say how many adoptions of only sons may since then have been made in these provinces on the faith of that Full Bench decision and in how many cases the overruling of that decision might affect the rights of persons, who relying upon it deemed themselves secure, effected marriages and dealt with property which came to them as such adopted sons.

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My answer to the first question is that the adoption of an only son which has in fact taken place is not null or void under the [100] Hindu Law applicable in this case. Having answered the first question as I have done, I do not consider it necessary to give any answer to the second or third questions.

STRAIGHT, J.—I have read the learned Chief Justice's judgment and upon a full consideration of it and of the arguments on either side so much doubt is left in my mind that I am not prepared to depart from the Full Bench ruling of this Court reported in I.L.R., 2 All. 164. Many titles may have been created and many estates have vested on the strength of that ruling, and I do not think that any sufficient grounds have been established for holding it to be wrong. I would therefore answer this reference in the manner indicated by the learned Chief Justice.

MAHMOOD, J.—My task in delivering this judgment is materially diminished in consequence of the advantage which I have had of perusing the judgment which the learned Chief Justice has prepared in this case, and also on account of my having on two previous occasions delivered judgments upon somewhat cognate questions of the law of Hindu adoption. Both the judgments have been printed in the reports, and I may conveniently refer to the pages of the published reports whenever it is necessary to deal with what my be called the preliminary aspects of the questions which have been referred to the Full Bench.

The main question as enunciated by Mr. Justice Young and myself, in our order of reference, dated the 10th June, 1890, is whether the adoption of an only son having taken place in fact, such adoption is null and void under the Hindu law.

The learned Chief Justice has pointed out that whilst there is a vast conflict of rulings of the High Courts in India, their Lordships of the Privy Council have not yet directly settled the question, and I may say that the latest case before their Lordships, *Sri Ammi Devi Goru* v. *Sri Vikarma Deou* (2), does not settle the question. In this state of things, and because the learned Chief Justice has already reviewed the various rulings and authorities that were cited, it would be a work of supererogation on my part to do [101] more than briefly state the reasons why, after much consideration, I have arrived at the same conclusion at which he has done. In doing so I wish to premise at the outset that the

(1) 2 A. 164.

(2) 15 I.A. 176.

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parties to this litigation admittedly belong to the twice born caste of *Vaishya* and that they are governed by the Benares School, or rather sub-division of the *Mitakshara* School, of the Hindu Law. I have mentioned this circumstance because, as appears from my judgment in *Ganga Sahai* v. *Lekhraj Singh* (1), the Hindu Law is sub-divided into various schools, and it does not follow that the interpretation of texts adopted by one school is to be necessarily followed by another. I may also add that this is a case of adoption under the *Dattaka* form, and that no question arises directly as to any other form of adoption.

In the case abovementioned after referring to various authorities, I summed up my conclusions in the following words :—

"*First.*—That the existence of male issue being favoured by the "Hindu Law *mainly* for the purpose of the parents'beatitude in the future "life, adoption is a sacrament justified by a fiction of law under condi- "tions when the natural male offspring is wanting.

"*Secondly.*—That a *substantial* adherence to ceremonials, but "principally the act of giving and taking, is sufficient to establish the "adoption.

"*Thirdly.*—That when such adoption has duly taken place, its effect "is the affiliation of the boy, as if by a feigned parturition he had been "begotten by his adoptive father, thus removing the boy from the family of "his natural to that of his adoptive parents.

"*Fourthly.*—That the boy so adopted (to use the words of Jagan "Natha), 'is born again by the rites of initiation, and his relation to the "giver ceases and a relation to the adopter commences.'"

I have quoted these conclusions, not only because they still have my approval, but also because they help me in stating the grounds of my judgment. But before proceeding any further I wish to point out that, whilst the first conclusion as enunciated by me does [102] not limit the motives for adoption to spiritual beatitude of the adoptive father and his ancestors, it does not go the extreme length of holding, what was held by the Calcutta High Court in *Rojendro Narain Lahooree* v. *Saroda Soonduree Debia* (2), that a childless Hindu is bound to adopt a son, if at all anxious for his own salvation, that the duty is an imperative one, and what is required to be done for that end is not optional with him. I also wish to observe in passing that my second conclusion as above quoted was carefully worded to prevent any confusion between matters of ceremonial and those of essence in connection with the applicability of the doctrine of *factum valet* as applicable to Hindu adoptions. In the case abovementioned (*vide* I. L. R., 9 All., pp. 292 to 297) I had to consider this question at considerable length, and at pp. 296 and 297 of the report I summed up my conclusions upon this point in the following words :—

"Now in the case of adoption there are of course questions of formalities, ceremonies, preference in the matter of selection, and other points, which amount to moral and religious suggestions. Such matters, speaking generally, are dealt with in the texts in a directory manner, relating to what I may perhaps call the *modus operandi* of adoption. To such matters which do not affect the essence of the adoption, the doctrine of *factum valet* would undoubtedly apply upon general grounds of justice, equity, and good conscience, and irrespective of the authority of any text in the Hindu law itself. There may, indeed, be cases where the express letter of the texts renders that which would in other systems be

(1) 9 A. 253, *vide* pp. 288—291. (2) 15 W.R. 548.

regarded as a matter of form, a matter of imperative mandate or prohibition affecting the very essence of the transaction. * * * * So also there may, of course, be definite texts of the Hindu law of adoption itself which, though relating to matters of form, would be sufficiently imperative to vitiate an adoption in which they have been disregarded. *But unless such texts are express and undoubted in their meaning,* I would apply the doctrine of *factum valet* to adoptions which, having been made in substantial conformity to the law, [103] "have infringed only minor matters "of form or selection. Having so far explained how I understand the "general scope of the doctrine of *factum valet*, I proceed to define upon "what points of Hindu adoption I would hold it to be inapplicable. "Adoption under the Hindu Law being in the nature of gift, three main "matters constitute its elements, apart from questions of form. The "capacity to *give*, the capacity to *take*, and the capacity to be *the subject* "*of adoption* seem to me to be matters essential to the validity of the "transaction and, as such, beyond the province of the doctrine of "*factum valet*; and I may at once say that if any of these three capa- "cities is wanting in this case, I shall hold the plaintiff's adoption to be "altogether invalid."

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I have quoted this passage in order to say that I still adhere to the views which I thus expressed, and also to show that it is in accordance with such views that I shall consider the texts and authorities which have been cited in this case as to the adoption of an only son being void and a nullity. Dealing with the case in this manner, it is obvious that the nature and significance of the authoritative texts assumes great importance, and also the language in which they are expressed. This being so, I wish to excerpt two passages from the most recent writer upon the Hindu Law of adoption, namely, Mr. Golap Chandra Sarkar Sastri, who is known not only to be a competent Sanskrit scholar, but also a trained lawyer, as appears from the lectures which he delivered as Tagore Law Professor in 1888. At page 146 of his work he observes—

"I have already told you that rules of legal and moral obligation have "been blended together in the institutes of Hindu Law, and that the parts "of them dealing with positive law also contain some rules that appear "to be merely admonitory or recommendatory, and not mandatory or im- "perative. I have also pointed out that the leading commentators them- "selves draw the distinction and declare a few rules to be of moral "obligation only. But at the same time it seems that they have not "always kept the distinction in view while discussing the texts of law, so "as to point out all the rules are intended to be merely directory, and the "Courts of Justice [104] had to consider the question, and have pro- "nounced a few rules to be of that character. * * * * It is "now admitted on all hands that there are certain rules which are not "legally obligatory; but the difficult question with respect to this matter "is, how are we to differentiate between imperative rules of law and those "that are merely binding on the conscience of men? The difficulty is "enhanced by the facts that the forms of expression generally used in "the Sanskrit books are the same whether legal or moral obligation be "intended. So it becomes necessary to consider what principles have "been followed by the commentators in declaring a precept to be of no "legal force."

I have been anxious to quote these passages because in the course of the argument it was insisted that none of the three capacities for adoption,

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which according to my abovementioned views are necessary for the validity of an adoption under the Hindu law in the *Dattaka* form, is indispensable for the validity of an adoption already made.

The learned Chief Justice's judgment has relieved me from the necessity of dealing with those various authorities which seem to rely for their interpretation principally, if not wholly, upon early translations made by European scholars of Sanskrit, such as the eminent Colebrooke and Sutherland, to be found in the collected edition of Stokes' Hindu Law books published at Madras in 1865. Since that period three books bearing upon the main question in this case have been written by Sanskritists. The *first* is Mr. Mandlik's excellent edition of the *Vyayahara Mayakha*, published in 1880. The *second* is Dr. Jolly's History of the Hindu Law of Partition, Inheritance, and Adoption, which appeared as the Tagore Law Lectures for 1883 and was published in 1885. The *third* is a work on the Hindu Law of adoption by Golap Chandra Sarkar Sastri, M.A., B.L., and was published in 1891 as the Tagore Law Lectures of 1888.

It is to these books that I shall principally refer in delivering the rest of my judgment upon the most important question which has to be dealt with in this case.

[105] Mr. Mandlik, at page 496 of his valuable work, says—

"The next subject I have to notice is the giving in adoption of an "only son. A precept about not giving nor receiving in adoption an only "son is found in some of our Smritis. But this, like that about the "eldest son, has been always regarded as purely directory, or recommen-"datory. The usage of adopting such a son has been both ancient and "general and has been followed by the preceding Governments as well as "by our own. It has been also generally upheld by our Courts."

The learned author then in a footnote (at p. 497) refers to numerous decided cases including the Full Bench ruling of this Court in *Hanuman Tiwari* v. *Chirai* (1), where it was held that the adoption of an only son cannot, according to Hindu Law, be invalidated after it has once taken place. Whilst citing these cases with approval, the learned author proceeds as a Sanskrit scholar to consider the text bearing, scope, and effect of the original Sanskrit texts which have been cited in this case for the proposition that the adoption of an only son is absolutely prohibited and therefore void.

I do not propose to enter into any minute discussion as to the various steps of reasoning which fill the next dozen pages of Mr. Mandlik's work, and I think it is enough to say that I accept the authority of such an eminent Sanskrit lawyer for holding that the texts relied upon for the opposite proposition do not sustain the argument addressed on behalf of the plaintiff-appellant to the effect, that they involve negation of any one of the three legal capacities which I have before now described as forming the essence of the right and power of adoption, even when an only son has been adopted. In this interpretation of those texts Mr. Mandlik's views are fully supported by what another Hindu Sanskrit scholar and lawyer, Mr. Golap Chandra Sarkar, says, at page 284 *et seq.* of his work on adoption. I wish to add in connection with the exact interpretation of the Sanskrit texts that I have had the honour and advantage of consulting my respected friend, an eminent Sanskritist, Mr. Archibald E. Gough, Principal of the Muir Central College, Allaha-[106]bad and that his

(1) 2 A. 164.

interpretation of those texts is consistent with the meaning placed upon those texts by the two Hindu Sanskritists and lawyers above-mentioned. 1892 FEB. 4.

Consistently therefore with the views which I expressed in *Ganga Sahai* v. *Lekhraj Singh* (1), I hold that such restrictions as are indicated in the texts upon the adoption of an only son are merely religious and moral as distinguished from *legal*; that they amount to moral or religious admonitions relating to the choice or selection of an only son for purposes of adoption as a matter resting between the giver and the taker; that as such admonitions they do not in law vitiate any one of the three capacities which I have held are essential to the legal validity of Hindu adoption. And it follows, therefore, that the doctrine of *factum valet* applies to this case. FULL BENCH. 14 A. 67 (F.B.) = 12 A.W.N. (1892) 161.

This answers the reference to the Full Bench; and I should have stopped here, but for the fact that stress was laid in the course of the discussion that I am precluded from any such view by the reasoning upon which my judgment in the Full Bench case of *Tulshi Ram* v. *Behari Lal* (2) proceeds. In that case my views had the approval of the learned Chief Justice and my brother Judges, and I need scarcely say now that I am satisfied with the distinction which the learned Chief Justice has drawn in his judgment in this case between the interpretation of the texts in that case and those which have to be considered here. I may, however, say perhaps that in the case of *Ganga Sahai* v. *Lekhraj Singh* (1), to which I revert for easy reference, I stated (at page 290) that the *Mimansa* formed a source of Hindu Law and governed the interpretation of its texts; and that in the case now before us, the learned Chief Justice has shown how the rules of interpretation adopted by Jaimini justify a distinction between an adoption by a Hindu widow without her husband's authority and the adoption of an only son given by his natural father to a widow who has been duly authorized by her husband to *take* a son in adoption. I may also add that irrespective of Jaimini's rule of interpretation, there are [107] many important reasons, as stated by me in *Tulshi Ram* v. *Behari Lal* (2), which, according to my notions of the Hindu Law, distinguish the power of an unauthorized Hindu widow to adopt a son from the question which has arisen in this case.

In connection with the suggested conflict between my ruling in *Tulshi Ram* v. *Behari Lal* (2) and the views which I have taken in this case, I am anxious, in order to prevent possible confusion in the future, to point out that at page 337 of the report I distinctly reserved the question which arises in this case, and that referring to the same matter at page 339, I distinctly indicated the scope of the question with which I had then to deal to the exclusion of the adoption of an only son with reference to the Full Bench ruling of this Court in *Hanuman Tiwari* v. *Chirai* (3).

I do not wish to end this judgment without explaining two further matters for preventing any possible misapprehension of the *ratio decidendi* adopted by me in the two earlier adoption cases to which I have repeatedly referred. Now, in the first of these cases, *Ganga Sahai* v. *Lekhraj Singh* (1), I explained that the beatitude of the adoptive parent is the *main* (I did not say the *sole*) object of adoption, and so far as the spiritual beatitude is concerned I need only refer to what has been said by Mr. Mandlik (at pp. 456 and 457) to show that the begetting of a son is a moral obligation, and failing that, adoption is desirable, and that failing either

(1) 9 A. 253. (2) 12 A. 328. (3) 2 A. 164.

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the childless Hindu may attain salvation by other methods. In this connection I may also invite attention to the remarks made by the same learned author at page 500 of his work; so that in the case of the father of an only son giving that son away in adoption his spiritual welfare may be secured by him by other methods. And this answers any difficulty which may arise over the views expressed by me in the case cited as to the spiritual beatitude being the *main* reason for the Hindu Law of Adoption.

[108] Now, the next matter which I wish to explain is common both to my judgment in *Ganga Sahai* v. *Lekhraj Singh* (1) and that in *Tulshi* v. *Ram Behari Lal* (2). The contention is that so far as the authority of the *Dattaka Mimansa* of Nanda Pandit is concerned those two judgments are conflicting; that, in the present case, not only the authority of the *Dattaka Mimansa* but also that of the *Dattaka Chandrika* are binding authorities upon this Court, and that since they agree in declaring the adoption of an only son to be void, they should be followed by us as they were by the recent Full Bench ruling in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (3).

In regard to this part of the argument I wish to invite attention to what I said in *Ganga Sahai* v. *Lekhraj Singh* (1) as to the various grades of authority to which the Hindu Law text-books are entitled, according to the class to which they belong in Hindu jurisprudence. The *Dattaka Mimansa*, as also the *Dattaka Chandrika*, belongs to the last of the classes, namely, *Nivandhana* or digests, prepared by later writers according to their interpretation of higher authorities. As to the former of these two I have said enough in the above case (at pp. 322—324) and again in *Tulshi Ram* v. *Behari Lal* (2), and I need only say that so far as the authoritativeness is concerned I hold the same views also in regard to the latter of these works. The result is that, in my opinion, both these works, since they do not belong to the higher grades of Hindu law books, are open to be questioned by citation of other authorities, as has been done in this case. The summary of the *Dattaka Nirnaya* given by Dr. Jolly at page 309 of his work (Tagore Law Lecturer for 1883) and again the discussion of the same subject by Mr. Mandlik at page 501 of his work sufficiently justified that in a case like this the authority of the *Dattaka Mimansa* or the *Dattaka Chandrika* is not so supreme and binding as to preclude the conclusion at which the learned Chief Justice has arrived in this case and in which I have expressed my concurrence.

[109] In conclusion, I wish to say that no sufficient reason is shown for us to depart from the last Full Bench ruling of this Court upon this point in *Hanuman Tiwari* v. *Chirai* (4) and that my answer to the reference in this case is the same as that given by the learned Chief Justice, rendering it unnecessary to deal with the two remaining questions referred to the Full Bench.

KNOX, J.—The first and, indeed, the main question referred to us is, whether or not the adoption of an only son having taken place in fact, such an adoption is null and void under the Hindu Law?

This same question was in 1879 referred to a Full Bench of this Court for decision with the result that all the Judges who composed that Full Bench, with the exception of Mr. Justice Turner, were unanimous in the

(1) 9 A. 253. (2) 12 A. 328. (3) 14 B. 249.
(4) 2 A. 164.

answer given that "the adoption of an only son is not altogether void, but that having once been made the adoption is valid." 1892 FEB. 4.

The question therefore is not *res integra*. It has already been answered by this Court in the affirmative, and as the answer was given by a Full Bench of the Court, it would, according to long and established practice, be regarded as conclusive, unless a decision of the Privy Council militating against it could be pointed out, or as Sir Charles Sargent adds, unless perhaps "the Court could be clearly shown to have formed its conclusion upon a mistaken impression as to the text of the Hindu Law books upon which it relied:" Sir C. Sargent in *Waman Ragupati Bova* v. *Krishnaji Kashirav Bova* (1). FULL BENCH. 14 A. 67 (F.B.) = 12 A.W.N. (1892) 161.

We have been referred to no such ruling of the Privy Council. On the contrary both parties are agreed that the question is one upon which their Lordships have not up to the present date delivered themselves of any decision. It only remains to be seen whether the decision is in accord with the principles of Hindu Law.

The reason given why the Court should reconsider the opinion at which it arrived in 1879, is that the answer of the Full Bench in that case is felt by some to be an answer open to serious doubts. [110] The learned Judges who joined in making the reference allude to two cases in which this doubt led Division Benches of this Court in 1886 to refer the same question a second time for consideration by a Full Bench. They refer also to a number of cases for and against the validity of the adoption of an only son, and those cases do beyond all doubt establish that the question is a question upon which there does exist, and has always existed among the Courts in India much conflict of authority.

To my mind, however, the fact that twelve years have passed since this Court pronounced upon the validity of such an adoption, and the further fact that its dictum cannot fail, so far as these Provinces are concerned, to have had considerable weight upon the minds of all prudent persons, who may have sought to perpetuate their name and lineage by an adoption of this nature are facts which cannot be left out of consideration and which would in any case make me hesitate to give utterance to an opinion in the opposite direction. I feel that before I could do so I should need irrefragable proof that the prior ruling rested upon either a wrong foundation or upon no foundation at all. I consider it a happy result that careful examination of the text-books confirms and places, so far as I am concerned, beyond the region of reasonable doubt the wisdom, truth and soundness of the conclusion at which this Court arrived in 1879. For, as I have already pointed out, it is not difficult to conceive that there may be some or even perhaps many families who would be thrown into serious trouble and unrest if we found it necessary now to hold otherwise on this point.

I have considered the question with the gravest anxiety. Had it not been for the approaching departure of my brother Straight, I should have deemed it necessary to ask the Court to postpone the delivery of this Judgment until I had found it possible to place on record all the information, I have obtained and the various reasons why I feel satisfied that the only true answer that can be returned to the question is that the adoption of an only son, once it has taken place, been compleated and recognized, must so far as the provinces over which this Court has jurisdiction are concerned, be

(1) 14 B. 249.

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[111] considered a valid act. Such an act may be the height of imprudence on the part of the giver; it may even, by those who pride themselves upon their strict observance of Hindu scripture, be considered a blameable act. But upon the authority of the same scripture it is as I shall presently show an act which is not a "Mahapatak": it ranks and is classed with acts which are "Upapatak," which can be atoned for by penances of a comparatively easy description, and when atonement has been made, the author of the act is as capable of going to heaven and is as pure as those who have performed meritorious deeds.

But before going to the text-books themselves I propose examining very briefly the cases in which an opinion contrary to that held by this Court is to be found. Such an examination will best show the difficulties which have been felt in the minds of Indian Judges, some of them Judges of exceptionally high authority, and which have led those Judges to the conclusion that Courts in India are compelled to treat an adoption of this nature as an act which cannot possibly be performed and which must therefore be considered utterly null and void.

The cases to which we were referred in the argument as cases in which the adoption of an only son had been finally and in definite terms held to be invalid, were four in number:—

Nundram v. *Kashe Pandey* (1).
Manick Chunder Dutt v. *Bhuggobutty Dossee* (2).
Upendra Lal Roy v. *Srimati Rani Prasanna Mayi* (3).
Waman Raghupati Bova v. *Krishnaji Kashirav Bova* (4).

In the first of these cases the ground upon which such an adoption was declared invalid was the opinion given by the Pandits who were consulted that according to the law current in Tirhoot the adoption of an only son was invalid.

[112] I have been unable to consult the reports in which this case is contained, and the only reference to it, as given in I. L. R 3 Calc. p. 450, contains none of the reasons which led the Pandits consulted to form that opinion or of the reasoning by which the Judges felt constrained to accept that opinion without reserve. The case therefore cannot be pressed further than this, that it is an authority in favour of the view that the law as understood by Pandits concerning such adoptions in Tirhoot and as current in the years 1823 and 1824 was to the effect that an adoption of this kind is invalid.

In the second case Mr. Justice Markby, and with him the learned Chief Justice, Sir Richard Garth, held that the entire authority in Bengal was against the validity of the adoption of an only son, and that for all classes of Hindus in Bengal such an adoption must be held invalid wherever the effect of the adoption if valid would be to extinguish the lineage of the natural father and to deprive the ancestors of the natural son of the means of salvation.

The third case is the one in which Mr. Justice Mitter pronounced that the adoption of an only son was forbidden by the Hindu Law; that the subject of adoption was inseparable from the Hindu religion itself, and that all distinction between religion and legal injunction must be necessarily inapplicable to it. He also enunciated his opinion that one of the essential requisites of a valid adoption is that the gift should be made by a competent person, and that the Hindu Law said distinctly that the father of an only son had no such absolute dominion over that

(1) 4 Sel. Rep. 70. (2) 3 C. 443. (3) 1 B.L.R. A.C. 221. (4) 14 B. 249.

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son as to make him the subject of a gift. From this he naturally went on to say that the doctrine of *factum valet* would not help towards rendering such an adoption when made a valid act.

There remains the case in which the learned Chief Justice of Bombay, Sir Charles Sargent, and with him the rest of the Judges in Full Bench assembled, concurred that a previous Full Bench had decided after solemn argument that the adoption of an only [113] son was by general Hindu Law invalid, and that no reason had been assigned which could justify interference in that decision.

The judgment which has just been delivered by Sir John Edge, and which I had the privilege of reading before it was delivered, contains such a careful and exhaustive examination of these cases and of the influences under which those precedents were apparently prepared that it is quite unnecessary for me to take up the time of the Court with observations of a like character. The reasoning of the learned Chief Justice appears to me exhaustive and convincing upon this part of the case. I shall confine my judgment to an examination of the original texts, and show that the reasons given in each of the judgments above quoted are reasons which appear to me based either upon a wrong estimate of the value of the authorities themselves, or of the value which those authorities intended to attach to such an adoption, or upon an imperfect knowledge of the text of the authorities. Under this last head would I also place errors which have flowed from a consideration of a single text detached and apart from its context.

I wish to add that I do so with extreme diffidence, and with the profoundest respect for those from whom I am compelled to differ. For it cannot be denied that the late Mr. Justice Dwarka Nath Mitter was versed in the Sanskrit language and that he, Mr. Justice Markby, Sir Michael Westropp and others who acquiesced in these reasons were lawyers who had devoted considerable time and attention to the subject of Hindu law.

In order to arrive at a right conclusion as to what is or is not for bidden by Hindu Law, it is necessary to define accurately the position occupied by the writes of the texts that will presently come under examination. These writers may be placed, so far as sequence of time is concerned, in three groups. In the first would come Manu, Vasistha and Yajenavalkya, in the second Narada and Vijnaneswara, and in the third by himself Nanda Pandita, the author of the Dattaka Mimansa. I do not propose to enter into any abstruse questions of chronology; it is sufficient for my purpose to show that there is a broad line of demarcation in point of time and also of binding authority between these several groups of [114] authorities. Nor would I deem it necessary to deal with the question at all, were it not for attempts made in the course of argument to treat all the authorities cited as entitled to equal weight and respect. True criticism teaches very differently. It is conceded that what is now received and known as the "Institutes of Manu" may be taken to be anterior in point of time, or at any rate to represent môre accurately than any other work the oldest exposition extent of Hindu Law. It is asserted by some that the author or authors were men who possessed and did wield the authority of kings. So far as those Institutes are concerned, I shall show that from either point of view, *viz.*, that whether the authors were law-makers and law givers or whether they were merely law-teachers, the result, so far as the present question is concerned, is the same. Every orthodox Hindu would unhesitatingly allow that Manu, Vasistha and

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Yajnavalkya received what they afterwards promulgated direct from Divine sources. He would maintain or acquiesce in the view that every word uttered by these Sages stands above criticism and should be deemed binding upon the conscience if not upon the conduct of everyday life. The second group he would put on a different footing; he would probably allow that the text of Narada was of very great weight and that Vijnaneswara was a commentator entitled to much respect, but still only a commentator. In the case of both and especially of the latter, criticism would not be resented, particularly when there appeared to be conflict between them and the sayings of the first group of writers. And when the third group is reached, he would be prepared to allow that the work of Nanda Pandita is as much open to review as the text of any commentator of the present school.

As, however, the present question cannot be dismissed as the more orthodox Hindu would dismiss it, with the mere dictum that the answer to it does or does not rest upon Divine revelation, I am compelled to add a few further remarks upon the position occupied by Vasistha, Manu and Yajnavalkya.

The fact that what we possess of the sayings attributed to the writers in the first group has come down by tradition, shows that [115] those sayings were possessed of vitality strong enough to defy the power of time. Even if they do contain words that have been misunderstood or misquoted, even if they contain additions or interpolations, the words misunderstood, the additions and interpolations are of venerable antiquity, and have so far been accepted by the generations through which they have passed before they reached the hands of the commentators that no distinct command contained in them can now be said not to amount to a command. They are sayings which do constitute law, and where they have to be explained away or added to, the only safe ground upon which such explanation or addition can be accepted is that the explanation or addition springs out of or rests upon कुलधर्म or स्वधर्म which terms may, if freely translated, be said to represent "custom" in the proper and legal sense of the word. I shall presently show that Manu himself does not object to such custom being accepted as law, provided it be ascertained and settled after enquiry made by a sovereign power who knows the Sacred law.

The authority of Narada, however, and of the commentators after him rests upon a very different footing. The highest position which Professar Jolly, who has made Narada's work the subject of special study, would allot to his Smriti is that it is an independent and therefore specially valuable exposition of the whole system of Civil and Criminal Law as taught in the law schools of the sixth century of the Christian era. This is, I venture to think, a right estimate. As for the rest their authority is in my opinion almost, if not quite, as much open to examination, explanation, criticism, adoption or rejection as the work of any scientific treatise on European or American jurisprudence: where they deviate from or add to the Smritis, great caution is required in adopting their gloss, and still reater caution if it is made to appear that कुलधर्म or स्वधर्म is in apparent harmony with the Smriti and at discord with the gloss.

Their Lordships of the Privy Council have (1) recognized that the authority of Manu is one which may properly be referred to when [116] it is

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(1) *Ramalakhsmi Ammal* v. *Sivanatha Perumal Sethurayer* (14 M.I.A. 570).

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necessary to resort to first principles in order to ascertain and declare the Law. I propose to refer to it for two purposes:—

1*st*—To point out what the Institutes of Manu teach as Law to be enforced by a king upon his subjects. So far as I am concerned, it seems to me treading on dangerous ground to lay down as positive Hindu Law which is to be enforced by our Courts any precept which is foreign to the teaching contained in the Institutes of Manu.

2*nd*—To bring together all the texts which are contained in the Institutes of Manu on the subject of adoption.

As regards the first point it will be remembered that Manu opens with a demand on the part of the great Rishis to be taught precisely and in due order the sacred laws appertaining to the different castes. In complying with their request after certain preliminary remarks upon the creation of the Universe, Manu is described as laying down that in his work the sacred law has been fully stated as well as the good and bad qualities of actions and the immemorial rule of conduct by all the four castes. Thy rule of conduct is transcendent Law, whether it be taught in the revealed text or in the sacred tradition, hence a twice-born man who possesses regard for himself should be always careful as to it (1). He further teaches in the second chapter and 6th verse that the whole Veda is the source of the sacred Law, next the Smriti (or tradition) and the virtuous conduct of those who are learned, also Achara (or the customs) of holy men, and self-satisfaction.

The seventh chapter is entirely devoted to the duties of kings, and very significant verses in that chapter as to the view which Manu, and with him every true Hindu, would take of Law, are the 14th and 18th verses, which run as follows:—" For the (King's) sake the Lord formerly created His own Son, Punishment, the protector of all creatures and the (*i.e.*, an incarnation of the) Law, formed of Brahmans' glory."

" Punishment alone governs all created beings, punishment alone protects them, punishment watches over them while they sleep, the wise declare punishment *the* law."

[117] Chapter VIII is devoted to an exposition of the civil, the criminal and the ceremonial law which a king according to Manu is bound to administer. In the 41st verse of that chapter we read that a king " who knows the sacred law should enquire into the laws of "caste, of districts, of guilds, and of families, and settle the peculiar law of each."

It is worth nothing that the word translated " settle " प्रतिपादयेत् in this verse according to a commentary (the Manvarthachandrika, written by Raghavananda Sarasvati) should be read प्रतिपालयेत् which would make the last clause run, " Protect the peculiar law of " each." Observations on the subject of interest, debt, pledge, contract, fraud and force as vitiating contract, bailment, sale and gift without ownership, title by purchase, wages, master and servant, boundary disputes and other kindred matters are spread over some 120 slokas. As many more slokas are taken up with assault, theft, and other crimes. I have examined the whole of this chapter with the utmost care, and there is not one word in it which attaches any disability or punishment to, still less contains any prohibition against, the kind of adoption now under consideration. The ninth chapter is first devoted to the propounding of the duties of husband and wife. The next subject treated in it is the subject of inheritance, and of this chapter

(1) Chapter I, vv. 107 and 108.

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I shall have more to say when I bring together the verses relating to adoption. I pass it over for the present with the remark that anyone who seeks to find in it any disability or punishment attached to or direct prohibition against the adoption of an only son will weary himself in vain.

In the eleventh chapter the subject treated of is penance. Offences are classified therein as Mahapatakas (mortal sins) and Upapatakas (minor offences, and of both verse 108 says that by means of the penances laid down in the verses preceding verse 108, "men who have committed mortal sins "may remove the guilt, but those who have committed minor offences "causing loss of caste" can remove their guilt by the penances set out in the verses following verse 108. This chapter has also been considered by me with minute care and attention. The range of acts which are classified under mortal [118] offences and minor offences is a very long and varied one. The only text which can by any possibility bear upon the performance of a sinful or invalid adoption is verse 66, and this runs, as follows:—" Neglecting to kindle the sacred fires, theft, non-payment of (the three) debts, studying bad books and practising dancing and singing" are all (see verse 67) classified as minor offences causing loss of caste. The text of verse 66 contains only the words ऋणानामपाक्रिया which literally translated is non-payment of debts. I think, however, that it is by no means forcing the words to place upon them the interpretation that they refer to the non-payment of the "three debts," a term familiar to every Hindu. One of the three debts is the procreation of a son. If the verse does not apply to those three debts there is again no offence in this list which can be held to include the offence of bringing about an unlawful or sinful adoption. If the verse does allude to such an adoption, then the act is an Upapatak or minor offence. Verses 72 and 108 *et seq.* teach how such an offence can be expiated. This penance may be briefly described as living in a cow-house for a month, fasting for two months more, worshipping and serving cows, and culminates in the giving of ten cows and a bull to Brahmins. If his conscience is particularly sensitive the offender may add strict fasting relieved only by a meal once a day on boiled barley gruel. I mention this detail in order to give some appreciation of the estimate in which the offence, if it can be called one, is held, and the comparative ease with which it may be expiated. Verse 240 teaches that if these austerities are performed the offender is freed from all guilt. I must not dismiss this chapter without the further observation that the disability of exclusion from inheritance has not been overlooked. It is a disability prescribed as attaching to one who associates with an outcast (v. 185).* The following verses, however, show that upon performing the necessary penances even such an one can recover his position purge himself of his offence, and free himself from the disability of loss of inheritance.

[119] From this *resume*, and I think it is one which will bear close examination, the following conclusions appear to be established:—

1*st.*—That according to Hindu Law as propounded by Manu, an act prohibited is an act for which punishment is prescribed by the same law.

2*nd.*—That nowhere is a king enjoined to regard a wrongful adoption as an act which is to be followed by दण्ड or punishment.

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* This disability is also mentioned in the Chapter on Inheritance; but as no mention is made in that chapter of the adoption of an only son it is not mentioned as a disability attaching to such an act.

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3rd.—That such an act is not alluded to in the treatise on civil law, still less is any disability prescribed for it.

4th—That at the outside such an act is an *upapatak*, causing it is true, temporary loss of caste, but easily expiated and after expiation as much forgotten as if it never had been committed at all.

5th.—That the possibility of exclusion from inheritance as a disability is not a consequence which has escaped the attention of Manu, but that it has been nowhere laid down as a consequence for the adoption of an only son.

To bring together the several texts to be found in Manu on the subject of adoption. They will be found to be very few indeed, and occur in the ninth chapter only. Verses 141 and 142 run as follows: "If the man "who has an adopted son possessing all good qualities गुण that same "shall take the inheritance though brought from another family; an adopt-"ed son shall never take the family and estate of his natural father, the "funeral cake follows the family and the estate, the funeral offerings of "him who gives cease."

Verse 159 mentions the son adopted as one of the six heirs and kinsmen: verse 168 is the most important of all and defines the qualifications necessary for a good adoption. It runs as follows:—

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।
दुशम्प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः ॥

"Whom the mother or the father give, with 'water,' a son, in distress, "similar, endowed with affection, he is to be deemed a *Datrima*, one "brought forth." In this translation I have attempted to follow the text word by word, and without interpolating or [120] taking away any particle. This will account in some measure for the roughness of the translation, but in an important passage like this, it is a matter of necessity to weigh each word and to give its proper weight and significance.

I have been referred to no other text, nor have I either on previous occasions, when I made the laws of Manu the subject of special study, or on the present occasion, when I have attempted to refresh so far as time would allow, my memories of past study, discovered any text which lays down any other qualification or disqualification connected with an adopted son.

Now a close examination of these texts appears to establish the following conclusions.

1st.—That Manu did devote consideration to the qualifications which go to the essence, if I may call it, of an adopted son, or, to use an expression which has found favour with some learned Judges, the capacities which must unite in a person whom another wishes to give or take in adoption.

2nd.—That as the result of such consideration he solemnly formulated the following as necessary qualifications:—

(*a*) Gift by mother or father.
(*b*) Gift evidenced by an outward symbol, *viz.*, the ceremony of water or "waters.".
(*c*) Gift of a son.
(*d*) Gift in distress.
(*e*) The son given must be similar.
(*f*) The son given must be endowed with an affectionate disposition.

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One further qualification may perhaps be inferred, from verse 141, *viz.*, that he must be a son possessed of all good qualities, but the words used in that verse probably are words pointing to verse 168, and "all the good qualities" to which these particular words refer are only the several qualifications which are included within the four corners of verse 168.

[121] Now after this explanation of the only verses which mention adoption, and I have laboured to keep with the utmost closeness to the text, it must strike even a casual observer as curious and extraordinary that Manu should insist upon, as necessary qualifications, that the son must be similar, in whatever that similarity may consist, that he must be endowed with affection, and that he should overlook the qualification that he must not be an only son. To my mind, the one only legitimate conclusion that can be arrived at by any thoughtful and well-balanced mind, is that at the time when the Institutes were handed down and first received, similarity in point of caste was a most necessary qualification; to be endowed with an affectionate disposition was a qualification second only to the former; but that no thought was then received as current which pointed to the necessity of an adopted son being chosen out of a family which contained more than one son. The difficulty of importing the qualification that the son adopted must not be an only son into this text of Manu, was a very serious difficulty to the commentators who wished to advocate it. They were compelled to fall back upon verses in the ninth chapter and to weld them in with this verse. The verse upon which they rely is verse 138 in Chapter IX. That and the preceding verses are as follows:—

V. 137. By a son a man obtains victory over all people; by a son's son he attains immortality (*not the immortal abodes*). Then by the son of that son he reaches the region of Brahma.

V. 138. Since the son delivers the father from the region called "Put" he was therefore called "Putra" by Brahma himself.

I shall allude to verse138 again: if verse 137 stood alone the primary idea of a son exactly corresponds to that of the psalmist. The man that hath sons shall "speak with his enemy in the gates."

From these texts the commentators claim the inference that Manu did know of the essential qulification that a son adopted must not be an only son. All I would say is that, if he did, it is and ever will be to me a mystery why he should have left it as [122] an inference and not mention it in the terms either of a positive direction or prohibition.

It is enough to pass from the consideration of Manu with this result that "the want of authority to give or to accept and the imperative interdiction of adoption" which prevented Sir Michael Westropp from applying the maxim *factum valet* to the adoption of an only son is not to be found in the text of Manu, still less is there any text to the effect that the father of an only son cannot give, that his gift cannot be accepted, and that the son cannot be given.

The Dharma Sashtra of Vasistha, or as much of it as has been preserved, upon the two points with regard to which I have already examined the Dharma Sashtra of Manu, is much to the same effect. On the first point, *viz.*, what is to be considered the law of the land, its teaching is as follows:—

The sacred law has been settled by the revealed text and by the tradition; on failure of these the practice of the Shistas (or men whose heart is free from desire) have authority. Manu has declared that the law

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of countries, castes and families (may be followed) in the absence of rules of the revealed texts (v. 17, Chapter I.)

The doctrine of Mahapatakas and Upapatakas or minor offences causing the loss of caste (Chapter I, vv. 19—23) ; and also punishment as one of the chief duties of kings, is recognized. (Chapter XIX, v. 40).

Penance (Chapter XX), is recognized and also its efficacy for removing the taint of guilt.

The one passage of great importance however is contained in the opening verses of Chapter XV, and it runs as follows :—

शुक्रशोणितसम्भवः पुरुषो मातापितृनिमित्तकस्तस्य प्रदानविक्रयपरित्योगेषु माता पितरौ प्रभवतः न त्वेकं पुत्रं दद्यात् प्रतिगृह्णीयात् वा स हि संदानाय पूर्वेषाम्,

"Man formed of uterine blood and virile seed, proceeds from "his mother and his father as (an effect from its cause). The father "[123] and mother have power to give, sell and abandon him, but he/she "should not give or should not take an only son, for he is for the pro-"longation of the line of ancestors."

It is contended and has been contended before us with great persistence by Mr. Banerjee that we must accept this saying of Vasishtha's as a direct prohibition having the force of law.

The first difficulty connected with its acceptance as a direct prohibition is that the words which represent "he should give" and "he should take" are verbs couched in the optative mood.

Now the Sanskrit language permits of a verb being conjugated in three amongst other moods, *viz.*, the imperative, the subjuntive, and the optative. The imperative signifies as in other tongues, a command or injunction, an attempt at the exercise of the speaker's will on some one or something outside of himself. The subjunctive may be omitted as it became very early extinct or all but extinct. The primary office of the optative is the expression of wish or desire. In the oldest language its prevailing use in independent clauses is that to which the name optative properly belongs, "but the expression of desire "on the one hand, passes naturally over into that of request or entreaty, "so that the optative becomes a softened imperative; and on the other "hand, it comes to signify what is generally desirable or proper, what "should or ought to be and so becomes the word of prescription ; or yet "again it is weakened into signifying what may or can be, what is likely "or usual, and so becomes at last a softened statement of what is." Whitney, paras, 572—575.

It may, however, be said and with truth that nearly every text contained in Vasishtha runs in the optative mood, and that in the classical language no sharp line of division exists between the imperative, subjunctive, and optative.

Both such statements if made would need qualification. Vasishtha can, as for instance in Chapter XI, verse 45, give a very imperative direction, and does do so by using after the optative *dadyat* (the very mood and verb used for "he should give" in Chapter X, v. 3—the verse which deals with the giving and taking of an only son)—the [124] adverb अवश्यम्. He does not add this adverb in Chapter X, v. 3, and the inference we are entitled to draw is either that he felt the precept of giving an only son could not be enforced as a law and must be left as

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a desire, or that he never meant it to reach a higher platform than that of entreaty or desire.

The second qualification is that, while it may be said that there exists no sharp line of division between the imperative and optative moods it cannot be denied that there does exist a difference of degree. One would not expect to find a softened form of imperative used when the object was to stigmatise an act as impossible or as an act forbidden by a strong interdictory mandate.

However, the reason why I am not prepared to attach to this verse the force of a direct prohibition rests not on the grammar only, but upon the treatment of the subject of adoption by Vasishtha himself, the second of the subjects proposed by me for examination. In the sixth verse of the fifteenth chapter the man who desires to adopt a son is advised to take a not remote kinsman, just the nearest among his relatives. If after so taking him the adopter entertains doubt, and this doubt, the commentators explain as a doubt regarding the caste or other qualifications of his adopted son, the adopter is advised to set him apart as a Sudra. Now if it be conceded for the sake of argument that one on the qualifications is a doubt whether or not he is an only son, then according to Vasishtha the expedient course to adopt is to set apart the unfortunate boy as a Sudra. It is not said that he becomes a Sudra or ceases to belong to the family or that his adoption becomes *ipso facto* null and void. And lest any one should say that he can never be readmitted into caste, Vasishtha in the 17th verse of the same chapter adds, that the performance of penance will enable any outcaste to readmission even to sacred rites. But as I said before, whether this was the qualification alluded to by the writer is, and must probably remain, a conjecture.

It may be said with safety that the adoption of an only son is an inexpedient act. Any assertion that Vasishtha meant more is matter of doubt.

[125] Once more Vasishtha deals with the question of inheritance and exclusion from inheritance. Thus Chapter XVII, vv. 52, 53, "Those "who have entered a different caste, eunuchs, madmen and outcastes, "receive no share." No allusion is made to only sons who have been taken in adoption, and the absence of any mention of them cannot be said to have been the result of forgetfulness or accident.

There remains however a still further reason, and one which will probably be appreciated still more strongly by Hindus, and after all the only way of attaining a proper knowledge of Hindu Law is by placing one's self, as far as foreigner possibly can, on the standpoint from which a Hindu would look at the question. To import foreign ideas and bring them to bear upon interpreting Sanskrit texts when modes of interpretation sanctioned by Hindu logicians of the highest authority are forthcoming is an obvious error. In the present case we have the advantage of such a guide in the Purwa Mimansa of Jaimini, Chapter I, section 2, verses 26-30. That learned philosopher about whose authority there is no room for doubt lays down as a rule of interpretation both for civil and religious ordinances that where a text is followed by a clause assigning a reason, a doubt at once arises whether such texts are simply commendatory or obligatory. Now the word Jaimini uses in this passage for obligatory is expressed by a gerundial participle. The force given by such participles as this passage shows and as Whitney points out is a force expressing "something which is to or which ought to suffer the action expressed by the "root from which they come" (section 961).

This rule of interpretation coincides with the natural construction from a grammatical point of view. According to both, this text expresses nothing more than an act of expendiency.

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No text of Vasishtha was pressed upon our notice beyond the first four texts and Chapter XV. So far as I have been able to examine the original and the translation as contained in the sacred books of the East, Volume XIV, there is no other text which bears directly upon the subject.

[126] The law, therefore, as far as it can be gathered from Vasishtha, probably amounts only to an expressoin that the adoption of an only son is an inexpedient act and cannot—if a regard to rules of construction approved by Sanskrit writers themselves be had—be with safety said to amount to a direct prohibition. There is no text declaring such an act impossible or null and void. At the very outside, and even this I find it difficult to concede, it may be an act *quod fieri non debet.*

The act is entirely omitted from the list of acts which amount to Mahapatakas, and can only by a strained interpretation be included in the list of Upapatakas.

I have gone with great care and attention through a text of Vasishtha published in the year 1805, and I have also compared the translation compiled by Dr. Bühler in 1882 after he had the good fortune to consult and examine the only three complete manuscripts of this writer which had up to that time been found. There is, as I have already said, from first to last, no allusion to the region termed "Put." The idea of a son and the benefit to be derived from him are given in chapter XI, vv. 41 and 42, which are as follows:—

The ancestors always rejoice at a descendant who lengthens the line, who is zealous in performing funeral sacrifices and who is rich in Gods, and Brahmans. The Manes consider him their descendant who offers food at Gaya, and they grant him (blessings) just as husbandmen produce grain on well-ploughed fields.

So remarkably free is Vasishtha from the idea of a son as being requisite and necessary for salvation, that I felt no little surprise when I came across the passage quoted by Mr. Mandlik at page 499 of his work. I at once turned to the reference in original as given by him in his foot-note, and found that the words in that passage contained no allusion whatever to salvation. Fortunately Mr. Mandlik has given the text in original just above his translation, and there the wrods are न त्वेकं पुत्रं दद्यात प्रतिगृह्णीयात् वा सहि सन्तानाय पूर्वेषाम् ॥

[127] The translation of these words are, as already pointed out "but he should not give or take an only son, for he is for the prolongation of the ancestors."

A reference to the foot-note shows that, when Mr. Mandlik translated, he translated not from the text of Vasishtha or even from the text he had just reproduced from the Dattaka Mimansa. He translated from a reading in the Mayukha, which substitutes, on what authority I am unable to discover, स हि त्रायते पुरुसम् instead of स हि सन्तानाय पूर्वेषाम्

Dr. Bühler does not even allude to such a text, and there is no doubt in my mind from its repugnance to the rest of Vasishtha that the text of the Mayukha if correctly given is an emendation or improvement on the original and not the original text itself.

I now pass on to the Dharmasastra of Yajnavalkya. In considering these I have again been confronted with the difficulty of want of leisure

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study these Institutes and the commentary on them by Vijnyaneswara in the original and as a whole. I have contented myself with a careful study of the passage to which Mr. Banerji referred us (and this was from the Commentary), and to the translation of that Commentary by Colebrooke. The passage to which he referred us is to be found in Chapter I, section XI, vv. 9 *et seq.** Now this passage needs careful examination.

Verses 9 to 11 run thus—

"मात्रा भर्त्रैरनुज्ञया प्रोषिते प्रेते वा भर्तुरि तात्पित्रावोभाभ्यां सवर्णाय यस्मै दीयते स तस्य दत्तक: पुत्र: ॥ यथाह मनु: ॥ माता पिता वा दद्यातां यमद्भि पुत्रमापदि) सदृशं प्रीतिसंयुक्तं स ज्ञेयो दात्रिम: सुत:, इति ॥ आपद्ग्रहणादनापदि न देयो दातुरयं प्रतिषेध: । तथा एक: पुत्रौ न देय: ॥ न त्वेवैकं पुत्रं दद्यात्प्रतिगृह्णीयाद्वेति वसिष्ठस्मरणात् । तथानेकपुत्रसद्भावेपि ज्येष्ठो न देय: ॥ ज्येष्ठेन जातमात्रेण पुत्रो भवति मानव इति ॥ तस्यैव पुत्रकार्यकरणे मुख्यत्वात् ."

[128] "He who is given by his mother with her husband's consent while her husband is absent or after her husband's decease, or who is given by his father or by both, being of the same class with the person to whom he is given, becomes his given son. So Manu declares" and then follows the 168th sloka or verse of the fifth chapter.

The commentator continues, "By distress it is intimated that the son $\frac{\text{is}}{\text{ought}}$ not to be given unless there be distress. This prohibition regards the giver."

"Similarly an only son $\frac{\text{is}}{\text{ought}}$ not to be given, for there is the Smriti of Vasishtha to the effect that—"But he should not take or accept an only son."

Mr. Colebrooke has translated this passage, and the translation has been much relied upon by the learned Judges in the rulings referred to at the beginning of this judgment. But the first point to be noticed is that the translation contains an undoubted error. The words used by the commentator are not, from a grammatical point of view, one whit more imperative than those of Vasishtha.

Next it will be seen that the commentator bases this dictum, that an only son is not to be given, on the text of Vasishtha, and I have already shown what only that text can with safety be held to mean.

Thirdly; it will be noted that the commentator, while expressing an opinion that there was a prohibition against the giving of a son when there was no distress, and a similar prohibition when there was an only son, passes over in silence any prohibition as regards the taker, Now one leading idea which runs through the Commentary of Vijnyaneswara, on Yajnavalkya is that the essence of a gift consists in its acceptance not in the giving. His doctrine is, a gift is not a gift because it is given, but it becomes a gift when it has been accepted. The whole argument leading up to this will be found in Chapter I, section 1, v. 10, *seq.* By his omission of any text about the taker he has surely stopped short of giving any [129] sanction to the idea that the gift of an only son was an invalid act.

Fourthly; another doctrine on which the commentator insists is that property and propietary right are temporal matters, and not, as some would hold, the result of holy institutes exclusively.

Fifthly; he gives, as we would expect, prominence to the text of Manu. In continuing the disquisition he comments upon the necessity for due

* The sections are those into which Mr. Colebrooke has divided the Commentary.

observance of the requisite ceremonies, and he has already given the first place in his text to the essential necessity of distress as a condition precedent to adoption. Examining the Commentary further, it will be found that in the second chapter, section 10, he deals with exclusion from inheritance. He enumerates a number of persons who are excluded from participation in succession. The roll of persons excluded does not differ from that given by Vasishtha and Manu beyond that the terms "impotent," "madman," &c., are explained, and that the commentator advocates their maintenance out of the family property although subjecting them to exclusion from participation, as we have already seen. There is not one word which permits of foundation for the idea that an only son taken under the guise of adoption is to be excluded from inheritance. Such an idea would militate with the doctrines already set out, it would militate also with another doctrine of his, that property, however acquired, does not become invalid because the means by which it is acquired amounted to an infringement of restrictions. In advancing this doctrine he does not overlook an objection that might be offered that proprietary right obtained by robbery and other nefarious means would still be property. This he answers by saying that such a right is not recognized by the world and disagrees with received practice. In other words, he recognizes the right of custom as a controlling power of high authority. Other instances of this view in his work will be found in Chapter I, section 1, vv. 22 and 23, 32, &c. Whether then we consider the authorities upon which the commentator relies, *viz.*, Manu and Vasishtha, or whether we consider the text in the light of the principles that pervade his writ-[130]ings, the inference is irresistible that in laying down the text as he did, the commentator meant no more than to enunciate as Yajnavalkya's and his own views that the giving of an only son was an optative act, an act of expediency.

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Another point which cannot be passed over in silence is the fact that he too does not import directly and in express terms into the doctrine of adoption any idea of salvation from "Put" or attainment of heaven. Before proceeding to commentators I would again draw a marked attention to the absence of this point from the texts on adoption in all the writers of this group. There is only one passage in Manu and that in the Chapter on the Domestic Life of the Commercial and Service classes, where the idea is wedged in. To that verse I shall allude hereafter. In fact the only idea we have been confronted with when adoption is being discussed is the solitary one that an only son should not be taken in adoption because the object for which he was destined was the prolongation of the line of ancestors, an idea which probably owes its foundation to vain glory and temporary power rather than to any idea of spiritual benefit in another world. Even in the *Mitakshara* I have been unable to find any such idea, and I have not been referred to any text which would show that Vijnyaneswara gave it his sanction. The real and legal position of father and son up to the end of this period of Hindu Law was briefly this :—The father was the patriarch with power of sale and gift over his offspring, a power which could not be questioned by the son Thus Manu (Chapter VIII, sloka 416) declares, "Three persons, a wife, a son and a slave are declared by law to have no wealth exclusively their own ; the wealth which they earn is acquired for the man to whom they belong." And a further principle was this, that a son, especially if a relation when adopted into a family, was at once made and treated as one of the family circle. (Manu, Chapter IX, sloka 169).

The text of Narada was not referred to by the other side in the course

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of the argument. I will not therefore refer to it at any great length. But a consideration of his views on the subject, if they can be gathered with accuracy from the text, is important for [131] this reason, that it is upon a text of his and one of Saunaka that Nanda Pandit really rests his doctrine that the adoption of an only son is invalid.

Narada's work, as I have already said, follows by a long interval of time the work of Yajnavalkya and is supposed to have preceded that of Vijnyaneswara by an interval of some seven centuries. His works contain doctrines decidedly opposed to the teaching of Manu, and it is very improbable that a writer of such clearness, as he is, would have ventured to differ on essential points, unless he had good authority for doing so or aimed at being a reformer. That he was an author whose writings exercised great influence is evident from this one fact alone, to which Dr. Jolly testifies, that upward of half his works has been embodied in the authoritative composition of the mediæval modern writers in the province of Sanskrit Law (S. Bk. East, * XXXIII and XXI).

Narada examines at some length the doctrine of valid and invalid transactions, and the conclusion of the whole matter is, according to him, that validity of a transaction hinges upon the independence of the parties to it. This, it will be perceived, is a new doctrine entirely and is the key note to the position he takes up about the gift of a son.

The doctrine of invalid gifts is again taken up and examined by him in the fourth title of law under the head "resumption of gift." Sixteen kinds of invalid gifts are enumerated, and under none of them can by any possibility be placed the gift in adoption of an only son. But there are two verses in the earlier part of the chapter, vv. 4 and 5, which run as follows :—

"An Anvahita deposit, a Yachita, a pledge, joint property, a deposit, "a son, a wife, the whole property of one who has offspring."

"And what has been promised to another man, these have been "declared to be inalienable by one in the worst plight even."

The natural interpretation of these verses would establish first this result, that under no circumstance whatever,—not even in distress, whatever Manu, Vasishtha, Yajnavalkya may say to the con-[132] trary,—can a son form the subject of a gift. One turns naturally and at once to the Chapter on Inheritance and to that on the Duties of Husband and Wife to see how he will explain the recognition in law of an adopted son. The result is disappointing. He mentions him only once, and that is when he is repeating the list of twelve sons given by Manu.

Thus it is easy to see why Narada excludes a son from being the subject of gift. The son is not an independent person, and as independence goes to the validity or invalidity of a contract, Narada boldly enunciates the proposition that the gift of a son at any time and under any circumstance is an invalid act; he has no place for the doctrine anywhere that a son is requisite because of welfare in the spiritual world. With this writer the object and idea of a son is the continuation of lineage (see especially Chapter XII—v. 84).

We have now gathered two distinct ideas, the idea that a son is for victory over enemies and for continuing the line of ancestors, and therefore the man who has only one and gives him away in adoption commits an imprudent act. We have a second idea that of Narada that a son is a person under subjection and therefore cannot be made the subject of gift.

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It is not till we reach Nanda Pandita that we come across the doctrine that the gift of an only son is an offence which threatens both giver and taker with the extinction of lineage. The text runs thus :—

इदानीं कीदृशः पुत्रीकार्य्य इत्यत आह शौनकः ।

" नैकपुत्रेण कर्त्तव्यं पुत्रदानं कदाचन ।

बहुपुत्रेण कर्त्तव्यं पुत्रदानं प्रयत्नत " इति ॥

एक एव पुत्रो यस्येति 'एकपुत्रः' तेन तत् पुत्रदानं न कार्य्यम्, न त्वेवैकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वेति, वशिष्ठस्मरणात् ॥ अत्र स्वस्वत्वनिवृत्तिपूर्वकपरस्वत्वापादानस्यदानपदार्थत्वात् परस्वत्वापादानस्य च परप्रतिग्रहं विनानुपपत्तेस्तमाप्याक्षिपाति, तेन प्रतिग्रहनिषेधोऽपि अनेनैव सिध्यति ॥ अतएव वसिष्ठः । 'न त्वेवैकं] पुत्रं दद्यात् प्रतिगृह्णीयाद्वेति' । तत्र हेतुमाह, 'स हि सन्तानाय पूर्वेषामिति'। सन्तानार्थत्वाभिधानेनैकस्य दाने सन्तानविच्छित्तिप्रत्यवायो बोधितः । स च दातृप्रतिग्रहीत्रोरुभयोरापि उभयशेषत्वात्। यत्तु स्मृत्यन्तरम् । " सुतस्यापि च दाराणां वशित्वमनु शासने। विक्रये चैव दाने च वशित्वं न सुते पितुरिति"॥ यच्च योगीश्वरस्मरणम् 'देयंदारसुतादृत' इति ॥ तदेकपुत्रविषयम् ॥ कदाचन, आपदि । तथाच नारदः, निक्षेपः पुत्रदारञ्चसर्वस्वञ्चान्वये सति । आपत् स्वपि हि कष्टासु वर्त्तमानेन देहिना ॥ अदेयान्याहुरचार्या यद्यत्साधारणं धनामिति । इदमप्येकपुत्रविषयमेव वशिष्ठशौनकैकवाक्यत्वात् ॥

The above text may be translated as follows :—

Now of what kind is the person who is suitable to be adopted as a son. On this point Saunaka says, "The gift of a son is not in any case "to be made by a man having an only son. The gift of a son is to be "made with readiness by a man having many sons." The meaning of the word *Eka Putra* is a man who has only one son, by him the giving of a son is not to be made. There is the Smriti of Vasishtha to the effect. "But he should not give or accept an only son." Now from the use of the word "gift" there arises the idea that the property of another is established after the previous extinction of one's own property, and also that property in another cannot be without acceptance. Saunaka implies all this. Therefore the prohibition against acceptance also is established by this text. This also says Vasishtha. "But he should not gave or take an only son." For this he mentions a cause. "For he is for the prolongation of ancestors." Seeing that an only son is appointed for the purpose of prolonging ancestry, loss and destruction of such ancestry must be understood (to be) in the giving of him, and this is the case of both giver and acceptor for the reason follows the (case of) both.

There is another text of the Smriti. "The father has power in the matter of treating of a son and a son's wives, but he has not [134] power over the son in the matter of sale and gift." And there is the text of the Holy Saint. "There may be giving except a wife and son" and this refers to an only son. "In any case" means "In a time of distress." Thus Narada says, "A deposit, a son, a wife, the whole property of one who has offspring, and what is joint property, these have been declared to be inalienable by one in the worst plight even."

This also refers to an only son according to the text of Vasishtha and Saunaka.

The authorities for this proposition are according to Nanda Pandita—Saunaka, Vasishtha and Narada. The texts of the two latter have been

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already considered. Nanda Pandita views them very differently: the text of Vasishtha in his eyes establishes a prohibition against the gift of an only son. The text of Narada presents a difficulty, but he gets over it by an *ipsi dixit* that Narada referred, when he wrote the text, to the case of an only son, and to no other. For this assertion of his he gives no authority of any kind.

The text of Saunaka is very emphatic. It runs thus in the Dattaka Mimansa.

नकपुत्रेण कर्तव्यं पुत्रदानं कदाचन

But there is one immense difficulty in considering the real meaning of this text. It stands a fragment which has been presented to us entirely detached from the context, and neither this library nor, as far as I know, any private person in Allahabad, is in possession of a copy of Saunaka's text. Probably if we had the context we might find that the text was in harmony with the writings of Manu and Vasishtha. Mr. Mandlik in his book the Vyavahara Mayukha, boldly maintains that this text as well as the other is purely a recommendatory one. I was not prepared to follow him, for so far as my study of Sanskrit had carried me this form of sentence did represent a strong imperative. Mr. Mandlik's knowledge of Sanskrit is however more wide and vast than any I can pretend to, and I find by reference to Witney that the interpretation advocated [135] by Mr. Mandlik is one which that eminent grammarian and scholar would be prepared to accept. In section 999 of the grammar, he says that the gerundive used in the same construction as is adopted in this text not seldom has a purely future tense.

The authorities then on which Nanda Pandita rests his prohibition do not when examined bear him out. He is so recent a commentator that his dicta can hardly pass unchallenged on the score of antiquity.

It is, moreover, not beyond doubt that Nanda Pandita himself may not have meant to lay down anything more than that the giving and taking of an only son was a fault and therefore to be avoided. There is a vast difference between this, in itself an advance upon the older texts, and between laying down the act as one interdicted by Civil Law.

The ground for holding that Nanda Pandita was not prepared to interdict the adoption of an only son are briefly as follows:—

A more particular examination of the text of the Dattaka Mimansa shows that Nanda Pandita was in the habit of using when necessary the more positive forms of prohibition such as वै, see section IV, v. 67, and elsewhere, a fact which affords some ground for the contention that his dicta upon पुत्रोकार्य do not amount to more than an enumeration of the "points," if I may use the term, which an adopting father would seek in his adoptive son, and do not define an absolute incapacity in the giver, taker or subject even if such ideas were recognised by him. The whole argument contained in section IV is obscure and gets still more obscure as it proceeds. It is in sharp contrast to the crisp, well-arranged and well-defined dicta of Narada, and I have already pointed out the unblushing way in which the Pandit perverts Narada's arguments into a foundation for his own proposition.

Again Nanda Pandita, in the section immediately preceding section IV, does deal with the case where the rule that a boy of a different caste should not be adopted has been transgressed. What is the result,

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the Pandit asks, of transgression, and his answer is not [136] that the adoption is invalid, but that such a son is to be excluded from participation in the estate; he is, however, entitled to food and raiment from the adoptive or would-be adoptive father. This section 3 follows section 2, in which the prohibition against such an adoption has been discussed. Section 4 is followed by no similar question and answer.

Section 5 deals with the ceremonies of adoption, and concludes with a precept that where the ceremonies fail, the filial relation fails. The absence of any like precept in section 4 can hardly be due to accident.

So much for internal evidence as to whether Nanda Pandita did or did not mean to interdict absolutely the adoption of an only son. That evidence is distinctly in favour of the proposition that he did not mean to interdict the act absolutely.

Now as to the authority to which the Pandit's work is entitled. Mr. Colebrooke was pleased to term the Dattaka Mimansa "an excellent treatise on adoption;" but he does not appear to have pursued to any length the enquiry how far the author was a man entitled to weight or cognizant of local custom, especially when he made additions to or offered explanations of the texts of those whom we may term the Sanskrit Fathers. Mr. Sutherland writing from Monghyr in 1819 claims for the author that certain works of his other than the Dattaka Mimansa existed in much esteem. He maintains though not without apology that the Dattaka Mimansa is alse held in estimation, by whom it does not appear. The arguments he allows are often weak and superfluous, the style frequently obscure and not unrarely inaccurate. The translator adds that the work has been compiled under circumstances affording little facility for enquiry or collecting information.

Now if 1 am asked to choose on a point of coflict between the authority of works like those contained in the first two groups of writers and the work of a man of modern times whose pretension to authority rests mainly upon the unsupported testimony of modern times and that testimony wavering and uncertain, my choice is made without hesitation and without difficulty.

[137] The one justification for Nanda Pandita and his views, if we must accept them in the direction Mr. Banerji would advocate, is that local custom has pronounced against such an adoption and that so distinctly that even Manu himself would require a king to bow to the custom when administering law to his subjects. Is there any evidence in favour of this view?

Now there is a certain amount of material, slight it may be, but still existing in this case, for the inference that the custom of Benares is not against the adoption of an only son. If it were, we should expect to find at the very least this result that Beni Prasad and his family are or have been put out of caste or have regained their caste by penance, for they are Agarwala Banyas by whom the idea of caste and religious observance is carefully cherished. Mr. Banerji does not for a moment pretend that any such effect has followed this adoption, and this in the very town where Nanda Pandita wrote his Dattaka Mimansa and where it is, we are told on authority, held in much esteem. Now in the Punjab where custom on the question has been made the subject of judicial enquiry, the answer to the question has been that such an adoption is valid. (1)

(1) 57 P.R. 1881, *Hoshnak* v *Tarmal Singh*.
43 P.R. 1879, *Majja Singh* v *Ram Singh*.
18 P.R. 1870, *Adjudhia Parshad* v *Dewan* (Musammat).

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No custom has been pointed out to or discovered by me which maintains such an alienation to be void.

Thus then after a careful examination of the text writer and commentators, I find—

(1) That this Court in 1879 founded its ruling upon what would appear to be a correct and not a mistaken impression of the text of Hindu Law books.

(2) That no text writer, except it may be Nanda Pandita, gives any countenance to the view that the adoption of an only son would be to extinguish the lineage of the natural father and to deprive the ancestors of the natural son of the means of salvation.

(3) That such an adoption is not forbidden by the Hindu Law as current in these provinces.

[138] (4) I also find that, save in Nanda Pandita, so far as these provinces are concerned, there is no real foundation for holding that the subject of adoption is inseparable from the Hindu religion. Yajnavalkya and his commentator distinctly incline to an opposite view.

Lastly I find no authority save a distorted gloss upon Narada for the idea that the father of an only son has no such absolute dominion over that son as to make him the subject of gift. The text of Narada does not apply to only sons, but to all sons alike and is in direct opposition to texts many and various to be found in all the Dharmshastras cited to us.

It will be easily seen from the above that I am satisfied that Mr. Colebrooke's translation is, as the learned Chief Justice has pointed out, in error, and the error is probably the cause why both Mr. Justice Dwarka Nath Mitter and Mr. Justice Markby were led into the opinions they formed. Mr. Justice Dwarka Nath Mitter, if he did follow Colebrook's translation, appears to have done so without full regard to that translation as a whole. Sir Charles Sargent adopts Mr. Justice D. Mitter's view. Sir Charles Turner was no Sanskrit scholar; the Dattaka Mimansa and its translation evidently were at the root of his dissenting opinion in Hanuman Das *versus* Chirai.

I have up to the present made little mention of the doctrine that because a son delivers his father from the region called Put, therefore we must infer that that adoption is inseparably bound up with the Hindu religion and the adoption of an only son must be null and void.

My silence is due to the fact that, as I have shewn, the text writers do not put this argument forward when they are dealing with adoption as a question of civil law. To them the distinction between religious law and civil law was not, I venture to think, so obscure or immaterial as some would endeavour to maintain.

Nanda Pandita, admitted to be an "obscure and not unrarely inaccurate writer," does mingle the two ideas and gets confused in [139] consequence. But Manu keeps them distinct and apart except in his ninth chapter, and the verse there to be found is generally believed by modern critics to be a verse 'really suspicious or clearly interpolated.' The verse I allude to is verse 138, and its authenticity has been suspected for more than a quarter of a century. That verse does say that because son delivers his father from the hell called *Put*, he was therefore ca Putra. But the theory of adoption as essential to the well-being family was earlier than the idea of *Put*, or of a son as necessary

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the libations to the Manes. It had become a recognized means of continuing by a fiction the line of ancestors, and the element of religion was imported into it by the Brahmins when they gained ascendancy. The foundation of adoption on the theory of salvation is, I am confident, an error. The view, which my study of Sanskrit literature leads me to think is the right view, as to the origin and growth of the law of adoption, has been well put by Mr. Sarvadhikari, an eminent Sanskrit scholar, in his Tagore Law Lectures. That writer when dealing with the subject says :—

"It is instructive to observe the feelings with which a son was regarded both in ancient and in mediæval India. In the hymns of the Rig Veda a son was the delight of his father, and his birth was earnestly desired to continue the line of his progenitors."

"The religious element had not yet entered into the conception of a son. The family would be destroyed and the mundane existence of a long continued line of ancestors would be obliterated, if no son were born in the family. Religion, in the Vedic Age, concerned itself with higher things, and not with the birth and death of a male representative of the family. The theory of a region of eternal torments which a sonless man would inhabit was not yet invented. But there is ample evidence to show that the primitive sages of India most solemnly enjoined upon all their faithful followers, the duty of begetting a son, and thus maintaining the power and the honour of the family in which they were born."

"In the later stages of the social progress, the birth of a son was felt as an *absolute* necessity, not only in this world, but also in the life to come. Religion had sanctified the natural craving, and the unfortunate man who was not blessed with a son in this world was doomed to a dark and fathomless abyss of eternal horrors."

[140] *Put* is not a region known to the Vedas. In the Aitareya Brahmana one Haris Chandra, who had no son, asks one Narada "What do people gain by a son whom they all wish for, as well as those who reason as those who do not reason?" Here, if ever, was an opportunity to drag in the idea of salvation from *Put*, but the idea and the word is not even mentioned. Even the doctrine of payment of the three debts finds no place in Narada's answer.

As Brahminical views prevailed the idea of *Put* and adoption as bound up with adoption found places in the texts of the older writers, but that place was side by side with rites and ceremonies, not with law.

I do not and would not for a moment wish to be understood as holding that the doctrine that a son is a powerful instrument for securing future beatitude to his parents is not a doctrine current in these Provinces, or that an orthodox Hindu would accept my criticism on Manu, Chapter IX, v. 138. But even he will, I think, on reflection admit that the doctrine is a matter of religion not of the civil law, and it is not, as often supposed, a doctrine which maintains that the possession of a son is the only means of attaining salvation. The XIIth Chapter of Manu and other passages show that this is quite a mistaken view. See also Vasishtha, Chapter IX, sl. 12; and Ch. XXIX, sl. 3.

Nor must it be forgotten that Heaven and Hell are essentially foreign ideas, if they are understood to mean fixed states of happiness or torment. Supreme beatitude or Moksha is not made anywhere dependent solely upon the possession of a son. It seems to me therefore quite unnecessary to pursue this idea further.

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For the reasons given above, my answer would be that the adoption of an only son having taken place in fact, such adoption is not null and void under the Hindu Law, and under these circumstances the remaining two questions call for no answer.

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NOTE.—Except in the quotation at p. 98 from the judgment of the Privy Council in *Srimati Uma Deyi* v. *Gokoolanand Das Mahapatra*, the maxim "Quod fieri non debet factum valet" throughout the judgment of Edge, C.J., is erroneously printed as "Quod fieri non *debuit* factum valet." The substitution of "debuit" for "debet" was made by mistake, and without his Lordship's authority.

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[141] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

MUHAMMAD ZAHUR (*Plaintiff*) *v.* CHEDA LAL (*Defendant*).*
[8th December, 1891.]

Civil Procedure Code, s. 375—*Act X of* 1873 (*Indian Oaths Act*,) s. 11—*Adjustment of suit.*

The question in a suit was whether the purchase-money for a house, which had been paid by the defendant, had been paid out of his own funds or out of monies belonging to the plaintiff. A witness for the defence having made statements apparently favourable to the plaintiff's case, the pleaders for both parties signed and presented to the Court a petition that if upon a particular bond in the witness's possession it should be stated that the money was received through the defendant, the Court should decree the suit, otherwise the suit should be dismissed.

Held that this arrangement was not an adjustment or compromise of the suit within the meaning of s. 375 of the Civil Procedure Code, so as to determine the jurisdiction of the Court and necessitate its passing a decree according to the arrangement.

The Oaths Act (X of 1873) does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says he will be bound by the oath of a particular person, s. 11 of the Act only means that *pro tanto* he will be bound, *i.e.*, so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth as against him throughout the whole of the litigation. But it in no way compels the Court trying the case to accept it as conclusive.

Vasudeva Shanbog v. *Narain Pai* (1) approved.

[R., 22 B. 680; 24 C. 908 = 1 C.W.N. 597; 33 C. 386 = 10 C.W.N. 501; 16 Ind. Cas. 733 (734); 19 Ind. Cas. 450; 6 S.L.R. 166 (167); D., 12 C.P.L.R. 56].

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *Amiruddin*, for the appellant.

Mr. *Conlan* and Babu *Rajendra Nath Mukerji*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This second appeal relates to a suit brought by Cheda Lal, the plaintiff-respondent, against Muhammad Zahur,

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* Second Appeal, No. 1424 of 1888, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 6th August 1888, confirming a decree of Maulvi Muhammad Abbas Ali, Munsif of Nagina, dated the 15th May 1888.

(1) 2 M. 356.

defendant-appellant, to obtain possession of two-thirds of a house of which the plaintiff is admittedly the proprietor to the extent of one-third. The case for the plaintiff as stated in the plaint shortly was that Hulas Rai was the owner of the house, that he, the plain [142] tiff, had acquired one-third of it, and that in consequence of disputes between himself and Hulas Rai that person had refused to sell to him the other two-thirds. Consequently, said the plaintiff, "I had to get a third person to act in the matter as purchaser, and that third person was Muhammad Zahur, the defendant, who is now in possession, but to whom I handed the purchase-price of the house, namely, Rs. 590, and who refuses to give me possession, alleging that he and not I was the purchaser of that two-thirds of the house."

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The defendant denied the plaintiff's story and asserted that he was the purchaser of the house; that he found the money from his own proper funds, and that he paid it to Hulas Rai. It was upon that condition of facts as stated on both sides that the cause went to trial before the Munsif, and he stated certain issues for determination, into which I need not more particularly enter, because the main issue to be determined was, "did the defendant purchase the two-thirds of the house for and on account of the plaintiff and with his money, and was the amount paid by the defendant for the plaintiff Rs. 590."

The cause went to trial and a number of witnesses were called for the plaintiff, and witnesses were also called for the defendant. In the course of the trial, namely, upon the 12th April a witness of the name of Maula Bakhsh was being examined on behalf of the defendant, and it was a matter to which he was deposing that the money paid by the defendant to Hulas Rai was the money of the defendant. He was apparently asked questions to show whether the plaintiff and defendant were not upon terms of intimacy such as might naturally lead the plaintiff to entrust the defendant with the task that he said he had entrusted him with. It was to be borne in mind that, according to the Munsif's judgment, a body of testimony had been given to show that such was the existing state of things. Upon the 11th April 1888, the pleaders for the plaintiff (Maula Bakhsh having then been apparently examined as a witness put in a petition which professed to be filed on behalf of the plaintiff, and was signed by the plaintiff's pleader, and the pleader for the [143] defendant, and in that document there was a passage to the following effect, "that in the bond written by Salig Ram which is in the possession of Maula Bakhsh, if there be not the following words, namely, that the money was received through Muhammad Zahur, let the Court decide the case against the plaintiff in this suit, if the words are written, let the Court pass judgment for the plaintiff. To this decision the parties have no objection."

Then there was an order made upon that document:—"the pleaders for the parties have put it before me and verified; it is ordered that Maula Bakhsh, the witness for the defendant now in Court, put forward the bond written by Salig Ram, the money of which Maula Bakhsh has paid and got the bond back."

Now it is important to my view of this case to see what the precise state of things was at that moment. Evidence had been given to show that the relations of the plaintiff and the defendant were of an intimate and very friendly character. Maula Bakhsh had been examined, and had made some admissions apparently favourable to the plaintiff's case, and these pleaders, probably more in advertence to the credit to be attached

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to Maula Bakhsh than for any other purpose, entered into this arrangement, which was what? That if Maula Bakhsh produced, or did not produce, a particular bond for Rs. 435 which had been redeemed by Maula Bakhsh as the purchaser of the house, then the plaintiff would be discredited to that extent or the witness Maula Bakhsh would be discredited.

I, however, much regret that through mistake upon my part when this appeal was originally argued I did not precisely appreciate the nature of this particular document. I was under the impression, and my brother Knox says he was also under the impression, that it was a document which was mixed up with the payment of the alleged Rs. 590 by the plaintiff to the defendant, Muhammad Zahur. It is in consequence of that confusion that the delay has taken place by reason of this remand order having been made. However, in my opinion it is fully competent for my brother Knox and myself, we having made no decree in this case as yet, to correct [144] the mistake we fell into and to see that due justice is done to the parties irrespective of that remand order.

Mr. *Amiruddin* who suported the appeal, and who, both on the former occasion and the present occasion, has put forward every fair argument that could be used in support of his views, has contended that the moment the agreement of the 11th April 1888, was filed in Court and the moment of Maula Bahksh had been examined and proudced the bond and the name of the defendant was found upon it, the jurisdiction of the Court to try the case ceased, and it had no alternative but then and there upon that material alone to proceed to decree in favour of the appellant.

I cannot agree with that view. I think it proceeds upon a misapprehension of the mode in which our Courts have to deal with a case under ss. 373 and 375 of the Code of Civil Procedure and a misapprehension of what is the true scope and operation of the Oaths Act of 1873. In my opinion, there being a suit pending in the Court of the Munsif, that suit could only be disposed of by a decree of some sort, either a decree passed upon the evidence and in reference to all the materials upon the record, or a decree passed upon an agreement for adjustment between the parties falling within the terms of s. 375. Code of Civil Procedure. Now I entirely agree with every word that is said by Mr. Justice Muttusami Ayyar in *Vasudeva Shanbog* v. *Naraina Pai* (1). The learned Counsel for the appellant with his naturally acute mind omitted to notice that upon that particular agreement, as it stood, the Court could pass no decree, but something else had to be done, namely, the witness had to be examined, and Mr. Justice Muttusami Ayyar has clearly pointed out in that case that that makes a very considerable difference and removes agreements of such a character from being recorded as an adjustment within the meaning of s. 375.

But lest the learned Counsel should suppose that I have not fully considered this matter, I will deal with it in the aspect of the Oaths Act, and, if he were to place his argument upon that statute, I would rule that the Oaths Act does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says, [145] he will be bound by the oath of a particular person as read by the light of s. 11 of that statute it means no more than this, that *pro tanto* he will be bound, that is to say, in so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth, and the truth of that evidence will be conclusive as against him throughout the whole of that litigation.

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But it in no way compels the Court trying the case to accept that evidence as conclusive. It may act solely upon that evidence, and in many cases it would act wisely to do so. But, on the other hand, it may be unwise in some cases to do so, for instance, where the evidence, as in the present case, is so vague as not to convey any satisfactory idea to the mind of the Court.

I do not think that the document of the 11th April, 1888, was an adjustment of the suit between the parties within the meaning of s. 375 which compelled the passing of the decree in its terms, and consequently I do not think that the evidence of Maula Bakhsh was conclusive of the suit. That being so, I think there is nothing whatever to be said for this second appeal. The learned Subordinate Judge upheld the conclusions of the Munsif that the defendant bought the house for the plaintiff and that the plaintiff found the money with which the two-thirds of the house was purchased, and that therefore the two-thirds was the property of the plaintiff and the defendant had no right to resist his prayer for ejectment from those premises. I dismiss the appeal with costs.

KNOX, J.—I concur. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

KADIR BAKHSH AND ANOTHER (*Applicants*) *v.* BHAWANI PRASAD (*Opposite-party*).* [5th January, 1892.]

Insolvency—Procedure in case of dishonest applicant—Powers of the Court—Civil Procedure Code, ss. 350, 359—Construction of statutes—Reference to statement of Objects and Reasons and to Report of Select Committee.

A Court is competent to take action under s. 359 of the Civil Procedure Code at the instance of a creditor, after the hearing under s. 350 has determined.

[146] (*Per* STRAIGHT, J.—It is desirable that an application under s. 359 should be made immediately or as soon as possible after the hearing under s. 350, but a delay of some months will not make the application unentertainable.)

When once any of the frauds referred to in clauses (*a*), (*b*) or (*c*) of s. 359 have been proved at a hearing under s. 350, the Court must under s. 359 either itself pass sentence on the applicant who has committed such frauds, or must send him to a Magistrate to be dealt with according to law. The Court has no option to decline to adopt either of these courses.

In acting under s. 359, the Court does not re-try the questions of fact decided by it at the hearing under s. 350, but has to proceed upon the findings come to at that hearing. An applicant for a declaration of insolvency who does not avail himself of his right of appeal from the order rejecting his application, is concluded by the findings of fact at the hearing under s. 350, and cannot afterwards question them.

In construing a statute the Court cannot refer to the statement of Objects and Reasons attached to a Bill, or to the report of a Select Committee, or to the debates of the Legislature, but can only look to the statute itself. *Queen Empress* v. *Kartick Chunder Das* (1) and *Romesh Chunder Sannyal* v. *Hiru Mondal* (2) dissented from on this point.

[F., 22 B. 112 (123); Appr., 3 L.B.R. 172; R., 7 A.L.J. 370=5 Ind. Cas. 503 (508); 11 Cr. L.J. 250=5 Ind. Cas. 805 (806)=13 O.C. 55 (57)]; D., 17 A. 156.]

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* Appeal No. 13 of 1891, under s. 10, Letters Patent.

(1) 14 C. 721. (2) 17 C. 852.

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THIS was an appeal under s. 10 of the Letters Patent from the following judgment of Knox, J., in which the facts of this case are sufficiently stated for the purposes of this report.

KNOX, J.—Karim Bakhsh and Kadir Bakhsh, the respondents in the application before me, applied to the Judge of the Court of Small Causes, Allahabad, exercising powers as a Subordinate Judge, to be declared insolvent. The learned Judge rejected their application with costs, and found on the 12th March 1890:—

(1) "that the applicants had concealed property of large value * * *"

(2) "that it had been fully proved that they owned other property of much greater value than they had entered in their application to be declared insolvent."

(3) "that shortly before filing their application, the applicants had either concealed or sold off the bulk of the stock they had in one of their shops, and that they had done so with a view to prevent its being availed of by their creditors."

(4) "that the applicants were guilty of fraudulent concealment and transfer in respect of some of their property."

[147] One of the creditors, Bhawani Prasad, applied to the learned Judge and prayed him to exercise the power conferred upon him by s. 359 of the Code of Civil Procedure.

The Court refused to exercise the jurisdiction vested in it by the Code. In passing the order of refusal no reasons for declining to exercise this jurisdiction are given, none of the findings at which the learned Judge arrived on the 12th March 1890 are questioned. He contents himself with recording "I am, however, of opinion that the present case is not one in which the applicants for insolvency should be dealt with under s. 359. That section certainly was enacted for the punishment of such applicants as were found to be guilty of gross acts of fraud or concealment. I do not think this can be said of the present applicants. I am therefore of opinion that this is not a case which the Court should exercise the powers vested in it by s. 359."

I have the greatest respect for the findings of the learned Judge, but I am clearly of opinion that s. 359 was framed expressly to meet the case of a person to whom the findings of 12th March 1890 apply. The respondents have in distinct terms been found guilty of concealment of wilfully making false statements respecting the property belonging to them, and of having fraudulently concealed, transferred or removed their property. After such findings duly placed on record, should any of the creditors, as in the present instance, press for an order under s. 359, the Court which recorded those findings has no option but to pass a suitable order under s. 359.

With the findings of fact I would not in any case as a Court of revision interfere, and all I have heard in the course of the prolonged arguments addressed to me by the learned counsel for the respondents has only convinced me that those findings were most sound and proper finding.

I accordingly set aside the order of the 19th September 1890, and direct that the case be returned to the Judge to pass proper orders under s. 359 of the Code of Civil Procedure. The application is granted with costs.

[148] From this judgment the applicants appealed under s. 10 of the Letters Patent.

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Mr. *Amiruddin*, for the appellants.
The Hon. G. T. *Spankie* and Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J.—On the 5th August, 1889, the two appellants before us in this Letters Patent appeal applied to a Small Cause Court Judge having powers to deal as a Subordinate Judge with the matter, to be declared insolvents. On the 12th March 1890 the Judge rejected that application, having found that the appellants had been guilty of fraudulently concealing and transferring property belonging to them. According to him such frauds were proved at the hearing which took place under s. 350 of the Code of Civil Procedure. In July, 1890, the respondent here, who was one of their creditors, moved the same Judge to proceed and deal with these appellants under s. 359 of the Code of Civil Procedure. The Judge issued a rule calling on these appellants to show cause, and on the 19th September 1890 he discharged that rule on the ground, apparently, that he did not consider the frauds which these appellants had committed to have been of a very gross character. On application for revision by the creditor to this Court that application came before our brother Knox, and he, being of opinion that, it having been proved according to the judgment of the Judge at the hearing under s. 350 that the frauds had been committed by these appellants, the Judge was bound to proceed under s. 359 of the Code, set aside the Judge's order of 19th September, 1890, and directed him to pass proper orders under s. 359 of the Code of Civil Procedure. From that order of our brother Knox this Letters Patent appeal has been brought. It has been contended that the Judge had no power to proceed under s. 359 after he had made his order rejecting the application of these appellants to be declared insolvents. It has also been contended that it was discretionary with the Judge to proceed or not under s. 359 of the Code. It was further contended on behalf of these appellants that we were bound to look at the report of the reasons and objects of the Select [149] Committee of December, 1886. It was also contended on behalf of the appellants that it was open to them now to question the correctness of the finding that the frauds referred to had been proved. As to the first contention, there is nothing in s. 359, or in any other part of the Code to which our attention has been drawn, which indicates that the Court cannot take action under s. 359 at the instance of a creditor after the hearing under s. 350 has determined. As to the second contention, as I read s. 359, when once any of the frauds referred to in clauses (*a*), (*b*) or (*c*) of s. 359, have been proved at hearing under s. 350, the Court must adopt one of two courses prescribed by s. 359, that is, it must proceed to deal with the applicant who has committed those frauds by passing sentence on him itself, or it may send him before a Magistrate to be dealt with according to law. In my opinion, under such circumstances the Court has not got the option of declining to adopt either of these courses. As to the third contention, we have been referred to the case of the *Queen-Empress* v. *Kartic Chunder Das* (1) and the case of *Romesh Chunder Sannyal* v. *Hiru Mondal* (2). I have the greatest respect for the Judges who were parties to those decisions, but I must act on my own judgment in this matter. It appears to me that when a Court has to put a construction on a statute, whether of the Imperial Parliament or of the Legislative Council of India, it is the

(1) 14 C. 721. (2) 17 C. 852.

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statute alone to which the Court is entitled to look. The principles upon which statutes have to be construed are the same whether in Courts of law or in Courts of equity, notwithstanding some mistaken views on that subject abroad. On that subject it is hardly necessary to say for the understanding of lawyers that that point has been concluded by the House of Lords. No doubt debates in the House of Commons or the House of Lords or reports of Special Committees, whether of one or other of these Legislative Assemblies or of the Legislative Council of India, are instructive historically if one has to consider, not what the statute says, but what may have been the motives of one or other party in promoting the legislation. If one were to refer to such debates and reports in order to ascertain [150] the true construction in law of a statute finally passed by the Legislature, it would be necessary to see whether any alteration took place between the time of the debate or the report and the final passing of bill into statute-law, and one would be construing the language of the report or the debate and not that of the statute. It is within one's own experience that parties to legislation sometimes fail so to express themselves in the statute as to carry out the intention they had in passing the statute, and that subsequent legislation is necessary in order by an amendment of the original statute to express in statute language the meaning of the Legislature. Another objection may be made that of two parties, members of the Legislature, who may approve of a bill as drafted, neither of them may attach the same meaning to the wording of the bill. In such a case what possible light could a reference to their opinions, when the bill was passing into an Act, throw upon the true construction of the bill as passed into statute law? In my humble judgment, if Judges were to allow their minds to be influenced in the construing of a statute by debates in Parliament or reports of Select Committees or other bodies on the bill, statute law would be reduced to confusion, and instead of there being one principle of construction of statutes well understood by lawyers, the construction of statutes would be reduced to no principle at all. For these reasons I, for one, decline to look at the objects and reasons referred to by Mr. *Amiruddin*, and I do so because I wish to avoid affording what in my opinion would be a bad precedent in this Court. As to the last contention on behalf of the appellants, that it was open to them now to question the correctness of the findings of fact of the Judge at the hearing under s. 350 of the Code, I am of opinion that they are concluded by those findings. They had a right of appeal against the order rejecting their application to be declared insolvents, but they did not avail themselves of it, and the time has long gone by when they could question those findings. Where a Judge proceeds under s. 359 of the Code, he does not proceed to re-try the questions of fact already decided by him at the hearing under s. 550, but he has to proceed upon the findings which were come to by him at that hearing. For the reasons which I have [151] stated, I agree with my brother Knox that the Judge was bound to take action under s. 359 in one or other of the manners specified in that section, and I would dismiss this appeal with costs.

STRAIGHT, J.—As the points raised in this appeal are somewhat novel, and as incidentally a contention has been put forward by the learned pleader for the appellants to adopt which would, in my opinion, be to sanction a most mischievous precedent, I think it right to add a few words to what has fallen from the learned Chief Justice. It seems to me that the argument for the appellants really resolves itself into two heads, first, that the Subordinate Judge had no jurisdiction to take up this matter,

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he having on the 12th March, 1890 declined to allow the petition of insolvency, and secondly, that under s. 359 the Subordinate Judge had a discretion and was entitled to refuse on certain findings already recorded by him to punish the appellants. It will be convenient shortly to trace the proceedings under Chapter XX of the Code of Civil Procedure. That chapter provides that any judgment-debtor arrested in execution of a decree, or against whom an order of arrest has been made, may apply in writing to be declared an insolvent, and in that application he is bound, amongst other matters, to state the amount, kind and particulars of his property and the value of such property not consisting of money, his willingness to put it at the disposal of the Court, the amount and particulars of all pecuniary claims against him, and the names and residences of his creditors, so far as they are known or can be ascertained by him. Other matters I need not refer to. That application has to be signed and verified in the same manner as a plaint, and therefore he is bound in that application to speak the truth. Now what is the procedure which the Court then has to adopt? Having read the application it is to fix a date for hearing, and it is to issue notice to the creditors of the applicant informing them of the application and of the date of hearing. Now comes the important section, *viz.*, s. 350, which provides for what is to take place at the hearing, and among other matters the Court is directed to examine the judgment-debtor and to hear all persons properly entitled to be [152] heard in that proceeding; therefore not only in his application but in his examination is the applicant afforded every opportunity of making a full statement as to the matters referred to in the application. S. 351 is a section the peculiar framing of which has often given considerable difficulty to me and I believe to other Judges. This much, however, is certain, that no such application shall be granted, on the contrary, it shall be refused, if the Court is not satisfied as to the various matters contained in that section. Now it was under s. 350 that the learned Subordinate Judge, acting on the petition of these appellants, held various proceedings which culminated in his order of the 12th March, 1890, and I am bound to presume that every act done was rightly done, and that when he rejected the application he did so on materials which satisfied him that the applicants had committed some or all of the acts mentioned in the section. Be that as it may, the appellants did not avail themselves of the right of appeal which they had under the law, and I entirely concur with the learned Chief Justice that behind those findings the Subordinate Judge at a later period was not entitled to go. Now Mr. *Amiruddin's* first point of jurisdiction is that contemporaneously with the Judge's order of refusal of the 12th March 1890, an application should have been made under s. 359 and should have been dealt with by that order, and that when once the Subordinate Judge had made that order his power under the chapter came to an end and he was not entitled to listen to any of the creditors. There is nothing in the statute to warrant that contention. I agree with the learned Counsel that it is better that an application to a Court refusing an application of insolvency to proceed under s. 359 should be made immediately, or as soon as possible, but that is a long way from holding that when the respondents applied in July, 1890 to the Subordinate Judge to enforce the provisions of s. 359 he was without jurisdiction to entertain that application. Then comes the point of discretion. Now it may well be that in some cases the word "shall" is used (as for example in the case of the words "shall be lawful") merely to confer on a Court a power which did not exist before, leaving it

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to that Court to exercise a discretion. So it may happen that in a statute the [153] word "may" may be used in such a way as to create a duty that must be performed, but in this s. 359 there can be, in my opinion, no doubt that the word "shall" as used there, and strongly contradistinguished from the word "may" used after, is used in an imperative and mandatory sense. Why I think so is that the section commences with the words:—"Whenever at the hearing under s. 350 it is proved." Now it seems to me that when the requirements of s. 350 have been satisfied and the examination of the applicant and the other requirements of that section have been concluded and there is sufficient proof on the record to warrant the Court refusing the application under s. 351, no option is left to the Court, if a creditor or the creditors apply to it to exercise its jurisdiction, but it must do one of two things, either it must act on the materials on that record taken before itself and then and there punish the applicant who has sought to mislead the Court by a dishonest application or by dishonest proceedings in regard to it, or must send the applicant before a Magistrate to be dealt with in the ordinary course of law. If, as Mr. *Amiruddin* suggests, s. 359 intended that the Court should hold a fresh and full enquiry into all the circumstances again, it is a most singular fact to my mind that, assuming its conclusions to be adverse to the applicant, he, under s. 588 of the Code of Civil Procedure, has no right of appeal. I infer from that that what was intended by the Legislature to be appealable was the result of the proceedings under s. 350 in regard to proof that the applicant had done certain specific acts. I have only one more word to add, and I am glad that the learned Chief Justice has spoken with no uncertain voice on the subject, namely, that I entirely and completely dissent from the view that Judges in administering the statute-law are entitled to refer for guidance either to speeches in Parliament or in the Legislative Council of this country or to reports made by select Committees of that Council in reference to proposed legislation. Our business is to administer the law as we find it on the statute book, and not to endeavour to ascertain what this or that gentleman, no matter how eminent he may be, intended to be the statute law. We must take his intention from the words found in the section, and to accept any other principle [154] or rule of construction would be to introduce an amount of confusion and uncertainty into the administration of justice that would be most undesirable. I believe it to be an axiom that the body of a bill is not to be construed by its preamble, or, to put it more guardedly, if the preamble provides for a wider mischief than the bill in its sections enacts, you are not to give those sections a wider scope than their language properly interpreted justifies. I think my brother Knox was right in holding that the Subordinate Judge, having held on the 12th March, 1890, that certain facts were proved in regard to the appellants, had no discretion when moved by the respondent but to proceed to inflict such punishment as he considered adequate to the misconduct of the applicants in regard to the application they had made to the Court, provided that he did not exceed the term of punishment allowed by the section. I dismiss the appeal with costs.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Knox.

BINDESHRI NAIK (*Plaintiff*) *v.* GANGA SARAN SAHU AND ANOTHER (*Defendants*).* [21st January, 1892.]

Civil Procedure Code, s. 559—Addition of a respondent by the Court—Limitation.

Held by the Full Bench that it is competent to a Court acting under s. 559 of the Code of Civil Procedure to add a person as respondent in an appeal though the time within which an appeal might have been preferred as against such person has expired.

[F., 1 Ind. Cas. 518 ; R., 59 P.R., 1913=59 P.L.R. 1913=88 P.W.R. 1913=18 Ind. Cas. 37 ; D., 14 A. 524.]

THIS was a reference made to the Full Bench by Edge, C. J., and Mahmood, J. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of Edge, C. J.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

[155] EDGE, C.J.—The question referred to the Full Bench is whether a person brought in as a respondent to an appeal on an order made under s. 559 of the Code of Civil Procedure is entitled to have the appeal as against him treated under the Indian Limitation Act, 1877, as if it were presented on the day on which the order of the appellate Court making him a respondent was passed. The question is quite apart from any question of limitation which might arise in the case of a person made a party to the suit by an order passed under s. 32 of the Code of Civil Procedure, and in the answer which I now propose to give to this reference I wish it to be distinctly understood that I am confining myself to the simple question before me and expressing no opinion as to the limitation to be applied in the case of an order made under any other section of the Code. In this particular case the Bench which was hearing the appeal was satisfied that one of the plaintiffs, *viz.*, one Moti Gir, who was not made a party to the appeal, was a person interested in the result of that appeal, and being of that opinion that Bench directed notice to go, and ultimately Moti Gir was added as a respondent to the appeal. At the time when he was added as a respondent to the appeal the period of limitation within which an appeal could have been presented as against him had elapsed. On the further hearing of the appeal it was objected that, so far as Moti Gir was concerned, the appeal was time-barred. Now it appears to me that the power of the Court to act under s. 559 is only limited in two respects, first, the person whom the Court may add under that section must have been a party to the suit, and secondly, he must be a person interested in the result of the appeal. When I turn to the Indian Limitation Act of 1877, I find no period of limitation specified for the action of the Court in that matter. Whether s. 22 of the Indian Limitation Act read with s. 4 of that Act would apply to the case of a person brought in under s. 32 of the Code of Civil Procedure after the period of limitation, I need not consider. There may be a difference so far as limitation is concerned, between

* Second Appeal No. 169 of 1891.

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the action of a Court under s. 559 and under s. 32. There is a wide difference between the wording of those two sections, particularly as to the grounds upon which a person may be brought in as a party. [156] S. 544 shows that in a case falling within that section a Court can in appeal afford relief to a person such as is referred to there, although that person was not an appellant in the appeal, and although at the time when such relief was granted such person could not have preferred an appeal by reason of limitation. For the above reasons, and confining my judgment strictly to s. 559, I answer this reference by saying that there is no bar of limitation in regard to the hearing of the appeal as against Moti Gir.

STRAIGHT, J.—I am entirely of the same opinion.

MAHMOOD, J.—I also am of the same opinion and all the more willingly, because all that has fallen from the learned Chief Justice, I understand to be in full accordance with my judgment in the case of *Sohna* v. *Khalak Singh* (1) where I discussed the scope of the powers exercisable under s. 559 of the Code of Civil Procedure as to respondents, and endeavoured to show how the exercise of those powers, so far as limitation is concerned, is distinguishable from the somewhat analogous powers exercisable by Courts of first instance under s. 32 of the Civil Procedure Code with reference to defendants.

KNOX, J.—I agree with the learned Chief Justice and my brother Judges in the answer which they have given to this reference.

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14 A. 156 (F.B.) = 12 A.W.N. (1892) 22.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Knox.

RAM KALI (*Plaintiff*) v. KEDAR NATH AND ANOTHER (*Defendants*).*
[21st January, 1892.]

Limitation—Suit by daughter entitled to possession of immoveable property on death of Hindu widow—Act XV of 1877 (*Limitation Act*), *sch. ii, art.* 141.

The daughter of a separated Hindu, who was entitled to succeed to her father's immoveable property upon his widow's death, instituted, after the widow's death, a suit for possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow.

Held, by the Full Bench that art. 141 of sch. ii of the Limitation Act (XV of 1877) was applicable, and that limitation ran from the date of the widow's death. *Srinath Kur* v. *Prosunno Kumar Ghose* (2) followed.

[Diss., 20 A. 42; F., 23 A. 448; 25 A. 435 (437) 20 M. 493; R., 21 B. 646 (670); D., 19 A. 357.]

[157] THIS was a reference to the Full Bench by Straight and Knox, JJ. The facts of the case are sufficiently stated in the referring order, which is as follows:—

STRAIGHT, J. (KNOX, J., concurring)—The facts out of which the question of law arises are as follows:—

One Ram Sahai, to whom it is admitted the property in dispute orginally belonged, died in the year 1862, leaving behind him a widow, Musammat Phulesari, and a daughter, Musammat Ram Kali. It is contended for the plaintiff that he was separate, and that succession to

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* Second Appeal No. 908 of 1889.

(1) 13 A. 78. (2) 9 C. 934.

the property left by him should have gone to his widow, and after her to his daughter. It is found as a fact that the widow never had any possession at all, but that from the time of the death of Ram Sahai, his nephew Janki, father of the present minor defendant Kedar Nath, took possession of the property and continued to hold it, and that property is now in the possession of the minor defendant. Musammat Phulesari died in September 1887, and the present suit was instituted on the 18th November 1887, and by it the plaintiff seeks to have her right to the property declared and possession of it given to her. Both the lower Courts have dismissed the plaintiff's claim, upon the ground that it is barred by limitation, in that the defendant and his father before him have acquired a prescriptive title by adverse possession for a period of more than twelve years. It is contended by Mr. *Ghulum Mujhtaba*, upon the authority of a Full Bench of the Calcutta High Court in *Srinath Kur* v. *Prosunno Kumar Ghose*(1), of a decision of the Madras High Court, *Sambasiva* v. *Ragava* (2), and of the Bombay High Court in *Cursandas Govindji* v. *Vundravandas Purshotham* (3), that the Courts below wrongly applied the principle of adverse possession to the facts of the present case, and that the plaintiff, under article 140 or 141 of the Limitation Act, was entitled to institute a suit, either upon the date when in the character of a reversioner the estate fell into her possession, or as a party, who on the date of the death of a Hindu female was entitled to possession of immoveable property.

[158] On the other hand, Mr. *Kashi Prasad* has relied upon some remarks of their Lordships of the Privy Council in *Aumirtolall Bose* v. *Rajoneekant Mitter* (4), and *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (5), and reference has also been made to two rulings of my brother Tyrrell and myself in *Adi Deo Narain Singh* v. *Dukharan Singh* (6), and *Ghandharap Singh* v. *Lachman Singh* (7).

I am disposed to think that the current of authority in this Court has always been to regard possession held adversely to the widow otherwise entitled to possession of her deceased husband's estate, as running, not only against the widow but against the reversionary heir or heirs. As, however, there is the Full Bench ruling of the Calcutta High Court and the rulings of two other High Courts taking a contrary view, and the point is one of considerable importance upon which, if possible, uniformity of decision should be secured, I think it would be best to refer for the consideration and reply for the Full Bench the following question :—

Does possession of the estate of a deceased separated Hindu held adversely to his widow entitled to its possession operate for the purpose of constituting adverse possession to the reversioner or reversioners entitled to succeed upon her death to that estate?

Maulvi *Gulam Mujtaba*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J.—The question referred to us is :—"Does possession of the estate of a deceased separated Hindu held adversely to his widow entitled to its possession, operate for the purpose of constituting adverse possession to the reversioner or reversioners entitled to succeed upon her death to that estate?" The facts as stated in the referring order are, that one Ram Sahai was the owner of the immoveable property in suit, and that

(1) 9 C. 934. (2) 13 M. 512. (3) 14 B. 482. (4) 2 I. A. 113.
(5) 5 C. 938. (6) 5 A. 532. (7) 10 A. 485.

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he died in 1862, leaving behind him a widow, who died in 1887, and a daughter, the plaintiff who brings this suit for possession. Ram Sahai was a separated [159] Hindu, and assuming that the referring order correctly states the facts, his brother's son, on the death of Ram Sahai, entered into possession of the property, and that nephew and his son, Kedar Nath the defendant, after the death of the nephew, continued in possession up to the time of the suit. There is no question of an alienation here ; it is a simple question of whether the plaintiff is barred by limitation from bringing this suit for possession—the possession of the defendant and his father being, according to the referring order, adverse, and without title unless title was obtained by limitation. There have been conflicting rulings on this point. There is a Full-Bench decision of the High Court at Calcutta in *Srinath Kur* v. *Prosunno Kumar Ghose* (1) in which it was held that under art. 141 of sch. ii of Act XV of 1877, a Hindu reversioner who succeeds to immoveable property has twelve years within which to bring his suit for possession from the time when his estate falls into possession. It is quite plain from the dates that Act XIV of 1859 does not apply to this case. The article of the second schedule of Act IX of 1871 which would, I think, have applied, if that Act had not been repealed by Act XV of 1877, is the same in terms as art. 141 of sch. ii of Act XV of 1877. Consequently, if either of those articles applied, having regard to the dates, this suit was within time. I am of opinion that art. 141 does apply expressly in this case, and that the twelve years began to run from the death in 1887 of the widow of Ram Sahai and consequently that the suit is within time. In order not to be misunderstood, I desire to say that I express no opinion as to the article of sch. ii of the Limitation Act which might apply if in this suit the plaintiff in order to succeed had to get rid of, for example, an adoption, an alienation or a deed. Until the question arises I will reserve my judgment on that point. That is my answer to the question referred.

STRAIGHT, J.—The suit here was precisely one of the character contemplated by art. 141 of sch. ii of the Limitation Act, 1877. The plaintiff was a Hindu female entitled to the possession of immoveable property at the death of her mother. Until the death of her [160] mother she had no title to possession. We are told that the article as to adverse possession is only to be applied to a suit where there is no other article applicable to the kind of suit. Here, there is article 141 which is naturally applicable, and I think it should be applied ; and I agree with the view expressed by the Calcutta High Court in the case reported in I.L.R., 9 Calc. 934. I only wish to add as to the two cases reported in I.L.R., 5 All. 532 and I.L.R. 10 All. 485 that, as to the first, no question of limitation arose, and as to the second, it was not argued that the possession held adversely to the widow was not adverse to the reversionary heirs ; on the contrary, it was conceded in argument that it was. I accordingly answer this reference in the same way as the learned Chief Justice.

MAHMOOD, J.—I have arrived at the same conclusion as the learned Chief Justice and my brother Straight in answering the question enunciated in the order of reference made by my brother Straight with the concurrence of my brother Knox on the 21st December 1891, and in what I am going to say now my remarks will proceed on accepting the facts therein stated as the grounds of my judgment.

The present suit was begun on the 18th of November 1887, so that

(1) 9 C. 934.

according to the law as it then stood the limitation applicable is that prescribed by Act XV of 1877. The law of limitation as laid down in that enactment as also in the two preceding enactments, *viz.*, IX of 1871 and XIV of 1859, has two aspects, the principal one being that of laying down rules of law *ad litis ordinationem* giving the limits of the time within which a remedy may be sought for in a Court of justice, and the second being that of laying down rules *ad litis decisonem* or rules of substantive law regulating one of the modes of acquisition of ownership, *viz.*, by prescriptive title.

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Now, in the present case, the date of the suit having been noticed by me and the title of the plaintiff as asserted by her never having been tried on the merits, her suit could fail only in one of the two ways which I have above described, *viz.*, either by showing that by dint of the lapse of the prescriptive period her title had vanished, [161] or by showing hat her suit as a matter of seeking remedy was barred by law.

Now on the facts as stated in the order of reference Ram Sahai died some time in 1862. The lapse of twelve years from that date would bring such property as he left behind him to about the year 1874, when the Limitation Act of 1871 had already come into force, so that it seems to me clear on the facts that the plaintiff's title could not have vanished by reason of anything in that enactment, because art. 142 of sch. ii of that Act, corresponding to art. 141 of sch. ii of the present Limitation Act, leaves no doubt in my mind on that matter.

It follows from what I have said that at the date of the present suit, *viz.*, the 18th November 1887, the question of prescriptive title, such as is asserted against the plaintiff, is governed by the present Limitation Act of 1877, and the learned Chief Justice and my brother Straight have already explained that in this aspect of the case art. 141 of the present Act leaves no room for doubt [as the Calcutta Court in the case of *Srinath Kur* v. *Prosunno Kumar Ghose* (1) have held] that the present suit was not barred by limitation. As to the prescriptive part of the defence, that again rests on s. 28 of the present Limitation Act, but that section again turns us back to the periods mentioned in sch. ii of that Act read with the rules in the body of the enactment. For these reasons my answer to the reference is the same as that of the learned Chief Justice and my brother Straight.

KNOX, J.—I agree with the learned Chief Justice as to the answer which should be returned to this reference and have nothing further to add to the judgment delivered by him.

(1) 9 C. 934.

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14 A. 162=
12 A. W. N.
(1892) 27.

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[162] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

THE COLLECTOR OF ETAWAH (*Defendant*) v. BETI MAHARANI (*Plaintiff*).* [19th February, 1892.]

Mortgage—Bond stipulating for recovery of loan "from my moveable and immoveable property"—Such instrument not a mortgage—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii, arts.* 66, 116—*Attachment of debt before judgment—Civil Procedure Code, ss.* 485, 486, 268 (*a*)—*Act XV of* 1877, *s.* 15—*Injunction or order staying a suit.*

A bond containing a stipulation "that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money to gether with the interest fixed by instituting a suit from my moveable and immoveable property, my own "milk" does not create a mortgage upon any property of the obligor.

Too such a bond art. 66 of sch. ii of the Limitation Act (XV of 1877) is applicable; but where the instrument is registered, art. 116 may be applied to a suit for failure to pay the bond debt.

An attachment before judgment under s. 485 read with s. 486 and s. 268 (*a*) of the Civil Procedure Code, of a debt secured by a bond; or an injunction obtained by a third party and restraining the attaching creditor from subsequently bringing the bond to sale in execution of his decree : is not an injunction or order staying the institution of a suit upon the bond by the obligee, within the meaning of s. 15 of the Limitation Act. *Shib Singh* v. *Sita Ram* (1) followed.

[F., 8 Ind. Cas. 864 (866) ; 19 Ind. Cas. 221 (222)=24 M.L.J. 479 (481)=13 M.L.T. 327 (329)=(1913) M.W.N. 335 (336) ; 1 O.C. 191 ; R., 8 O.C. 227 (231).]

THE facts of this case are sufficiently, stated in the judgment of Straight, J.

Mr. *A H. S. Reid* for the appellant.

Mr. *W. M. Colvin* for the respondent.

JUDGMENT.

STRAIGHT, J.—The plaintiff-respondent at a sale in execution of a decree on the 7th March 1887, purchased the bond upon which the present suit has been brought. That instrument is dated the 20th June 1876, and it was executed by one Lala Laik Singh, in favour of Kishen Das, the proprietor of the firm of Gopalji Kishen Das, bankers, of Etawah. The amount borrowed was Rs. 7,000, the due [163] date was the 1st November 1876, and the interest stipulated for was at the rate of Re. 1 annas 8 per cent. per mensem. That bond was not paid upon the due date and the present suit was instituted upon it on the 6th November 1888, that is to say, five days beyond twelve years from the due date of the bond. The defendant-appellant in the suit, namely, the Collector of Etawah, as representing the Court of Wards, is in possession of the estate of Lala Laik Singh, Lala Laik Singh has been for some time deceased, and the present owner of the estate is Lala Prithi Singh, his nephew, who is a disqualified proprietor by reason of his unsoundness of mind. One Musammat Thakurani Raj Kuar is the wife of Lala Pirthi Singh, and she has been treated as Sarbarahkar of her husband's estate by the Court of Wards.

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* First Appeal, No. 131 of 1889, from a decree of Babu Ganga Saran, Subordinate Judge of Mainpuri, dated the 8th April 1889.

(1) 13 A. 76.

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The suit of the plaintiff is met by the plea of limitation, and that plea proceeds upon the interpretation which the defendant contends should be placed upon the language of the bond of the 20th June 1876. If it creates a mortgage of immoveable property, admittedly the suit is within time, if it does not create a mortgage of immoveable property, then either art. 66 or art. 116 of the Limitation Act is applicable, and in the aspect of either of those two articles, the suit is barred, unless the plaintiff is entitled to pray in aid certain acknowledgments made on behalf of the obligor, which would come within the meaning of s. 19 of the Limitation Act. It is obviously necessary, therefore, in the first place to examine the language of the bond of the 20th June 1876, in order to see if it does create a mortgage upon immoveable property. I presume there can be no question that an instrument that is so obscure and indefinite in its terms as to be incapable of having effect given to it, must be treated as void for uncertainty. In the case of *Shadi Lal* v. *Thakur Das* (1) I said what I had to say upon the subject, and I took occasion then to refer to a ruling of the learned Chief Justice and my brother Tyrrell in *Ramsidh Pande* v. *Balgobind* (2) as to which I remarked that it seemed to me to have gone as far as it was possible to go. In the present instru-[164]ments the words are:—" I do hereby agree that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money, together with the interest fixed by instituting a suit from my moveable and immoveable property, my own 'milk,' I will offer no objection, hence this bond has been executed that it may serve as a document."

It is contended for the plaintiff that we should regard these words as amounting to a covenant of a mortgage, and that "my immoveable property" is sufficient to satisfy that condition. It appears to me that the language of this instrument is far too vague to hold any such view or to warrant the inference that we are asked to draw that the parties at the time that instrument was made contemplated the creation of a mortgage of a definite estate. The terms really come to no more than this, that if the money is not paid up upon the due date the obligee will be entitled by due process of law to recover the amount of the debt which became due by breach of the obligation. I am therefore of opinion that this bond of the 20th June 1876 did not constitute a mortgage within the well-understood meaning of the term.

That being so, it seems to me the instrument was no more than a single bond to which in direct terms art. 66 of the Limitation Law would be applicable, the date for payment being mentioned in the bond; but, accepting the view that has always been adopted in that Court in such matters, that, where the instrument is registered, art. 116 may be properly applied, and that the suit for the failure to pay the bond debt may be regarded as in the nature of one for compensation in damages for such failure to pay, I readily apply that article. That being so, the suit should have been brought within six years from the 1st November 1876. But, as I have stated, it was not brought until the 6th November 1888, and in view of these facts it is barred. But it is contended for the plaintiff that by a deposition made by one Ajudhia Prasad, on the 14th October 1882, an acknowledgment of liability in respect of this bond debt was given by which the defendant as representing the estate of the original obligor is bound.

[165] With regard to the authority of Ajudhia Prasad I was at first

(1) 12 A. 175. (2) 9 A. 158.

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somewhat inclined to doubt whether he was a duly authorised agent for the purposes of making that acknowledgment. But upon examining the terms of the power-of-attorney of the 12th April 1880, made by the Sarbarahkar and wife of the disqualified proprietor in favour of that person, and to the circumstances in connection with this property, I think it may perhaps be inferred that he was entitled to make such an acknowledgment, and that Lala Pirthi Singh, the disqualified proprietor, is bound by that acknowledgment. But supposing this authority to be, as I have said one that would bind the disqualified proprietor, it would still be insufficient to prolong the period of limitation up to the date when the suit was in fact brought. The mode in which the plaintiff gets out of this further difficulty is by contending that a notice issued by the Collector of Etawah on the 12th April 1888, was another acknowledgment on behalf of the disqualified proprietor of the existence of this debt. It becomes important to see exactly the circumstances under which that notice was issued. It purports to be signed and was signed in fact, or initialled rather, by the Collector of Etawah, and in the deposition which he made in March 1889, a print of which is upon this record, we are very clearly informed as to the precise circumstances that were present to him at the date of his issuing that notice. He says in effect that at that time he was inquiring into the question as to whether a petition of the wife of the disqualified proprietor that the estate should be taken under the Court of Wards should be acceded to, and he says when asked this question:—"Did you by this order of the 12th April 1888, marked A, mean directly or indirectly to admit the debt of any creditor?" "I did not up to that time know even the names of the creditors of the *riasat.* I came to know within three months from the 7th April 1888, that there was one other bond in the name (in favour) of Gopal Jai Kishen Das." What I mean is:—"How much money Rani Kishori claims against the Harchandpur estate on the basis of the bond, which document was in the name of Gopal Jai Kishen Das?" "Up to [166] the 12th April 1888 I was not aware of any particular document or debt. My object in passing that order was to know what was the amount of the debt and who were the creditors. I do not think I have power to settle any debt without the sanction of the Board. I wrote to the creditors that what I had settled was with the sanction of the Board, and I made a report of that to the Board also. Information of the Harchandpur estate having been placed under the Court of Wards was received in the Collectorate of Etawah from the Board on the 7th April 1888, and that very order contained a direction that a report should be made after ascertaining a detail of the debts, and under this order the order of the 12th April 1888 was issued."

I find myself wholly unable to hold that upon this state of facts which must be borne in mind in order to gather the meaning of the language of the notice of the Collector of Etawah, he in the sense of s. 19 of the Limitation Act admitted any liability on behalf of the disqualified proprietor in respect of the debt due under the bond made by Laik Singh in favour of Kishen Das. The suit in my opinion is barred by limitation.

But it is further contended, and this upon the strength of the view taken by the learned Subordinate Judge, that in reference to certain litigation that went on between the parties, the plaintiff as the purchaser of the bond in suit under the execution sale of March 1887, is entitled to allowance for the considerable period of time during which those proceedings were pending. The learned Subordinate Judge has given the plaintiff the benefit of the period which elapsed from the 17th May 1881 to

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the 7th March, 1887, and no doubt, if that concession were to be made in her favour her suit would be within time. But it is necessary to examine the precise nature of the facts upon which the learned Subordinate Judge came to his conclusion, in order to see how far in law it is warranted.

I have stated that the bond of the 20th June, 1876, was made by Laik Singh in favour of Kishen Das. It appears that on the 5th May, 1881, one Rani Kishori, who had an account with the firm of [167] Gopalji Kishen Das, of which Kishen Das, the obligee, was one of the members, instituted a suit for an account of her dealings with that firm, and on the 17th of the same month she obtained an order of attachment before judgment under s. 485 of the Code of Civil Procedure. On the 20th September, 1881, she obtained a decree and threatened with sale in execution the bond which had been so attached. One Kirpa Dial then brought a suit for a declaration of his title to the bond upon the allegation that it had been assigned to him by the obligee on the 17th April, 1881. On the 21st August, 1882, Kirpa Dial got an injunction directed to Rani Kishori, the successful decree-holder in the other suit, restraining her from bringing to sale in execution of her decree the bond of the 20th June, 1876. The suit of Kirpa Dial was dismissed by the first Court on the 7th June, 1884, and an appeal was preferred to this Court from that decision by Kirpa Dial, pending the determination of which appeal Kirpa Dial came to this Court, and I, by an order of the 4th August, 1884, granted a fresh injunction restraining Rani Kishori from selling the bond. The appeal of Kirpa Dial was subsequently dismissed, and in execution of Rani Kishori's decree the bond of 20th June, 1876, was sold upon the 7th March, 1887, and was purchased by the plaintiff-respondent, and this is the title upon which she comes into Court. The learned Subordinate Judge has treated the period from the date of the attachment of the bond by Rani Kishori in her suit, *viz*, the 17th May, 1881, to the date of the purchase by the plaintiff, on the 7th March, 1887, as a period during which by reason of the attachment and injunction the party entitled to recover the amount of that bond was prohibited from putting that bond into suit and recovering on it, and in this view of the matter has applied the principle of s. 15 of the Limitation Act.

I am not prepared to concur in that view. I think that the learned Chief Justice in the case of *Shib Singh* v. *Sita Ram* (1) has very satisfactorily and clearly dealt with the question that thus arises, and I unhesitatingly adopt his view in preference to that expressed by Sir Charles Turner in the case of *Shunmugam* v. [168] *Moidin* (2). It is true that according to the terms of s. 486 of the Civil Procedure Code an attachment before judgment is to be made in the manner provided for the attachment of property for the execution of decree for money, but I am not prepared to say that the words used in s. 268, cl. (*a*), "the creditor from recovering the debt" mean that the creditor is prohibited from instituting the suit he is entitled to bring to assert his right to the debt. What I understand s. 268 to mean is that the debt is not to be realized by the judgment-debtor who is a creditor of some third party; and not that he is to refrain from, in the ordinary course of law, putting his claim into Court and asserting his right to such money as may be due to him. Neither under this order of attachment which, though not before us, I must presume to have been drawn up in the ordinary way, nor in the injunction

(1) 13 A. 76. (2) 8 M. 229.

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which went first under the order of the lower appellate Court in the suit of Kirpa Dial, and next under my order in the appeal of Kirpa Dial to this Court, was there any prohibition to the party in whose hands the bond of the 20th June 1876 was, to restrain him from putting that bond in suit and obtaining a decree. If the decree had been obtained there would have been nothing to prevent the judgment-debtor under one of the clauses of s. 268 from paying the money into Court, while under the same section, cl. (*a*), there would have been a prohibition to refrain from realizing the amount. I do not think that either in the order of attachment or in the injunction granted by the lower appellate Court or by this Court was there anything amounting to an injunction or order to restrain the obligee from maintaining an action upon the bond of the 20th June, 1876, and I am unable to appreciate or understand any defence that the obligor could have set up on the facts, as I have stated them, which would have been a successful answer to the suit. This being the view which I take, it seems to me that there is in the way of the plaintiff succeeding an insuperable bar of limitation and that she must fail. Decreeing the appeal, I reverse the decree of the lower Court, and the suit of the plaintiff will stand dismissed with costs in all Courts.

[169] TYRRELL, J.— I entirely agree with the order which my brother Straight had just made with regard to the disposal of this appeal and with his reasons for making that order; but I think it right to add that in one respect I am not altogether in accord with my learned brother, for I agree with the Court below in its finding that Ajudhia Prasad was not an agent duly authorized to acknowledge and sign an acknowledgment on behalf of Laik Singh in respect of his liability under the bond of the 20th June, 1876. I think that the learned Subordinate Judge has given sufficient and sound reasons for coming to this conclusion. I agree that the appeal should be decreed and the suit of the respondent should be dismissed with costs here and below.

Appeal allowed.

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14 A. 169 (P.C.) = 19 I. A. 9 = 6 Sar. P.C.J. 106 = 15 Ind. Jur. 750.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Morris, Sir R. Couch and Lord Shand.
[*On Appeal from the High Court for the North-Western Provinces.*]

LACHMI PRASAD (*Plaintiff*) *v.* NARENDRO KISHORE SINGH (*Defendant*). [19th November, 1891.]

Evidence—Failure to prove an alleged transaction of lending money.

Upon the evidence the decision of the High Court was affirmed as to a question of fact, *viz.*, whether the defendant's deceased father had, or had not, in his lifetime, in consideration of a payment to his order by the plaintiff, promised repayment. The High Court, reversing the decree of the first Court, had found that there had been no sufficient proof of the alleged transaction. This was the conclusion, also, on this appeal; and although it was possible that the money might (as it was indicated in the judgment) have been wrongly obtained from the plaintiff by persons about him, it was not shown to have been received by the alleged borrower.

APPEAL from a decree (1st May, 1888) of the High Court, reversing a decree (10th December 1886) of the Subordinate Judge of Benares.

The appellant, who carried on business in Benares as a banker, obtained a decree in the Subordinate Judge's Court for Rs. 17,614 against the respondent, the Raja of Bettiah, district Sarun, who succeeded his father, on the death of the latter, on the 27th December, [170] 1883. By his plaint the appellant claimed Rs. 12,000, with interest at 12 per cent. per annum, which he alleged that he had advanced to Musammat Sarab Mangla on the 28th November, 1883, under an order of that date, signed by the late Raja, Rajendro Kishore, a month before his death.

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Filed along with the plaint was an alleged parwana or order purporting to have been signed by Raja Rajendro Kishore, in which he acknowledged the advance at his request, of Rs. 12,000 to Musammat Sarab Mangla, and promised to repay this sum with interest at the above rate on or before the 16th November 1884. Also was filed what purported to be a receipt of the same date, signed by her, for that sum, stated to have been received through Sukdeo Girdhar Das and Beni Misr.

The defence was that the parwana did not bear the signature of the late Raja; that it was a forgery; and that no such advance was made on his authority. The issues were as to the genuineness of the alleged *parwana*, and the liability of the defendant to pay the amount.

The decree of the first Court having been reversed by the High Court (STRAIGHT and MAHMOOD, JJ.), on this appeal, Mr. *J. Graham*, Q. C., and Mr. *H. Cowell*, appeared for the appellant. They contended that the proofs were sufficient.

Mr. *R. B. Finlay*, Q. C., and Mr. *R. V. Doyne*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by LORD MORRIS.

JUDGMENT.

LORD MORRIS.—This is an action brought by a banker, or money lender, against the heir of the deceased Maharaja Rajendro Kishore, and for the recovery of a sum of Rs. 12,000, and interest, alleged to have been borrowed from him by the Maharaja shortly before his death. The transaction is said to have occurred on the 28th November, 1883, and the Maharaja died on the 27th December following. In an action brought to recover money against an executor, or, as in this case, the heir of a deceased person, it has always been considered necessary to establish as reasonably clear a case as the [171] facts will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself.

The present case depends upon the testimony of two persons, Beni Misr and Sukhdeo, who detail a transaction which is in many respects of an improbable character, and would in any event require corroboration. Beni Misr is a Gomashta of the plaintiff. Sukhdeo appears to be a broker. He is described, in the judgment of the High Court, as a person who "hangs about the Bazaar ready to give his services in any way people "may feel disposed to employ him . . . . a sort of tout, willing to "mix himself up in any sort of transaction, out of which he can obtain "some remuneration for his trouble." He says that he was one day accosted by a servant of the Maharaja, named Dammal Pande, and requested to raise a loan for the Maharaja. He describes the conversation between himself and Dammal Pande, and his going to Beni Misr. He relates the terms upon which Beni Misr agreed to the loan for the Maharaja, namely, 1 per cent. per mensem, and how Beni Misr required that the Maharaja should execute a document upon a *hundi* or stamped

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paper. He describes how he went back to Dammal Pande and informed him of the terms of the loan; how Dammal Pande went inside the house where the Maharaja was, and came back saying that the Maharaja agreed to the terms, and how he got a sum of Rs. 9 from Dammal Pande to purchase the *hundi* paper. He says specifically that he purchased the *hundi* paper a "day before that on which the Maharaja signed the *hundi*," namely, on the 27th November 1883. But the *hundi* paper has upon it the memorandum of the date of its sale, namely, the 28th November 1883, the day upon which the Maharaja is alleged to have signed it. It is, therefore, in the absence of explanation, impossible that he could have bought it on the 27th, seeing that on the face of it it purports to have been issued on the 28th. The evidence of Sukhdeo, therefore, at the outset is met by this grave discrepancy, which is not a mere inaccuracy of date, but an inaccuracy which goes to the very root of the transaction which he purports to describe.

[172] The other witness, Beni Misr, disposes to the fact of his having accompanied Sukhdeo to the house of the Maharaja. There is some want of distinctness as to whether he alleges that he saw the Maharaja sign the parwana or not. He only states that the Maharaja signed it; whereas Sukhdeo says that he and Beni Misr went into the Maharaja's room, and that the Maharaja signed it. Their Lordships would point to the difference between his having merely said that the thing was done, and his having said that he had seen it done.

The case of the plaintiff therefore, who appears to have had no personal dealing whatsoever with the Maharaja in this transaction, and who never saw him, depends altogether on the evidence of Beni Misr and Sukhdeo, and by their evidence he must stand or fall. There has been no corroboration of any kind of the story of these two witnesses brought forward on the part of the plaintiff. Indeed at the trial, and certainly in the argument of counsel on his behalf here, counsel seemed to think that the fact of two men having sworn to the signature of the Maharaja to this instrument establishes the case so completely as to render it almost unnecessary to corroborate it on any particular. Their Lordships cannot concur in that view.

The transaction is open to a good deal of comment, both as regards its inception and the mode in which it was carried out. The Maharaja had persons who were acting for him in the management of his affairs of considerable importance in his household, and it seems unlikely that Dammal Pande would have been employed at all by him in the matter. Then there is the significant fact of this large sum of money being raised by him just a month before his death, and with nobody of his household, apparently, brought into privity with it, or knowing anything about it. The discrepancy of date has been already mentioned. There is also a certain degree of difficulty attending the fact that the *parwana* purports to be drawn at twelve months' date, whereas no application for the money appears to have been made for some months afterwards, at all events to Mr. Gibbon, the manager, to whom the plaintiff ultimately [173] wrote. He alleges in his first letter to Mr. Gibbon, of the 30th March 1885, that he had previously written for the money, but there is no distinct testimony of that. A reply was written to him by Mr. Gibbon, requiring to know for what necessary purpose, in what manner, and through whom the money was advanced, and what evidence the plaintiff had in his possession that it was advanced, seeing that it did not appear from the inquiry and statements of the managers of the private expenses of the Maharaja that it was

drawn by him. To that letter the plaintiff does not appear to have given any direct answer. He alleged that he was ready to show the *parwana*, but he passed by all the other demands made upon him to state the circumstances under which the money was advanced. Possibly, as stated by Counsel for the plaintiff, parties in India, when a dispute on such a matter has arisen, may be chary of showing their hand, and, although they have an honest case, may wish to state as little as they can when they see that their claim is going to be resisted.

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The *parwana* purports to declare that a thing had been done which in reality was only going to be done; because it says. "As you have paid Rs. 12,000 to Musammat Sarab Mangla according to my permission, this money is due to you from me; and so I declare it in writing that I shall pay to you the principal amount, together with interest at 1 per cent. per mensem, within a year, and take back this *parwana*"—Whereas in any case the money had not been paid at that time. The explanation given is that the *parwana* was entrusted by the Maharaja to one of his own servants to be deposited with Sarab Mangla, and that she was not to hand it over until she had actually got the money.

In addition to her handing over the *parwana* the plaintiff appears to have required from her a receipt for the money, which has been relied upon by him as being a document of the last importance. It is in the following terms:—"I, Sarab Mangla, do declare that according to a *parwana* of the Maharaja of Bettiah............with a direction for payment of money to me, I have received the sum of Rs. 12,000 in a lump sum from them through Sukhdeo, Girdhar [174] Das, and Beni Misr, and there is now nothing due. I have therefore granted this receipt in order that it may be of use when needed."

The document, as well as the *parwana* itself, is impeached as a forgery. As regards the *parwana* itself, there is the evidence in favour of it, as has been already observed, of Beni Misr and Sukhdeo. As against it there is the evidence of three witnesses on the question of handwriting, namely, Mr. Gibbon, an Englishman, who was the manager of the Maharaja; Madho Narain, his paymaster; and Har Prasad, his office-keeper. These three witnesses all depose that the signature to the *parwana* is not in the handwriting of the Maharaja. Sarab Mangla deposes that she never got the Rs. 12,000, and that the receipt referred to does not bear her signature.

If these documents were forgeries it does not follow that the plaintiff is involved in them. He may have given his money, and upon the evidence it would appear that he did give his money, to Beni Misr, to be handed over to the Maharaja. He may have been misled by Beni Misr, and Beni Misr and Sukhdeo may have been in a conspiracy to obtain the money for themselves, and the money may have gone from the coffers of the plaintiff and still never have reached Sarab Mangla, whom the Maharaja is said to have expressly ordered to receive it. It therefore does not appear to their Lordships that it is at all necessary to hold, nor that there is evidence in the case which would lead to the conclusion, that the plaintiff was in any way a party or privy to such a transaction.

It should never be forgotten that the onus of proof in this case lies upon the plaintiff. It is for him to satisfy their Lordships that he has established a reasonably clear case. But he has failed to bring forward the evidence which he ought to have done, when he knew that this transaction was called in question, and that the *parwana* and the receipt were impeached as forgeries. There are no less than five persons who ought to

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have been called in support of his case, but were not. The first person was the plaintiff himself, although, as their Lordships have already said, there is no evidence [175] establishing that he was party to this attempt to fix an untrue liability upon the heir of the Maharaja. It would have been better, to say the least of it, if he had come forward and described the transaction so far, at all events, as he was able. But he did not come forward. The second witness, whose evidence would have been of the last importance, was Dammal Pande, for he appears, according to Sukhdeo's testimony, to have been the person who initiated the transaction by going to Sukhdeo and saying that he had been asked by the Maharaja to obtain the Rs. 12,000. But Dammal Pande was not produced. The third missing witness was Bhagauti Parshad. He is said by Sukhdeo to have written the receipt, to have taken it to Sarab Mangla for her signature, to have obtained her signature to it, and to have given it with the *parwana* to Beni Misr. His evidence would have been most material. But he was not called. The absence of Girdhar Das is still more extraordinary. He is named in the receipt as being one of the three persons who paid over the money to Sarab Mangla, the other two being Beni Misr and Sukhdeo. Yet he was not called. Neither has there been any attempt to identify the Muharrir, to whom no name has been given, who was alleged to have written the *parwana* itself. It was suggested that he was the same person as Bhagauti Parshad who wrote the receipt. But no evidence has been given that this was so.

Thus, all the probabilities of the case are against the plaintiff. The evidence of the handwriting is distinctly against him, and he has in no way corroborated, as he might have done, the testimony of Beni Misr and Sukhdeo. Neither has any trace been found in the books of the Maharaja of any loan of this sort. To this Counsel for the plaintiff replied that, it being a loan to this lady, who was his mistress, it was not a transaction that would be likely to appear in the Maharaja's books. But the fact nevertheless remains that no trace of it can be found there.

It appears to their Lordships that the decision arrived at by the High Court on appeal from the Subordinate Judge of Benares, is right, and they will humbly advise Her Majesty to affirm the decree [176] of the High Court and dismiss this appeal. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Ranken Ford*, *Ford*, and *Chester*.

Solicitors for the respondent: Messrs. *T. L. Wilson* and *Co.*

14 A. 176=12 A.W.N. (1892) 25.

1892 JAN. 28. — APPELLATE CIVIL. — 14 A. 176=12 A.W.N. (1892) 25.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GAYA PRASAD (*Defendant*) v. BAIJ NATH AND ANOTHER, (*Plaintiffs*).* [28th January, 1892.]

Lease—Assignment by the Official Liquidator of lease held by a Company in liquidation—Assignment not in writing registered—Suit for rent—Use and occupation.

In the course of the winding up of a Company, the Official Liquidator, with the sanction of the Court, sold the remainder of a lease for a long term of years reserving a rent, which was held by the Company. No written assignment was ever executed, but the Official Liquidator handed over the lease to the purchaser, who entered into possession. In a suit by the lessors against the purchaser for rent,

Held that whether the assignment was invalid because not in writing and registered, or whether it fell within s. 2 (*d*) of the Transfer of Property Act (IV of 1882), the defendant, even if not liable as assignee in law of the lease, was liable for rent as for the use and occupation, and under such circumstances the rent fixed by the lease would be a fair basis for the amount to be decreed.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon. *G. T. Spankie*, Mr. *Mehdi Hasan* and Babu *Rajendro Nath Mukarji*, for the appellant.

[177] Mr. *T. Conlan* and Munshi *Ram Prasad* for the respondents.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This was a suit for rent. The plaintiffs' suit was decreed by the first Court, and the defendant's appeal was dismissed by the lower appellate Court. The facts of this case are as follows:—

On the 1st December, 1883, the plaintiffs granted a lease of the land and the buildings thereon in the city of Cawnpore to the Cawnpore Cotton Ginning Company for a long term of years, reserving a rent. The deed contained several covenants to be performed by the lessors, their successors and assignees.

The Company got into difficulties and was wound up under the Indian Companies Act, 1883. In the process of winding up, the Official Liquidator, with the sanction of the Court, sold the property of the Company in the land in question, that is, their interest in the lease, by auction. The defendant was the purchaser. There was no written assignment ever executed, although the sale took place as far back as the 11th October, 1886. The Official Liquidator handed over the lease to the defendant and the defendant entered into possession of the land included in the lease and the buildings and the property thereon. If the defendant is liable as assignee of the lease, the plaintiffs are entitled to the decree for rent and interest which they have obtained. If, on the other hand, by reason of there having been no assignment in writing registered of the lease he is not in law, according to the Transfer of Property Act, the assignee of the lease, it does not follow in our opinion that he is not liable for the amount which has been decreed. It has been contended on behalf of the plaintiffs that the sale having been effected under an order of

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* Second Appeal No. 671 of 1890, from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 20th March, 1890, confirming a decree of Maulvi Akbar Husain, Subordinate Judge of Cawnpore, dated 4th February, 1890.

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a competent Court sanctioning the act of the Official Liquidator, s. 2 (*d*) of the Transfer of Property Act, 1882, applies, and excluding the transaction from the requirements of that Act, the defendant is in law the assignee of the lease. It is undoubted that everything was done to make him assignee of the lease unless the case comes within the Transfer of Property Act. It is by no means easy to say whether or not the sale in the present case was within the meaning of s. 2 (*d*) of that Act, a transfer by or in [178] execution of an order of a Court of competent jurisdiction. Certainly without the order sanctioning the sale the defendant would have got no title from the Official Liquidator. In one sense it might be considered that the transfer in question was in execution of the order which was made. However that may be, we do not think it necessary actually to decide whether s. 2 (*d*) of the Transfer of Property Act, 1882, applies. Assuming for the moment that the sale in this case was not a transfer within the meaning of s. 2 (*d*), and that consequently there has been no good assignment under the Transfer of Property Act, 1882, of the lease with its benefits and liabilities to the defendant, we are of opinion that he still is liable for the amount claimed. He purchased the interest of the Company at the sale, he got, and holds, possession of the lease, and he took, and since the date of the sale has held, possession of the land and buildings thereon. He cannot be treated as a trespasser. Although in one sense his title may be infirm, he was let into possession by the Official Liquidator acting under the sanction of the Court. In the latter view, we consider that for the time in respect of which the suit is brought, the defendant, even if not liable as assignee in law of the lease, is liable for rent as for the use and occupation, and under such circumstances the rent fixed by the lease would be a fair basis for the amount to be decreed. The result is that in whichever aspect the defendant's possession is regarded, and, whichever may be the true view of that position, the defendant in our opinion is liable for the amount decreed. That decree we shall not disturb. We ought to say in conclusion that Official Liquidators who take leases and subsequently as such Liquidators sell the interest of the lessee had better, for their own protection and to avoid any question as to their continuing liability, execute in favour of the purchasers written assignments of the leases and see that they are registered. We dismiss the appeal with costs.

Appeal dismissed.

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14 A. 179 (F.B.) = 12 A W N. (1892) 49.

[179] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

PEM SINGH AND OTHERS (*Defendants*) v. PARTAB SINGH (*Plaintiff*).*
[10th March, 1892.]

Hindu Law—Joint Hindu family—Hypothecation by father of joint ancestral estate—Property described as "haq haquq zamindari apna"—Decree enforcing hypothecation—Attachment of estate—Suit by sons for declaration that only father's interest was affected by hypothecation—Burden of proof.

Where a Hindu son comes into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the

* Second Appeal No. 898 of 1889.

interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt which he desires to be exempted from paying was of such a nature that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate. *Beni Madho* v. *Basdeo Patak* (1) and *Bhawani Bakhsh* v. *Ram Das* (2) approved.

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FULL BENCH.

14 A. 179 = (F.B.) = 12 A.W.N. (1892) 49.

In a suit by the sons of a Hindu for a declaration that certain joint ancestral property was not liable to sale in execution of a decree upon a hypothecation bond of such property executed by their father in which the property was described as "*haq haquq zamindari apna*," and that the bond and decree were limited to the father's own interest,—*held* by the Full Bench that, if the plaintiffs could not show that the interest which was hypothecated was a limited interest, the Court must take it, as against the plaintiffs, that the family property was hypothecated.

[**F.**, 16 C.P.L R. 169 ; **Appr.**, 14 A. 190 ; **R.**, 1 O.C. 53 ; **D.**, 28 A. 508 = 3 A.L.J. 274 = A.W.N. 1906, 117 ; 4 Bom. L.R. 587 (600).]

THIS was a suit for a declaration that certain immoveable property should be released from attachment and exempted from sale in execution of a decree obtained by five of the defendants against the first defendant, who was the father of the plaintiffs (the family being a joint Hindu family), on the allegations that the property was the joint ancestral estate of the judgment-debtor and the plaintiffs ; that the decree was passed upon a hypothecation bond which did not charge the whole joint ancestral estate but only the mortgagor's interest therein ; and that only the judgment-debtor's one-third share was liable to attachment and sale in execution of the decree.

[180] The property in suit consisted of zemindari shares in four villages, Rampura Enayetpur, Rupura, Nahna, and Nagain Datnagar. It was hypothecated by the first defendant Baldeo Singh in favour of the ancestors of the defendants 2 to 6 by a bond dated the 24th December, 1875. The bond was as follows :—

"I hypothecate my rights and interests in the zamindari (*haq haquq zamindari apna*) in the villages of Rupura, Rampura Enayetpura, Nahna, Dehat pargana tahsil Karaur, and also Nikasdatnagar, tahsil Aonla, (*haq haquq zamindari Anola*) Bareilly, in satisfaction of the creditors for the recovery of the said amount. I hereby promise that till the payment of the entire amount I shall not alienate, sell, mortgage or make a gift of the property hypothecated in the bond, if I do so it shall be null and void."

Upon this bond the obligees brought a suit against Baldeo Singh, and on the 23rd February, 1886, they obtained a decree for enforcement of hypothecation, and in this execution of this decree the property mentioned in the bond was attached. Hence this suit. The defendants pleaded that inasmuch as the debt contracted by Baldeo Singh and secured by the bond was not of an immoral character, but was incurred for family purposes, the plaintiffs were bound by it, and that the hypothecation and the decree thereon were sufficiently wide to cover not merely Baldeo Singh's interest but that of the whole family in the ancestral estate.

The Court of first instance (Munsif of Bareilly) and the lower appellate Court (Subordinate Judge of Bareilly) decreed the suit, holding on the construction of the bond of the 24th December 1875, that the hypothecation was limited to the interest in the ancestral estate of the mortgagor Baldeo Singh. The defendants appeal to the High Court.

(1) 12 A. 99. (2) 13 A. 216.

1892 MARCH 10. — FULL BENCH. — 14 A. 179 = (F.B.) = 12 A.W.N. (1892) 49.

Munshi *Ram Prasad*, for the appellants.

Babu *Bishan Chandra Moitro* for the respondent.

EDGE, C. J.—The plaintiff in this suit sought a decree declaring that the property in suit should be exempted from sale in execution under a decree obtained by the defendants two to six against [181] the defendant No. 1, who was the plaintiff's father. The seventh defendant is a brother of the plaintiff and a *pro forma* defendant. The decree was obtained on a hypothecation bond executed by the defendant No. 1, Baldeo Singh, the father of the plaintiff.

The first Court on the construction of the bond held that Baldeo Singh had hypothecated his own particular share only in the family property. The second Court in appeal construed the bond as the first Court had done. The defendants two to six have brought this appeal. The defendant Baldeo Singh had described the property which he was hypothecating, so far as this appeal is concerned, in the following words—"*main ne haq haquq zamindari apna, &c.*," giving the names of the villages and the pargana in which the property was situated. It appears to me that that description was capable of covering the whole property referred to in the deed in which Baldeo Singh had an undivided interest, that is, the whole of that family property. It is possible that the intention of the parties was that his own particular interest as distinguished from the interest of the joint family only was intended to be hypothecated.

Now, taking the view which I do of the wording of the deed, I think the law to be applied is to be found concisely stated in the judgment of my brother Straight, which was concurred in by my brother Mahmood, in the case of *Beni Madho* v. *Basdeo Patak* (1). It is to be found in the following portion of the judgment at the foot of page 104 :—"These rulings seem to me to have gone somewhat further than the former ones, and the outcome of the whole of this body of decisions appears to be this, that where a Hindu son is coming into Court to assail either a mortgage made by his father or a decree passed against his father or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his [182] interest affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate." That proposition was approved of by our brother Straight and our brother Tyrrell in *Bhawani Bakhsh* v. *Ram Dai* (2). The judgments in those two cases referred to all the material cases which I am aware of relating to the point in question. Taking this view of the case I think we should set aside the decree of the lower appellate Court and remand this case under s. 562 of the Code of Civil Procedure for trial upon the merits.

Now one point which it appears to me the lower appellate Court will have to try, if there is material on the record for the purpose or if the evidence is tendered, is what was the real intention of the parties to the hypothecation bond? If the plaintiff is not in a position to show that the interest which was hypothecated under the hypothecation band was

(1 12 A. 99. (2) 13 A. 216.

1892 MARCH 10. — FULL BENCH. — 14 A. 179 = (F.B.) = 12 A.W.N. (1892) 49.

a limited interest, then the Court below must take it as against the plaintiff, that the family property was hypothecated. There may be several other issues to be tried in this case which must be tried when the case is tried on the merits. I would accordingly remand this case under s. 562 and order that the costs here and hitherto should abide the result.

STRAIGHT, J.—I only wish to add a word to what has fallen from the learned Chief Justice, in whose remand order I entirely concur. The learned Subordinate Judge has in the course of his judgment referred to ruling of my brother Mahmood and myself in *Raghubar Singh* v. *Lachmi Narain* (1). If the learned Subordinate Judge had examined that judgment more closely, he would have seen that, in advertence to a ruling of their Lordships of the Privy Council in *Simbhunath Pande* v. *Golap Singh* (2), I was of opinion that the terms of the sale certificate, which was the document of title of the auction-purchaser in that [183] case, passed no more than the rights and interests of the father, and applying the rule laid down in the Privy Council ruling to which I referred, I held that only the father's interest passed. The present case is a very different one, as pointed out by the learned Chief Justice.

TYRRELL, J.—I quite agree with the views expressed and the order passed by the learned Chief Justice, and I think that his opinion is fortified by the consideration that whereas the mortgagor in respect of part of the mortgaged property situate in mauzas Raupur and Rampura used the words "*haq haquq zamindari apna*," he described another portion of the property hypothecated situated in another pargana as "*haq haquq zamindari Aonla*" without the qualifying word "*apna*." Now there is no suggestion that any difference exists or was intended to exist as to the extent of the rights and interest hypothecated in the two properties respectively. The bond should be read according to the ordinary rules of interpretation in such a way as to make the description, so far as the word "*apna*,' is concerned, consistent with the description of similar property in the same document where it is not used. I concur in the order proposed.

MAHMOOD, J.—The rule of law which I would apply to this case is exactly the principle upon which my brother Straight proceeded with my concurrence in the case of *Beni Madho* v. *Basdeo Patak* (3) and where all the principal ruling of their Lordships of the Privy Council upon this somewhat complicated question were reviewed and considered and a decision arrived at in which I delivered no judgment other than saying that I was entirely of the same opinion. The other case is *Bhawani Baksh* v. *Ram Dai* (4) in which my brothers Straight and Tyrrell, whilst discussing a cognate case, expressed views which are wholly consistent with the case to which I have referred before.

Here the difficulty arises, not over my having any doubt as to the soundness of those rulings nor any difficulty over a question of law, but a difficulty over a question of interpreting a document. [184] Fortunately this document happens to be in a language which is my own, and I may, therefore, say with some confidence that the interpretation placed upon this document of the 24th December 1875 by the learned Chief Justice is exactly as I understand the document; and I am using the language for which I am indebted to my brother Tyrrell when I say that even if we allow the fullest import to the single word "*zamindari*"

(1) 7 A.W.N. (1887) 291. (2) 14 C. 572. (3) 12 A. 99. (4) 13 A. 216.

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in respect of some only of the villages, I would understand the word to cover the whole property of the mortgagor, who would, and doubtless did, hold himself to be the owner of all the *zamindari* of himself and his infant children.

This interpretation is exactly what I understand the language of this deed to mean because these words, "*haq haquq zamindari apna*" do not by dint of the use of the word "*apna*" exclude other rights such as would in ordinary Urdu idiom exclude those rights. A Hindu father holding property belonging to his children does describe his *zamindari* to be his own. He does not call it the *zamindari* of himself, his children, wife or wives. The order "*apna*" has no significance other than saying "my zamindari rights." It certainly cannot mean the exclusion of such other rights as the father may hold under the system of joint Hindu family property.

An attempt was made to show by dint of a ruling of a Calcutta Division Bench in *Uporoop Tewary* v. *Lalla Bandhjee Suhay* (1) that the use of a word like this would mean that there was exclusion of the shares of other members of the joint family when the father of the family, let me call him *paterfamilias*, deals with the whole property of that family. On account of this discussion it was by our order that the original deed of the 24th August 1864, which was the subject of consideration by the learned Judges of the Calcutta Division Bench in the case to which I have referred, has been sent for, and it is now before me. It is a document in Persian, and I think I should be taking up more time than necessary if I had to show that the word "*apna*," which is the Urdu **[185]** word as it occurs in this deed, is not to be understood in the sence in which that document uses the word "*khud*," nor how far that document was fully apprehended by the Calcutta Court.

All I think is this. This is a deed which conveyed all that the excutant thereof intended to convey: that he as head of the family intended that all that he called his own should be conveyed, and his position is not that of an ordinary *karta*. In the cases to which my brother Straight referred, in the two judgments to which I have alluded, and in other cases also, the Privy Council has distinguished the position of a father as the managing member of the family from that of an ordinary managing member. Therefore in this case the executant being the father, his position must not be confounded with that of any other manager of a joint Hindu family. This being so, the two rulings to which I have referred leave no doubt in my mind that unless it can be proved that the mortgage for which the bond of the 24th December 1875, whereupon the decree of the 23rd February 1886 was passed, was due to immorality of the executant, namely, the father of the present plaintiff, I should be inclined to hold that there is no case made out why that bond should be set aside or why it should be held that only the share of the executant and not of his children passed by that deed. I may also add that the decree itself is not well prepared, because it refers to the bond itself, and I have, therefore, considered it necessary to consider the terms of the bond.

For these reasons I agree in the order which has been proposed by the learned Chief Justice.

KNOX, J.—For the reasons given by the learned Chief Justice I concur in the proposed order of remand.

Cause remanded.

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(1) 6 C. 749.

14 A. 185 (F.B)=12 A.W.N. (1892) 38.

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FULL BENCH.

14 A. 185 (F.B.)= 12 A.W.N. (1892) 38.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

UDIT SINGH AND OTHERS (*Defendants*) v. KASHI RAM (*Plaintiff*).*
[11th March, 1892.]

Easement—Way—Prescription—Landholder and tenant—Act V of 1882 (*Easements Act*)—*Act VIII of* 1891.

There is nothing in Act VIII of 1891 to compel the Court to apply the Easements Act (V of 1882) to a suit commenced before Act VIII of 1891 came into force.

[186] A tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as tenant, over other land belonging to his landlord.

So *held* by the Full Bench. *Gayford* v. *Muffatt* (1) referred to.

[Appr., 29 C. 363=9 C.W.N. 856; 1 C.W.N. 151; R., 31 C. 503=8 C.W.N. 425; D., 16 A. 181.]

THE plaintiff in this case was a corn-dealer who established a market upon a plot of land which he rented from the defendants. To the north of this plot was a piece of waste land belonging to the defendants, and access to the market could only be obtained through this land. Such access was afforded by a wide opening between certain buildings on the west and east. In January 1886 the defendants built on their own land a wall across the opening, cutting off all communication from the north to the plaintiff's market. On the 16th March 1886 the plaintiff instituted the present suit, in which he claimed the demolition of the wall, a declaration that he was entitled to an easement of way by prescription through the defendants' waste land to the market, and damages for the loss of business at the market caused by the erection of the wall and obstruction of the passage.

The Court of first instance (Munsif of Ballia) decreed the claim. On appeal by the defendants, the District Judge of Ghazipur affirmed the Munsif's decree. The defendants preferred a second appeal to the High Court.

The appeal came for hearing before Mahmood, J., who directed that the case should be laid before the Chief Justice, with a recommendation that three questions (which are stated in the judgment of Edge, C. J., below) should be referred to the Full Bench. These questions were accordingly ordered by Edge, C. J., to be referred to a Full Bench of five Judges.

Mr. *Roshan Lal*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J.—This is a second appeal in a suit brought by a tenant against his landlords, in which the tenant alleged that he had acquired by user an easement or right of way over the adjoining [187] land of his landlords. The questions which we are asked to decide in order to dispose of this suit are as follows:—

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* Second Appeal, No. 104 of 1888.

(1) L. R. 4 Ch. A. 133.

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"(1) Whether Act VIII of 1891 is retrospective, that is, whether, by dint of the enactment, Act V of 1882 governs this case.

"(2) Whether a tenant or occupier of land can acquire for his own benefit a right of easement under s. 26 of the Indian Limitation Act (XV of 1877) or under the Indian Easements Act (V of 1882) read with Act VIII of 1891.

"(3) If so, whether the tenant can acquire an easement against his own landlord."

The alleged cause of action was the building by the landlords of a wall which interfered with the right of way claimed. So as to avoid any mistake as to my meaning, I should point out that the tenant does not allege that his holding had at the time it was let to him the right of way in question as appurtenant to it, nor does he allege that the landlords granted any such right of way as appurtenant to the holding, nor again does he allege that the way claimed was what is known in law as a way of necessity; he merely alleges that he as the tenant in the occupation of his holding had by user obtained a right of way against his landlords, over their adjoining land. In my opinion it is contrary to common sense that any such right as is here alleged could possibly have been acquired. Such right could only have been acquired, if at all, in respect of the holding occupied by the plaintiff. That holding is the landlords' holding, and they, the landlords, are in possession of it through their tenant the plaintiff. The plaintiff is not an owner claiming a right in respect of a dominant tenement over another servient tenement; he is not claiming this right for or on behalf of his landlords; but he is claiming it adversely to them, although for and on behalf of their own property. The law, as I conceive it to be, was very concisely put and illustrated by Lord Cairns in his judgment in *Gayford* v. *Moffat* (1). That was a case in which a tenant was claiming a right of easement over his landlord's [188] property as a right acquired by the tenants not granted by the landlord. Lord Cairns said—"But it is not necessary to examine the user, for this reason, that if there is a person to whom the owner of two closes has demised one of them, and if in order to get at that one there is a necessity to cross the other close which was not demised, and if, in the course of years, from the circumstance that the landlord had no particular occasion to use the close for any other purpose, or that he was not strict in obliging his tenant to adhere strictly to the way, he had allowed the tenant for his convenience occasionally to make deposits of this kind on other parts of the close, still it is utterly impossible that by such a course of proceeding the tenant as against his landlord could acquire any easement whatever. An easement must be acquired in respect of some tenement, and the only tenement in respect of which this easement could be acquired, and which itself would become the dominant tenement, is the demised close. But the possession of the tenant of the demised close is the possession of his landlord, and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord, the duty of the tenant being to take care that if he is passing over close B at all, he should do nothing on it more than his lease authorized him to do, and it must be supposed for this part of the argument that the lease in this case authorized him to

(1) L.R. 4 Ch. A. 133.

do no more than cross the yard without any right of depositing goods on it." In that case it must be observed that it was assumed that the lease granted a right of way, but not the right claimed by the tenant to deposit goods on the neighbouring close of his landlord. I would answer the first question by saying that Act V of 1882 does not govern this case, inasmuch as it was not made applicable to these Provinces until after this suit commenced, and there is nothing in Act VIII of 1891 to compel us to apply Act V of 1882 to a suit commenced before Act VIII of 1891 came into force. I would answer the second and third questions so far as they are applicable to the facts [189] of this case in the negative, and further with regard to the Indian Easements Act (Act No. V of 1882), I would draw attention to s. 12 of that Act. The result is that I would allow the appeal and dismiss the suit with costs in all Courts.

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STRAIGHT, J.—I entirely agree with the learned Chief Justice both in his answer to the questions referred and in the decree which he proposes to make in the appeal.

TYRRELL, J.—I am entirely of the same opinion as the learned Chief Justice.

MAHMOOD, J.—I also am of the same opinion; but there is one point which I wish to explain, and that is, that the passing of Act VIII of 1891, which extended the operation of the Indian Easements Act (V of 1882) to these Provinces, cannot, in the absence of express words, be taken as retrospective, or as either disturbing existing rights or creating new ones. Therefore till the date of the coming into force of Act VIII of 1891, there was no law in this part of the country governing questions of easements except s. 26 of the Indian Limitation Act (XV of 1877) and such portions of the Common Law as were applicable to those questions. Another point which I wish to add relates to the emphasis laid by Mr. *Jwala Prasad* in regard to the use of the words "owner or occupier of certain land" as those words occur in s. 4 of the Indian Easements Act in the definition of the word "easement," and also I wish to refer to s. 12 of that enactment in order to say that neither the definition contained in the former section nor anything in the latter section militates against the view which the learned Chief Justice has expressed. The Indian Easements Act may be referred to and taken for what it is worth and in settling disputes arising before the Act was extended to these Provinces, but it does not in any way negative the views expressed by the Chief Justice and concurred in by my brother Straight. Then come the other two questions of my referring order, and as to these I have merely to add that I agree not only in the judgment of the learned Chief Justice but also in the decree proposed by him.

[190] KNOX, J.—I am of the same opinion as the learned Chief Justice both as to the answer to the reference and as to the decree which he proposes to pass in the appeal.

[The appeal was accordingly allowed and the suit dismissed with costs.]

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APPELLATE CIVIL.

14 A. 190= 12 A.W.N. (1892) 53.

14 A. 190=12 A.W.N. (1892) 53.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MUHAMMAD HUSAIN (*Defendant*) *v.* DIP CHAND AND OTHERS (*Plaintiffs.*)* [24th March, 1892.]

Hindu Law—Joint Hindu family—Simply money decree against father how far binding upon son's interest in the joint family property—Execution of decree—Civil Procedure Code, s. 237.

With reference to the question whether the whole joint family property or only the interest of the father therein is liable under a decree obtained against a Hindu father, *held* that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or of a simple money decree, it may be presumed that the family property and not the mere undivided share of the father was sold. *Pem Singh* v. *Partab Singh* (1) referred to.

The specification required by section 237 of the Civil Procedure Code, of the judgment-debtor's share or interest in immoveable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share, which was sought to be attached, and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, the Court would hold, unless something to the contrary appeared, that the sale was of that share and interest only.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Mr. *A. H. S. Reid* and Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

[191] EDGE, C.J., and TYRRELL, J.—The appellants in the second appeal are auction-purchasers or representatives of auction-purchasers who purchased at an auction sale in 1861 held in execution of a money decree obtained against one Duli. The suit out of which this appeal has arisen was brought by one Dip Chand, a grandson of Duli, against these appellants, or those since dead whom they now represent. We shall refer to the appellants as the defendants in this suit for brevity's sake. Dip Chand was born before that sale of 1861, and was at the time of that sale a minor. Since this appeal was filed Dip Chand died and his father, Sita Ram, was brought on the record to represent the interest of Dip Chand in the appeal. The suit was to obtain possession of Dip Chand's share, namely, one-sixth, in the property which the auction-purchaser took possession of after the sale to them by auction in 1861. The question has been, what was the property sold, that is, was the property sold the whole of the undivided family property in the mauza, or was it merely Duli's undivided share in the family property, in other words, his right to partition? The lower appellate Court found that Dip Chand's share was not sold. The meaning of that finding is that the only share which was sold in execution of that money decree in 1861 was the undivided share of Duli in the family property. It has been contended by Pandit

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* Second Appeal, No. 1800 of 1885, from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 30th June 1883.

(1) 14 A. 179, *supra*.

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Sundar Lal that on the authority of *Beni Madho* v. *Basdeo Patak* (1) and the recent Full Bench ruling in *Pem Singh* v. *Partab Singh* (2) the lower appellate Court should have found as a question of law that the whole family property, and not Duli's undivided share, was sold at the auction sale in 1861. On the other hand, Mr. *Reid* for the respondent has referred to *Hardi Narain Sahu* v. *Rudır Perkash Misser* (3) and *Maruti Sukha Ram* v. *Babaji* (4) and has contended that the decree in execution of which the auction sale took place having been a money decree against Duli and not against the members of the joint Hindu family, the lower appellate Court's finding is correct in law. He has pointed out that in each of the cases cited by Pandit *Sundar Lal* the sale had either been effected or threatened **[192]** in execution of a decree obtained on a mortgage. We abide by the view expressed in effect in the recent Full Bench ruling that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or in execution of a simple money decree obtained against the father, a member of a joint Hindu family, it may be presumed that the family property and not the mere undivided share of the father was sold. Such a case can rarely arise where the decree is a money decree, simply because the creditor seeking execution of his money decree is bound under section 237 of the Code of Civil Procedure to set forth in his application for attachment of the property a specification of his judgment-debtor's share or interest in the property sought to be attached. Section 238 of the Code would also bear on such a case where the property was registered in the Collector's office. In our opinion such specification should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share which was sought to be attached and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, we should be prepared to hold, unless something to the contrary appeared, that the sale was of that share and interest only and nothing else. At the time of the execution proceedings in which the sale of 1861 took place, Act No. VIII of 1859 was in force, and by section 213 of that Act an application for attachment of immoveable property required a specification similar to that required under section 237 of Act No. XIV of 1882. Neither party apparently put in evidence the execution proceedings of 1861. There was however some other evidence on the record, on which the lower appellate Court found that the decree in execution of which the sale of 1861 took place was a decree against Duli and others who were strangers to the joint family and in respect of a matter in which the joint family was not interested and in which Duli had not represented the joint family. There is some evidence on the record that Duli was made liable in that matter not as a principal, but merely as a surety. It appears to us that there is **[193]** evidence, slight though it may be, to support the finding of the lower appellate Court that Dip Chand's one-sixth was not sold in 1861. Pandit *Sundar Lal* raised a further contention, namely, that this suit was barred by section 13 of the Code of Civil Procedure. It appears that Sita Ram and his brother Nathu brought a suit against the purchasers of 1861 to recover the whole of the property which they had taken possession of after the sale, their case being that Duli's liability arose out of an immoral contract from a Hindu point of view. That suit was dismissed. It appears to us that that dismissal does not operate as *res judicata* in this suit.

(1) 12 A. 99. (2) 14 A. 179. (3) 10 C. 626 = 11 I.A. 26. (4) 15 B. 87.

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In that suit Sita Ram and Nathu appear to have been suing on their own behalf. It does not appear that either of those plaintiffs represented Dip Chand, although Sita Ram was in fact Dip Chand's father. The accident that Sita Ram for the purpose of defending this appeal has been brought upon the record as the legal representative of Dip Chand has, so far as we can see, no bearing on this question. It was Dip Chand who obtained the decree from the lower appellate Court and Sita Ram is merely here to defend that decree, supporting the decree and the rights of the person whom he represents. There is a slight error, we are informed, in the decree below. The decree will stand for delivery of possession of one-sixth of the property of which the auction-purchasers who are now before us, or represented, got possession under the auction of 1861 and for proportionate mesne profits calculated on the basis of the profits ascertained below. To that extent the decree below will, if necessary, be varied, in other respects the appeal will be dismissed with costs.

Appeal dismissed.

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14 A. 193=12 A.W.N. (1892) 55.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

JAFAR HUSAIN AND ANOTHER (*Defendants*) v. MASHQU ALI (*Plaintiff*).* [2nd April, 1892.]

Suit for recovery of possession of immoveable property—Limitation—Adverse possession—Burden of proof—Act XV of 1877 (*Limitation Act*), s. 28.

Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation [194] becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within twelve years of the suit. *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1) and *Parmanand Misr* v. *Sahib Ali* (2) referred to.

[F., 28 A. 760=A.W.N. (1906), 234=3 A.L.J. 567; R., 20 A. 182=18 A W.N. 19; 15 Ind. Cas. 292 (293); L.B.R. (1893—1900) 360; 60 C. 119 (124); 65 P.R. 1901=105 P.L.R. 1901; 105 P.R. 1901; U.B.R. (1897—1900), Vol. II, 360.]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Munshi *Jwala Prasad* and Munshi *Kashi Prasad* for the appellants.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

EDGE, C.J. and BLAIR, J.—This was a suit for possession brought by a husband of a deceased Muhammadan lady against her brother and her brother's son. The plaintiff alleged that he was dispossessed in 1887. The defendants alleged that the plaintiff and the lady through whom he claims had never been in possession, and that the defendants had held adverse possession for more than twelve years. The first Court dismissed the suit as barred by limitation. The District Judge on appeal set aside this decree of the first Court, and finding that twelve years' adverse possession

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* First Appeal, No. 40 of 1891, from an order of Babu Mirtonjoy Mukerjee, Subordinate Judge of Benares, dated the 28th March 1889.

(1) 16 C. 473. (2) 11 A. 438.

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was not established, made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand the appeal has been brought. The District Judge did not try the issue as to whether the plaintiff had been in possession within twelve years before suit; he assumed that in a case of this kind the onus of proof was upon the defendant, and he in fact found no facts on which we could infer that he thought the plaintiff had made out a *prima facie* case of possession within twelve years.

We are satisfied that where a plaintiff comes into Court alleging that he has been dispossessed within limitation, and when the defence is adverse possession, the question of limitation becomes a question of title. The plaintiff must at least give some *prima facie* evidence to satisfy the Court in the first instance that he was in possession within twelve years before the defendant can be called upon to make out his defence of twelve years' adverse possession. Apparently that is the result of the decision of their Lordships of the Privy Council [195] in the case of *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1). The authorities which show that s. 28 of the Indian Limitation Act of 1877 makes limitation a matter of title to be proved by the plaintiff in suits for the possession of property are collected in the case of *Parmanand Misr* v. *Sahib Ali* (2). In the present case the District Judge had not tried, or apparently considered, the question as to whether plaintiff had proved, *prima facie* or otherwise, title within twelve years before suit. On that point he seems to have expressed no opinion on the plaintiff's evidence at all. Before going into the question as to whether the defendants had or had not a title by adverse possession, the District Judge ought to have satisfied himself and expressed an opinion that there was *prima facie* proof that the plaintiff had a subsisting title at the commencement of the suit. We set aside the order of remand and remand the case under s. 562 of the Code of Civil Procedure to the Court of the District Judge for him to try the issues which arise in the case and to dispose of the appeal according to law. It may be that the District Judge may find the question of limitation either way. We express no opinion on the facts on either side as to the question of limitation. Costs here and hitherto will abide the result.

Cause remanded.

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14 A. 195 = 12 A.W.N. (1892) 42.

APPELLATE CIVIL.

Before Sir Jhon Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

ALI AHMAD (*Plaintiff*) v. RAHMAT-ULLAH (*Defendant*).*
[10th March, 1892.]

Construction of document—Mortgage—Sale—Bai-bil-wafa, *nature of—Act IV of* 1882 (*Transfer of Property Act*), s. 58—*Pre-emption.*

The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882, and not a sale.

The plaintiff in a suit for pre-emption had, prior to the sale of the property claimed, executed a deed in respect of his share in the village in virtue of which

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* Second Appeal, No. 1125 of 1889, from a decree of Rai Lalta Prasad, Subordinate Judge of Ghazipur, dated the 9th July 1889, reversing a decree of Maulvi Sayyid Zain-ul-abdin, Munsif of Korantadih, dated the 18th January 1889.

(1) 16 C. 473. (2) 11 A. 438.

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he claimed the right to pre-empt, the material portion of which deed was as follows :—" Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi [196] of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and returning the property sold, described above in the document to me the vendor, revoke the sale."

Held that this deed was a *bai-bil-wafa* or mortgage by conitional sale and that as the conditional sale had not become absolute at the time when the right of pre emption accrued, the conditional vendor or mortgagor was still a shareholder in the village, and therefore had still a subsisting right of pre-emption. *Bhagwan Sahai* v. *Bhagwan Din* (1) distinguished.

[**Appr.**, 20 A. 19 ; **R.**, 19 A. 434 ; 33 A. 585 (592)=8 A.L.J. 389=5 Ind. Cas. 1013 ; 7 A.L.J. 484 (493)=6 Ind. Cas. 183 (187) ; 11 Ind. Cas. 124 (125) ; **D.**, 6 C.W.N. 192 ; 72 P.R. 1901=114 P.L.R. 1901.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Majid* for the appellant.

Munshi *Kashi Prasad* for the respondent.

JUDGMENT.

EDGE, C.J. and TYRRELL, J.—The plaintiff, who is the appellant here, brought his suit for pre-emption in the Court of the Munsif of Korantadih. The suit is based on the village *wajib-ul-arz* and a sale-deed, dated the 20th of October 1887. The vendor and vendee were made defendants to the suit. The defendant, who was the vendee under the deed of the 20th of October 1887, pleaded several matters by way of defence. Amongst other defences he alleged in effect that the plaintiff had, prior to the 20th of October 1887, ceased to be a shareholder in the village. In support of that defence the defendant vendee relied upon a deed which had been executed by the plaintiff on the 30th of September 1887, and which was registered on the 19th of October 1887, and contended that that deed was a deed of absolute sale by which all the interest of the plaintiff in the village had been assigned by him to a third party. On the other hand, the plaintiff contended that the deed of the 30th of September 1887 was a conditional sale-deed, and that the transaction evidenced by that deed was a mortgage by conditional sale within the meaning of s. 58 of the Transfer of Property Act, 1882 (Act No. IV of 1882); and that as mortgagor he was and continued to be a shareholder in the village within the meaning of the *wajib-ul arz*.

The Munsif gave the plaintiff a decree. The defendant, the vendee, appealed. The lower appellate Court holding that, under the deed of the 30th of September 1887, the plaintiff had abso [197] lutely assigned his share in the village, made a decree setting aside the decree of the first Court and dismissing the suit. From that decree this second appeal has been brought. The only issue determined by the lower appellate Court was that as to the effect of the deed of the 30th of September 1887.

The material condition in the deed of the 30th of September 1887, as translated by the head of the Translating Department of this Court is as follows :—Thirdly, if I, the vendor, or the heirs of me the vendor, Ali Jan *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold, described above in the document, to me

(1) 17 I.A. 98=12 A. 387.

the vendor, revoke the sale." The words have been translated as "revoke the sale" are *ikala bai.*"

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Wilson's Glossary of Judicial and Revenue Terms (London, W.H. Allen & Co., 1855) gives the meaning of the word *ikala* thus :—"*Ikala.* The cancelling or dissolution of a sale on condition of furnishing an equivalent for the original price of the article ; breaking a contract or engagement." In the second edition of Hamilton's Hidaya by Grady "*ikala*" is thus defined —"*Ikala* literally signefies to cancel. In the language of the law it means the cancelling or dissolution of a sale." The lower appellate Court translated "*ikala bai*" as "re-sell." Mr. *Abdul Majid* for the appellant relied upon s. 58 of the Transfer of Property Act, 1882, and the case of *Thumbusamy Moodelly* v. *Mahomed Hussain Rawthen* (1) and *Sahib-un-nissa Bibi* v. *Hafiza Bibi* (2).

Mr. *Kashi Prasad* for the respondent, cited the cases of *Mussammat Chando* v. *Hakeem Alim-ood-deen* (3) ; *Rajjo* v. *Lalman* (4) ; *Bhajan* v. *Mushtak Ahmad* (5) ; and *Bhagwan Sahai* v. *Bhagwan Din* (6)

[198] The decision in *Musammat Chand* v. *Hakeem Alim-ood-deen* (3) does not appear to us to have any bearing on the question before us, as the rights of the parties here must be determined by the contract or the village custom contained in the *wajib-ul-arz* and by the construction of the deed of the 30th of September 1887, having regard to the Transfer of Property Act, 1882.

The case of *Rajjo* v. *Lalman* (4) does not apply. In that case the person who claimed to enforce a right of pre-emption under a *wajib-ul-arz* had in anticipation mortgaged to a stranger, *i.e.*, to a person who was not a shareholder in the village, the very share which he sought to pre-empt.

The case of *Bhajan* v. *Mushtak Ahmad* (5) has no possible bearing on this case. The transaction there evidenced by the instrument of July 1870 was an absolute sale. Whether the vendor in that case could have enforced the subsequent agreement of November 1870, we need not consider.

Mr. *Kashi Prasad* strongly contended that the decision of their Lordships of the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (6) governed this case, and that applying the principle of that decision we were bound to construe the deed of the 30th of September 1887, as a deed of absolute sale and not as a mortgage by conditional sale. If the facts in the two cases were the same, and if the Transfer of Property Act, 1882, was equally applicable to the two cases, we would without doubt be bound to take the law to be applied in this case from their Lordships of the Privy Council and to apply it without hesitation. It is doubtful how far, if at all, the attention of their Lordships of the Privy Council was drawn in the case of *Bhagwan Sahai* v. *Bhagwan Din* (6) to the origin and object of the *bai-bil-wafa* form of mortgage which was introduced to enable Muhammadans, contrary to the precept of the Muhammadan law against lending money at interest, to lend money at interest and to obtain security for the repayment of the principal **[199]** and interest. It may be doubted if their Lordships of the Privy Council were informed that it was possible that the *bai-bil-wafa* mortgage transaction was, at least by the people of these Provinces, before their Lordships' decision understood as being capable of being effected in

(1) 2 I.A. 241=1 M. 1. (2) 9 A. 213. (3) N.W.B.H.C.R. (1874) 28.
(4) 5 A. 180. (5) 5. A. 324. (6) 17 I.A. 98=12 A. 387.

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different ways, as, for instance, by a deed which purported to assign the property absolutely, but which contained a stipulation for a right of re-purchase, or by two contemporaneous deeds one of which purported to effect an absolute and unconditional sale, and the other of which was an agreement that the apparent vendor should have a right of re-purchase, and that, as a rule, the common lump price mentioned in each of such deeds did not represent the actual price paid by the apparent vendee, but represented that price plus interest calculated, frequently at a usurious rate, for the period during which it was agreed that the right of re-purchase should subsist, an arrangement which could hardly be consistent with such a transaction being one of an absolute sale and not one in the nature of a mortgage.

In such a case it would be hardly consistent with justice, equity or good conscience to treat the transaction as other than what it in fact was, or was admitted to have been, or to construe the documents as if they had been drafted by a conveyancer of Lincoln's Inn in accordance with English decisions which might be wholly unknown to the people of this country and wholly inapplicable to the form and object of the contract as understood by the parties in India, or to deprive either party of the remedy recognized by the Indian Limitation Act.

In this part of India for many centuries conveyancing followed the Muhammadan forms.

It may also be doubted if the attention of their Lordships of the Privy Council was drawn to the passage in the judgment of this Court in which it was stated, as was the fact :—

"The plaintiffs contended that the sale was a conditional sale or a mortgage by conditional sale. The correctness of this contention was admitted on behalf of the appellant."

[200] The appellant was one of the defendants who had appealed from the decree of the Subordinate Judge of Cawnpore who had held that the transaction was one of mortgage. The appellant in that case was represented by two of the most experienced lawyers then practising in this Court, who had been for years familiar with the different forms in which a *bai-bil-wafa* mortgage transaction was effected in these provinces. Unfortunately this Court did not think it necessary to state in its judgment its reasons for agreeing with what was conceded on behalf of the parties to the appeal, namely, that the transaction was one which was intended by the parties to it to be a transaction of mortgage. Whether any of those considerations would have influenced their Lordships of the Privy Council to take a different view of the transaction, we are unable to say. As in duty bound, we accept the decision as it stands as an authoritative exposition of the law to be administered in this country in a similar case. There is an apparent distinction between that case and this. In that case the contract which was alleged by oneside and admitted on behalf of the other side in this Court to be a contract of mortgage was evidenced, if at all by two contemporaneous documents, whilst in this case the contract is contained in one document, and is obviously a mortgage within the meaning of clause (*c*) or of clause (*e*) of s. 58 of the Transfer of Property Act, 1882. It is not necessary for the purposes of this case to decide which of those clauses of the section applies to it. Taking that view of the transaction as evidenced by the deed of the 30th of September 1887, we hold that the plaintiff had not by rason of the mortgage of the 30th September 1887, ceased to be a shareholder in the village, and that he was not by reason of his having mortgaged his share in the village disentitled to maintain this suit for

pre-emption. As the other issues in the case have not been tried by the lower appellate Court, we remand the case under s. 566 of the Code of Civil Procedure, for the trial and determination of the other issues raised by the memorandum of appeal which was filed in the lower appellate Court. Ten days will be allowed for filing objections after the return has been received.

Cause remanded.

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14 A. 201 (F.B.) = 12 A.W.N. (1892) 74.

[201] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood, and Mr. Justice Knox.

DEOKI NANDAN RAI AND ANOTHER (*Applicants*) v. TAPESRI LAL AND OTHERS (*Opposite party*).* [10th March, 1892.]

Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale—Order against defaulter to make good such deficiency—Appeal—Civil Procedure Code, ss. 2, 293, 540, 588.

No appeal lies from an order under s. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Ram Dial* v. *Ram Das* (1) and *Baijnath Sahai* v. *Moheep Narain Singh* (2) dissented from. *Soudagar Mal* v. *Abdul Rahman Khan* (3), *Rahim Buksh* v. *Dhuri* (4) followed.

So *held* by EDGE, C.J., MAHMOOD and KNOX, JJ., STRAIGHT, J., dissenting.

[Diss., 25 C. 99; 18 M. 439; F., 12 Ind. Cas. 360 (364)—7 N.L.R. 134 (135).]

[N.B.—See in this connection 19 A. 22, an offshoot of 14 A. 201.]

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Tyrrell, J. The appellants, Deoki Nandan Rai and Sheo Balak Rai, purchased certain immoveable property at an auction-sale in execution of a decree on the 20th May 1888. The price at which the property was sold was Rs. 800. As the purchasers did not pay the purchase-money within the time required by section 307 of the Civil Procedure Code, the sale was set aside, and the property was re-sold under section 308 on the 22nd August, 1888, when it was purchased by one Baldeo Lal on behalf of Musammat Sona Kuar for the sum of Rs. 245. Thereupon the decree-holder applied in the Court of the Munsif executing the decree to recover from the defaulting first purchasers the difference between the prices relaized at the two sales, and these purchasers on their part filed objections. Those objections were, however, overruled, and the Munsif, acting under section 293 of the Code of Civil Procedure, ordered the purchasers to make good the deficiency. The objectors appealed to the Subordinate Judge of Ghazipur, who allowed the appeal, holding that as the officer conducting the sale had not certified under the provisions of section 293 the circumstances under which the re-sale took place, the Munsif was not competent [202] to make the order under appeal. From this decision the decree-holders appealed to the High Court.

Munshi *Jwala Prasad*, for the appellants.

Mr. *J. E. Howard*, for the respondents.

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* Letters Patent Appeal No. 20 of 1890.

(1) 1 A. 181. (2) 16 C. 535. (3) 10 A.W.N. (1890) 85. (4) 12 A. 397.

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TYRRELL, J.—This is a second appeal from the appellate order made by the Subordinate Judge of Ghazipur reversing the decision of the Munsif executing the decree, who made an order under section 293 of the Civil Procedure Code directing the defaulting auction-purchaser to make good the loss which his default brought about. The learned vakil who appears for the decree-holders appellants, contends that the order of the Munsif was unappealable. It seems to me that the contention is sound. An order under section 293 is not appealable as an order under section 588 of the Civil Procedure Code. To be appealable, then, it must be regarded as an order under section 244. It is not such an order, for Deoki Nandan Rai, who made an abortive final bid at the first sale, cannot be said to be in any sense a party to the execution of the decree. A doubt as to appellate jurisdiction in regard to orders under section 293 was suggested in the Calcutta Court in *Ramdhani Sahai* v. *Rajrani Kooer* (1), and I am informed that the first Bench of this Court has recently ruled that an order under section 293 is not appealable. Unfortunately I cannot find the judgment (2), but I have very little doubt that the order in question was unappealable. The decretal order of the Court below must be set aside; that of the Munsif restored, the appeal being decreed with all costs.

From this decree an appeal under s. 10 of the Letters Patent was filed by the defaulting purchasers, which appeal coming on to be heard by Edge, C.J., and Straight, J., was, by their orders of the 5th January 1892, directed to be laid before a Bench consisting of the Judges of the Court other than the Judge from whose decree the appeal was brought.

Mr. *T. Conlan* for the appellants.

Munshi *Jwala Prasad*, for the respondents.

JUDGMENT.

[203] MAHMOOD, J.—This is a Letters Patent Appeal under s. 10 from the judgment of my brother Tyrrell, in which he held, as his judgment shows, that no appeal lay either to the lower appellate Court or to him.

A preliminary difficulty occurred in my mind in this case as to whether or not an appeal lay to this Bench under s. 10 of the Letters Patent in view of the recent Full Bench case of *Muhammad Naimullah Khan* v. *Ihsanullah Khan* (3). But upon full consideration, and inasmuch as the ground of appeal contests the judgment of my brother Tyrrell, whatever view I may entertain as to the validity of the judgment, I am of opinion that this appeal lies. This view is consistent and indeed in conformity with what was ruled by me in an earlier case where I held that the mere circumstance that an appeal did not lie to the lower appellate Court does not oust the jurisdiction of a higher Court of appeal to hear an appeal from a decree passed by such lower appellate Court.

We are therefore seized of this case as an appeal, and as such I understand that the appeal comes before us and that this Bench has to deal with it. The case has come up for hearing before the learned Chief Justice and my brother Straight, and by their order of the 5th January 1892, they referred the whole case to us, namely, the Judges of the Full Bench. In that order of reference the points which really arise in the

(1) 7 C. 337. (2) 10 A.W.N. (1890) 85. (3) 12 A.W.N. (1892) 14.

case have been succinctly but clearly stated, and I do not wish to add anything to what is said there.

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What I have to consider is the solitary question which arises before me sitting here in the Full Bench, and that is this, namely, whether or not orders under s. 293 of the Code of Civil Procedure are matters which can be made a subject of appeal to any Court at all. In considering this question one thing is important, and that is this, that if any orders made under s. 293 are orders, you have to search for a right of appeal from those orders, and in that search the Code leaves no doubt in s. 588 that that search must be limited to the four corners of that section and nowhere else. So that if these orders are orders, as distinguished from decrees, then [204] there is no doubt and the section is clear enough ; I mean s. 588 is clear enough to show that it contains a prohibition as to appeals from orders other than those specified in that section. In that section there is one thing which I wish to point out, and for that I am indebted to the learned Chief Justice, namely, that whilst in cl. (16) orders under s. 294 are declared appealable, there is a significant silence as to the appealability of orders under s. 293, and this significance is all the more significant, because s. 294 is somewhat cognate in its nature to the provisions of s. 293 which immediately precedes it. Holding the rule *expressio unius exclusio alterius*, and taking that to be the sound principle of interpretation, I regard the absence of s. 293 from the various clauses of s. 588 as signifying that no orders under that section were to be rendered appealable.

Then comes a greater question upon which my judgment must proceed, and that is this. The difficulty over s. 293 arises over the last part of that section, because it says that the deficiency of the price, "shall at the instance of either the judgment-creditor or the judgment-debtor be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money."

I have quoted these words on purpose, because I have long held the view, expressed in numerous cases from the Bench in this Court, that whilst a clear distinction must be drawn between the rules of substantive law and the procedure law, so, in considering the rules of procedure itself, there must be a distinction drawn between that which is purely indicative of the *modus operandi* and that which is otherwise a rule of procedure only for the purposes attaining substantive rights when they are infringed. The only reason for holding that an order under s. 293 becomes an order such as that contemplated by s. 244 can be founded on the words I have already quoted, namely, that the deficiency of price "shall be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money."

There is no doubt that such money can be so recovered, that is to say, by means of attachment, by arrest and by whatever [205] procedure there may be. The question is : is it therefore an order which becomes a *decree* by dint of the definition of that term in s. 2 of the Civil Procedure Code ? Now, there the Legislature in the first place fully realized that the word "*decree*" when loosely used may be confounded with "*order*" and that the word "*order*" when loosely used may be confounded with "*decree*," and therefore the definition there is very specific. It is needless to read the whole of that portion of the statute ; but it is important to say this: —"decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the *suit* or appeal."

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Now I am indebted to the learned Chief Justice for the significance which I am going to attach to these two words "*suit*" and "*appeal*." A defaulting purchaser when ordered to pay up the deficiency:—Is he a "*suitor*" within the meaning of the word "*suit*," or an "*appellant*" within the meaning of the word "*appeal*"? If he is not a suitor, he cannot be an appellant, till he shows that the order of which he complains is an appealable order. Orders of this kind and character are really administrative orders. They do not partake of the nature of adjudication as that word is used in defining the word "*decree.*" Nor do I think the definition of the word *judgment-debtor*" applies to a person of that character, because the word "judgment-debtor" is defined to be "any person against whom a decree or order has been made."

Again, the words "*judgment-debtor*" and "*decree-holder*" as defined in the same clause are correlative terms. Therefore, before we can call a defaulting purchaser a judgment-debtor, it is necessary to know who the decree-holder is. Who is the decree-holder under the enactment in a quarrel with regard to price? There is no decree-holder. Because a man who chooses to rush into an auction-room and bids imprudently and goes the length of paying up the one-fourth of the price and chooses not to pay up the rest, or cannot pay it up, suffers from the results of his own imprudence. He is not a judgment-debtor; he must forfeit the price and he **[206]** must suffer the consequences, and there is no decree-holder, because of this character.

This being my view, I have to consider the case-law as it stands. I do not intend to do more than first of all refer to the Full Bench ruling of this Court in *Ram Dial* v. *Ram Das* (1), where it was held that an appeal lay from orders under s. 254 of Act VIII of 1859 read with s. 11 of Act XXIII of 1861 for the reasons mentioned in that judgment. The next case I wish to refer to is the case of *Baijnath Sahai* v. *Moheep Narain Singh* (2), where Tottenham and Banerjee, JJ., delivered a judgment which is now before me, and the first paragraph of which is the one applicable to the point now before us and undoubtedly supports the contention that an appeal would lie under s. 293, and I think Mr. *Conlan*, in the able argument which he addressed to us, was fully entitled to cite that as a case in support of his contention.

The next case I wish to refer to is a Division Bench ruling of this Court, namely, the case of *Soudagar Mal* v. *Abdul Rahman Khan* (3) where the learned Chief Justice and the late Mr. Justice Brodhurst delivered a joint judgment and held that such orders as those contemplated by s. 293 were not appealable. The report of the case shows that no early cases or authorities were cited, because there is no reference in the judgment, and I am assured by the learned Chief Justice that no such authorities were cited.

Then the last, and what I regard as the most important, case for the purposes of my judgment is the case of *Rahim Bakhsh* v. *Dhuri* (4). That judgment indicates that all the authorities which were then existing, including the Full Bench ruling of this Court in *Ram Dial* v. *Ram Das* (1), as also the ruling of the Calcutta High Court in *Baijnath Sahai* v. *Moheep Narain Singh* (2), were cited and considered by the learned Chief Justice and the late Mr. Justice Brodhurst. In that judgment they distinctly differed from the view **[207]** taken in the Full Bench case

(1) 1 A. 181. (2) 16 C. 535. (3) 10 A.W.N. (1890), 85. (4) 12 A. 397.

of *Ram Dial* v. *Ram Das* (1), and also from the Calcutta Division Bench ruling in *Baijnath Sahai* v. *Moheep Narain Singh* (2). **1892 MARCH 10.**

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Such, then, is the case-law upon the subject, and having considered not only these but numerous other cases which have been cited during the course of the argument, I have no doubt that the rule laid down in *Rahim Bakhsh* v. *Dhuri* (3) is a sound rule of law. In saying so, I maintain that, although s. 293 of the Code of Civil Procedure renders rules applicable to recovery of money in execution of decree applicable also to recovery of money from the defaulting purchaser, yet rules which are intended only to apply to the *modus operandi* of the recovery of money cannot give any right of appeal. I take it to be an undoubted doctrine of interpreting statutes that the maxim *ubi jus ibi remedium* does not include a right of appeal. It must be expressly granted by the Legislature, and it is not a right which arises out of common law. If the Legislature intended that quarrels such as those arising under s. 293 of the Code should be appealable, there could be nothing easier than adding another clause immediately above clause (16) of s. 588 granting a right of appeal. But there is no such clause to be found. There is no other provision in the Code to show that an appeal lies.

It has been contended that to apply rules which are so stringent as those required by the Chapter of the Code relating to the execution of decrees to a defaulting purchaser and not to give him a right of appeal is a hardship upon him. This argument I have weighed in my mind. At first sight it appears that there is hardship, but as a matter of fact the law intends that imprudent bidders at auction must not have those rights, and that the functions to be discharged by the Courts of justice such as those contemplated by s. 293 should be peremptory and final, subject of course to such rights as the defaulting purchaser may otherwise have in regard to the recovery of money which he has paid up. I therefore hold that the principle of the Full Bench ruling in *Ram Dial* v. *Ram Das* (1) [208] is erroneous; that the views expressed in Division Bench ruling in *Soudagar Mal* v. *Abdul Rahman Khan* (4) and in the recent case of *Rahim Bakhsh* v. *Dhuri* (3) are correct; and that the judgment of my brother Tyrrell, from which this appeal has been laid, was correct, and I would therefore dismiss this appeal.

KNOX, J.—The order which was before my brother Tyrrell in appeal purported to have been an order passed under s. 293 of the Code of Civil Procedure. Whether an order is not necessary, or can or cannot be passed under s. 293, may be open to question. The section itself does not in terms provide for an order. All that it says is that when a re-sale has been made under the Code by reason of a purchaser's default and the result of such re-sale shows that there is a deficiency of price, and that there are certain expenses which have to be recovered from someone, that deficiency and those expenses shall be certified to the Court by the officer holding the same. It may well be conceived that numerous instances would arise when no order of any kind would be passed upon such certificate, and, as I said before, I do not find that s. 293 requires a Court to pass an order upon such certificate. If there is a decision passed by the Court under s. 293, in my opinion such a decision cannot at the highest amount to anything more than an order, and as s. 588 of the Code of Civil Procedure makes no provision for appeals from such orders, no appeal will lie, and the judgment of my brother Tyrrell is in that view

(1) 1 A. 181. (2) 16 C. 535. (3) 12 A. 307. (4) 10 A.W.N. (1890) 85.

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a judgment which, in my opinion, must be upheld. I might therefore leave the case at this stage, but it has been pressed before us by Mr. *Conlan*, who appeared for the appellants, that much injustice might arise to the defaulting purchaser, if he can in no way appeal from the decision of the Court, if there be any, under s. 293 and the consequences which flow from that decision. We are not called upon to determine in the present case the question whether an appeal does or does not lie from decisions resulting after the proceedings have passed the stage contemplated in s. 293. But it seems to me that when such a question arises for argument hereafter, and when the judgment-creditor or the judg-[209]ment-debtor proceeds to recover from the defaulter the deficiency mentioned in s. 293, the following facts will have to be considered. Such judgment-creditor or judgment-debtor, as the case may be, will have to follow the rules contained in Chapter XIX for the execution of a decree for money. His first step will be probably to take the certificate to the Court through whom he wishes to recover, and put it in as the foundation of proceedings in execution. Such proceedings will, in the ordinary course of things, lead up to an adjudication, if any question arises, and that adjudication, it appears to me, subject to what I have said above, would be a decree. For these reasons I would dismiss this appeal with costs.

EDGE, C.J.—I am still of the opinion which I expressed in my judgments in the case of *Soudagar Mal* v. *Abdul Rahman Khan* (1) and *Rahim Bakhsh* v. *Dhuri* (2). I would only add that the order passed under s. 293 of the Code of Civil Procedure, which is questioned here, if it is not a decree, must be an order within the meaning of that word as defined in s. 2 of the Code. For I find that an order is defined as "the formal expression of any decision of a Civil Court which is not a decree as above defined." Consequently, if it is an order, it was an order within the meaning of that word as used in the Code of Civil Procedure, and no appeal lies under s. 588 from such an order made under s. 293 of that Code. It cannot, in my opinion, be considered to be a decree which decides the suit or appeal. It is not in fact the decree in the suit, and no other suit, as that word is used in the Code of Civil Procedure, ever was commenced. A suit, as that word is used in the Code of Civil Procedure, has a definite meaning. It is a proceeding commenced by the filing of a plaint; written statements have to be filed, and certain specific procedure is applicable to it. Then again, as I have said in my judgment in one of the former cases, I fail to see how a defaulting purchaser at an auction-sale can be considered as a party to the suit in which the decree was passed, or as a representative, as such, of any parties to the suit within the meaning of s. 244 of the Code. For these reasons I am of opinion that, [210] although the facts may have been correctly found by the Subordinate Judge in this case, the appellant here, whatever remedy he may have, has not got a remedy by way of appeal. If he has any other remedy, he would not apparently be debarred from it by reason of s. 244, which, in my judgment, does not apply to his case. I would therefore dismiss this appeal with costs.

STRAIGHT, J.—I am strongly inclined to hold that an appeal does lie. But as four members of the Court are of the contrary opinion and as I am shortly to leave the Court, I do not think that any useful purpose will be served by my entering at length into the reasons that lead me to that view

(1) 10 A.W.N. (1890) 85. (2) 12 A. 397.

I therefore simply say I do not concur in the judgments that have been delivered. 1892 MARCH 10.

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ORDER OF COURT.

The order of the Court is, consequently, that this appeal is dismissed with costs.

Appeal dismissed.

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14 A. 210=12 A.W.N. (1892) 56.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

KASHI RAM (*Petitioner*) v. MANI RAM (*Opposite party.*)*
[7th April, 1892.]

Execution of decree—Order dismissing application under s. 295 *of the Civil Procedure Code for participation in assets—Civil Procedure Code*, ss. 2, 244, 295—*Appeal.*

No appeal will lie from an order under s. 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under s. 244 read with s. 2 of the said Code.

[F., 12 Bom. L.R. 365 (366)=6 Ind. Cas. 522; R., 27 M. 504; 65 P.R. 1905=130 P.L.R. 1905; D., 6 O.L.J. 437=11 C.W.N. 433.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* for the appellant.

Babu *Rajendra Nath Mukerji* for the respondent.

JUDGMENT.

[211] EDGE, C.J., and BLAIR, J.—The appellant here put his decree in execution in the Court of the Subordinate Judge of Cawnpore. The respondent had a decree against the same judgment-debtor, and was proceeding in execution of his decree in the Court of a Munsif. The respondent got his execution proceedings transferred to the Court of the Subordinate Judge, and applied under s. 295 of the Code of Civil Procedure to participate in the assets. The Subordinate Judge, holding that the respondent's decree was time-barred, made an order refusing him participation in the assets. On that the respondent here appealed against that order to the Court of the District Judge. The District Judge entertained the appeal, set aside the order of the Subordinate Judge, and remanded the case to the Court of the Subordinate Judge. From that order of remand this appeal has been brought. An order passed under s. 295 is not an order appealable. Section 588 of the Code prohibits an appeal against any order passed under s. 295. The question then remains, was the order of the Subordinate Judge appealable as a decree, reading "decree" as defined in s. 2 of the Code. Unless the order in question was an order under s. 244 of the Code, it would not be a decree as defined in s. 2. The parties to the appeal below were the respondent here, a decree-holder, and the appellant here, another decree-holder. The judgment-debtor was not a party to the appeal below. Consequently we have only to consider whether the question decided below

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* First Appeal No. 77 of 1891 from an order of A. McMillan, Esquire, District Judge of Cawnpore, dated the 25th May 1891.

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was a question which arose between the parties to the suit in which the decree was passed or their representatives within the meaning of cl. (*c*) of s. 244. The parties to the appeal below were not parties to any common suit. Each was a decree-holder in his own separate suit, and the only person common to both suits was the judgment-debtor. Now in those proceedings these decree-holders could not be treated as representatives of each other or of the judgment-debtor; consequently we cannot treat the order of the Subordinate Judge as one which was made or capable of being made under s. 244 of the Code. An appeal is a creation of statute. There is, so far as we can see, no section in the Code of Civil Procedure which gave an appeal from the order of the [212] Subordinate Judge, but there is a provision in s. 295 allowing a party a right of suit in a case of this kind. For these reasons we are of opinion that the appeal below did not lie. We accordingly allow this appeal with costs here and in the lower appellate Court, and, setting aside the order of remand, we reinstate the order of the Subordinate Judge with costs.

Appeal decreed.

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14 A. 212=12 A.W.N. (1892) 63.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* G. W. HAYFIELD AND ANOTHER. [18th April, 1892.]

Practice—Sessions trial—Adducing evidence for the defence—Documents produced for cross examination of crown witness—Right of reply—Criminal Procedure Code, ss. 289, 292—*Witness for Crown tendered at Sessions trial who had not been examined by the committing Magistrate.*

In a trial before a High Court or a Court of Session evidence for the defence cannot be adduced until the close of the case for the prosecution; but counsel for the defence may, while a witness for the Crown is under cross-examination, put documents to him, and if in so doing counsel reads or causes to be read to the Court such documents, he thereby impliedly undertakes to put those documents in as evidence at the proper time. When such documents as aforesaid are filed in Court as evidence, or any other documentary evidence is put in by the defence, the defence has "adduced evidence" within the meaining of ss. 289 *et seq.* of the Code of Criminial Procedure, so as to give the prosecution a right of reply, though no witnesses may be called for the defence.

In a trial at the Criminal Sessions of the High Court, during the cross-examination of one of the witnesses for the Crown, counsel for the defence put certain documents to the witness, and these were read to the Court and jury and marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and after the cross examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply, in the event of the accused not calling witnesses.

Held that although, as a matter of order, such a question would be better raised either when the first document intended to be used in this way was put to a witness, or when the accused was asked if he meant to adduce evidence, yet there was nothing in the Code of Criminal Procedure to prevent the Court [213] from deciding the question at any other stage, and that, under the special circumstances of the case, it might be considered then.

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Held also that the use of the documents in the manner above stated gave the prosecution a right of reply. *Queen-Empress* v. *Grees Chunder Banerji* (1), *Empress of India* v. *Kaliprosonno Dass* (2), *Queen-Empress* v. *Solomon* (3), and *Queen-Empress* v. *Krishnaji Babu Rav Bulell* (4), dissented from.

At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice.

[R., 4 L.B.R. 5 (7) = 6 Cr. L.J. 115.]

THIS was a trial before Knox, J., and a jury at the Criminal Sessions of the High Court. The accused, George William Hayfield, was charged with offences punishable under ss. 420, 420 read with 511, and 436 read with 107 of the Indian Penal Code. During the course of the case for the prosecution an application was made to the Court by the Public Prosecutor that a certain Mr. Garstin might be examined as a witness for the Crown. Mr. Garstin was not examined as a witness by the committing Magistrate either at the time of the inquiry in the Magistrate's Court or subsequently under s. 219 of the Code of Criminal Procedure. The defence objected to the proposed examination of Mr. Garstin.

The Public Prosecutor (The Hon. *G.T. Spankie*), for the prosecution.

Mr. *W. M. Colvin*, Mr. *A. Strachey* and Mr. *T. E. Strachey*, for the prisoner.

KNOX, J.—With reference to the application of yesterday that Mr. Garstin might be examined as a witness for the Crown, my ruling is as follows:—

Mr. Garstin was not examined as a witness by the committing Magistrate: he was not examined by the Crown under the supplementary provisions of s 219 of the Code of Criminal Procedure, and up to the present the accused have no knowledge of the nature [214] of the evidence which he may give, how it may affect them, and therefore cannot say whether or not, if it had been given at the preliminary inquiry, they would have cited evidence to rebut it.

It was the intention of the law, so far as can be gathered from the provisions of the Code, that an accused should not be put on his trial until all the evidence that was forthcoming, and of the existence of which the Crown might reasonably be supposed to be aware, had been put on record and in his presence, if possible; and further, it is provided that if the accused so require a copy of all such evidence so recorded be given to him before his trial commenced.

There was, in my opinion, no intention, and therefore no provision made for the purpose, that the Crown could demand of right that any witness not examined by them in the preliminary inquiry should be called and examined at the trial. It is true that in the present instance certain witnesses, among them Mr. Garstin, have been summoned by order of the Court, but no notice was given to the accused, and I therefore regard their being summoned as a purely ministerial act and in no way binding upon myself in the sense that the witness so summoned is, as a matter of course, to be examined.

I therefore rule that Mr. Garstin cannot give evidence on the part of the Crown to-day. This will not preclude the Court, if, it considers it necessary in the interests of justice, from calling and examining him as a

(1) 10 C. 1024. (2) 14 C. 245. (3) 17 C. 930. (4) 14 B. 436.

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witness cited by the Court; and to prevent any hardship to the accused, I direct that the papers to which his evidence and that of Kamta Prasad are supposed to refer be placed to-day at the disposal of the counsel for the accused.

[The case for the prosecution then proceeded. During the cross-examination of one of the witnesses, counsel for the defence put certain letters and other documents to the witness, some for the purpose of contradicting his testimony and others for the purpose of proving that he was an accomplice in the commission of the offences charged against the accused, so as to lay the foundation for argument that his evidence should not be acted upon without corroboration. These documents were read to the Court and jury and [215] marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and, after the cross-examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply in the event of the defence not calling witnesses. The Public Prosecutor objected that the point was prematurely raised at the present stage of the trial.]

KNOX, J.—Upon the conclusion of the examination-in-chief of one of the witnesses for the Crown, Mr. *Strachey*, on the part of the defence, raised the question whether, if certain documents were tendered to witnesses for the Crown with the intention of using those documents as evidence hereafter, the Crown would be entitled to the right of reply. The Public Prosecutor questioned the right of the counsel for the defence to raise this question at the present stage of the trial. Counsel for the defence referred me to the cases *Queen-Empress* v. *Solomon* (1), *Empress of India* v. *Kaliprosonno Doss* (2) and *Queen-Empress* v. *Krishnaji Baburav Bulell* (3), and contended that this question might be raised at any point during the progress of the trial. The Public Prosecutor suggests that those cases established nothing further than that there were two stages at which this question might be raised. First, when the first document intended to be used in this way was put to a witness, and secondly, when the accused is asked if he means to adduce evidence. I am clearly of opinion that these two stages would be the preferable ones in which as a point of order such a question should be raised, but there are special circumstances in this case, one being that the trial will probably have to be adjourned, and the counsel for the defence assures me that my ruling on the point will probably determine whether the witnesses are to be put to the inconvenience of staying [216] over such adjournment. On this ground, therefore, and seeing nothing in the Code of Criminal Procedure which would prevent me from deciding the question at any other stage beyond those named, I rule that the question may be considered now.

[The question was then argued.]

RULING.

KNOX, J.—The question on which I am asked to rule is as follows:—"Can counsel for the accused during the cross-examination of a witness called for the prosecution at a Sessions trial and before the close of the

(1) 17 C. 930. (2) 14 C. 245. (3) 14 B. 436.

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evidence for the prosecution, read or cause to be read to the Court and Jury a letter or other document written by the witness which has not been put in evidence by the prosecution or by the judge presiding, without giving a right of reply to counsel for the prosecution." As this was a question involving procedure, I thought it best to take counsel with my brother Judges in the matter before ruling. It was contended for the prisoner that the tendering of such documents does not entitle counsel for the prosecution to a right of reply, and in support of that contention I was referred to the following cases:—*Queen-Empress* v. *Grees Chunder Banerji* (1), *Empress of India* v. *Kaliprosonno Doss* (2), *Queen-Empress* v. *Solomon* (3) and *Queen-Empress* v. *Krishnaji Baburav Bulell* (4). In *Queen-Empress* v. *Grees Chunder Banerji* (1), in which an accused during the cross-examination of a witness used certain documents and those documents were tendered in evidence and marked as exhibits; at the same time it was intimated by counsel for the defence that he would contend that by so doing he did not give counsel for the prosecution a right of reply on the case in the event of no witnesses for the defence being called, Mr. Justice Field held that the prosecution was not entitled to a reply. In *Empress of India* v. *Kaliprosonno Doss* (2), Mr. Justice Trevelyan gave a similar ruling, following the ruling already quoted. In *Queen-Empress* v. *Solomon* (3), Mr. Justice Wilson also held to the same effect after it had been pointed out to him that the Madras High Court had decided to a [217] contrary effect. This case is of some importance, as therein it was pointed out to Mr. Justice Wilson by Mr. Pugh, who appeared for the prosecution, that he had been informed that it was the practice of the North-Western Provinces High Court under such circumstances to allow a reply. In *Queen-Empress* v. *Krishnaji Baburav Bulell* (4), Mr. Justice Farran followed the rulings of the Calcutta Court. No precedent of this Court has been pointed out, but an allusion has been made to the procedure which is said to have taken place during the trial of *Queen-Empress* v. *Trotter* (5); but it is admitted that in that case the question was not argued, and that when the point was raised the documents were put on the record by the presiding Judge and not by counsel for the defence. Upon these authorities it was contended by counsel for the defence that he was entitled to read or have read to the Court and jury before the prosecution had concluded their case a letter or other documents, which a witness for the prosecution admitted in cross-examination had been written by him and which contained statements on relevant matters, without giving the prosecution a right of reply. That contention involves the assumption that a letter or other document may be read to the jury in evidence in a trial without such document having been put in evidence and without any obligation being incurred to put such document in evidence. This is an assumption which cannot be supported. The fact that a witness for the prosecution has admitted in cross-examination that a document was written by him does not make it incumbent on the prosecution to put that document in as part of the evidence for the prosecution, although that document may contain a statement relevant as contradicting, explaining, or raising a doubt as to the value of the oral evidence of the witness. Thus the prosecution might be satisfied that the oral evidence was true and that the document had been prepared in collusion with the accused or fabricated as a trap or

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(1) 10 C. 1024. (2) 14 C. 245. (3) 17 C. 930. (4) 14 B. 436.
(5) Not reported.

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might have other good reasons for declining to put in a document of which up to that moment it had had no notice as evidence for the prosecution. Nor is it incumbent on the presiding Judge to exercise his right of putting the document [218] in as evidence. If the accused desires to have the benefit of such document as evidence, and he cannot have the benefit of it as evidence unless it is put in as evidence, he must put it in as evidence, if neither the prosecution nor the presiding Judge will put it in as evidence. The difficulty arises from the fact that it may be convenient and desirable that the document should be read to the jury whilst the witness is under cross-examination ; and from the fact that s. 289 of the Code of Criminal Procedure does not apparently authorize the accused to adduce evidence until the examination of the witnesses for the prosecution and the prisoner's own examination have been concluded. Ss. 286 to 296 of the Code prescribe the procedure to be followed in Sessions trials from the opening of the case for the prosecution to the close of the case for the prosecution and defence. I can find nothing in any of those sections to suggest that an accused person or his pleader can, before the examination of the witnesses for the prosecution has been concluded, adduce evidence for the defence: indeed, the language of s. 289 strongly indicates that evidence for the defence can only be adduced at a Sessions trial after the examination of the witnesses for the prosecution and the examination of the accused are concluded, for then, and not till then, is the accused to be asked whether he means to adduce evidence, a procedure which is inconsistent with a right or the exercise of a right by or on behalf of an accused to adduce evidence at an earlier stage of the trial. There is, however, nothing in any of those sections to show that an accused person is precluded from stating for his own benefit, or intimating at any time whilst the witnesses for the prosecution are being examined, that he intends to adduce evidence for his defence. It has been contended that the reading to the jury in Court by counsel for the accused, or the causing a witness called for the prosecution, to read a letter or other document written by the witness, which has not otherwise been put in evidence, is not an adducing evidence by or on behalf of the accused and does not amount to an intimation on behalf of the accused that such document will at the proper time be put in evidence by the accused, and that in that respect such docu-[219]ment stand on a footing different from that of other documentary evidence. It appears to me that the fact that the letter or document was admitted by the witness to have been written by him is immaterial, and the position would be the same if the latter or document was one which the witness had sworn he had not written and had no previous knowledge of, and had stated in his evidence to be in the writing of some one else, as *e.g.*, of another witness for the prosecution. In either case neither the prosecution nor the defence could read or have the letter read to the Court and jury, that is, use it as evidence, until it was put in as evidence, or, to use the language of the Code, until it had been adduced as evidence, or unless upon an undertaking that the party desiring to use it as evidence, would at the proper time put it in formally as evidence. Such an undertaking should be carried out ; with the result that the prosecution would be entitled to a reply. Such an undertaking is, as a general rule, I understand, implied and not expressed. A similar undertaking is implied when counsel in opening the case for the prosecution, or the accused or his pleader in opening the case for the defence, reads to the Court a letter or other document not at that time put in as evidence. If the reading of the letter or document at that stage of the trial is not objected to, the party

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reading it impliedly undertakes to put it in as evidence at the proper time as part of the evidence adduced by him. If the opposite party objects to the letter or document being read to the jury until it is a proved and put in as evidence, it cannot be read to the jury until it is proved and put in as evidence in the case. It is obvious that a letter or document cannot be read to the jury unless it has been put in as evidence at the trial, or unless the party using it as evidence expressly or impliedly undertakes to put it in as evidence at the proper time.

If a fact has to be proved at a criminal trial, the evidence which proves that fact must be adduced. If such fact is to be proved by oral evidence, the oral evidence must be adduced. Similarly if the fact is to be proved by documentary evidence, the documentary evidence must be adduced. The only essential difference is that the [220] oral evidence of the fact may be obtained from the cross-examination of a witness of the opposite party without that witness being made a witness for the party who in cross-examination has extracted the evidence of the fact which he wishes to prove. When a document has been put in evidence by either side its contents are before the jury, and its contents may or may not afford evidence, or may be the sole admissible evidence, of a particular fact. The document so put in evidence is, no matter for what purpose it may be used by either party, evidence adduced by the party who put it in as evidence. An example of how a document in the writing of a witness may be used without involving the necessity of putting the document in as evidence is afforded by s. 145 of the Indian Evidence Act. Under that section :—" a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved." In such cross-examination the exact words used in the writing as to which it is desired to obtain an admission should be put to the witness. If the witness admits that he did write those words, that admission is evidence of the fact that on a previous occasion he made the statement which those words convey. If the witness denies that he ever made that statement, the person who is cross-examining can put the document into the hands of the witness and tell him to look at it, or at a portion of it, and ask him if he still denies having made that particular statement. The witness may either admit or deny that he made the statement. So far the person cross-examining the witness has incurred no obligation to put the document in as evidence. If the witness admits that he made the statement, the person cross-examining has obtained all that is necessary and is under no obligation to put the document in as evidence. If the witness denies that he made the statement, the person cross-examining has two courses open to him. He may decide not to put the document in as evidence; in which case he must accept the denial of the witness as conclusive, and lay himself open to the observation that he put to the witness a question suggesting that the document contained a statement which in fact it did not. On the other [221] hand, he may decide to put the document in as evidence showing that the witness had on a previous occasion made a particular statement and then contradicted it. In the latter case the document when proved should be put in formally as evidence when the party who intends to use it as evidence is adducing his evidence. Similarly, if a witness in cross-examination denies that on a previous occasion he made on a relevant matter an oral statement inconsistent with, or which would give a different complexion to his evidence at the trial, the person cross-examining the

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witness must accept the denial as conclusive, unless he can, by the cross-examination of the person to whom the oral statement was made, in case such witness happens to be a witness for the other side, or by calling such person as a witness for his own side when he is adducing his evidence, prove that the statement was in fact made.

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14 A. 221 = 12 A.W.N. (1892) 66.

APPELLATE CIVIL.

Before Sir John Edge., Kt., Chief Justice, Mr. Justice Tyrrell, and Mr. Justice Blair.

SANT LAL AND OTHERS (*Judgment-debtors*) *v.* SRI KISHEN AND ANOTHER (*Decree-holders*).* [20th April, 1892.]

Rules of Court of the 30th November 1889—Practice—Memorandum of appeal—Appeal described as "first appeal from order" instead of first appeal from decree.

It is not a fatal objection to an appeal that the same is described in the memorandum as "First appeal from Order" being in reality a First appeal from a decree, it not being shown that the respondent was in any way prejudiced by such misdescription or that by reason thereof an insufficient stamp was placed on the memorandum. *Kedar Nath* v. *Lalji Sahai* (1) *quoad* this point distinguished.

[F., 22 A. 430 = 20 A.W.N. 136.]

THIS was a reference made at the instance of Mahmood, J., to a Bench of three Judges. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

MR. *Abdul Majid* and Mr. *Malcomson*, for the appellants.

[222] Munshi *Ram Prasad* and Babu *Sirish Chandar*, for the respondents.

JUDGMENT.

EDGE, C. J., TYRRELL and BLAIR, JJ.—In this case the memorandum of appeal when presented and admitted was headed "First Appeal from Order." Subsequently it appeared that the order in question was an order under s. 244 of the Code of Civil Procedure, and consequently came within the definition of decree, as decree is defined in s. 2 of that Code. It was contended on the authority of the decision of a Divisional Bench in the case of *Kedar Nath* v. *Lalji Sahai* (1), and on the authority of an unreported case, First Appeal from Order No. 70 of 1890, decided by a Divisional Bench on the 9th January, 1891, that the appeal having been misdescribed should be dismissed. On the other hand, it was contended on the authority of an unreported decision of a Divisional Bench in First Appeal From Order No. 15 of 1890, decided on the 15th April, 1890, that the misdescription, if any, might be corrected and the appeal heard. The proper description of the appeal in question, according to the practice of this Court at the time when the appeal was presented, was simply "First Appeal." That is the practice as embodied in Rule 9 of the Rules of Court of the 30th November, 1889. The misdescription, if it is one, did not take any one by surprise. It did not

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* First Appeal, No. 239 of 1890 from a decree of Rai Pyare Lall, Subordinate Judge of Meerut, dated the 8th February, 1890.

(1) 12 A. 61.

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in any respect affect the stamp on which under the Court Fees Act the memorandum should be presented, whether it was a memorandum of appeal from a decree or a memorandum of appeal from an order strictly so called. The decision of the Divisional Bench reported in the Indian Law Reports, 12 Allahabad, p. 61, was apparently based on the former practice of this Court and related, as appears by the dates, to a memorandum of appeal which had been presented before the rules of Court of the 30th November 1889 came into force. The decision in the unreported case, First appeal from Order No. 70 of 1890, was in a case in which no application to amend the memorandum of appeal was apparently made. The memorandum of appeal has been already amended in this case, and we are of opinion that the appeal should be heard as a First Appeal from a decree as a decree is defined in [223] s. 2 of the Code. We do not for one moment suggest that an application for revision under s. 622 could be treated as a memorandum of appeal from a decree or an order.

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14 A. 223 = 12 A.W.N. (1892) 73.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

SRI KISHEN (*Plaintiff*) *v.* ISHRI AND ANOTHER (*Defendants*).*
[4th May, 1892.]

Land-holder and tenant—Suit for ejectment against occupancy tenant and his mortgagee—Limitation—Act XV of 1877—*Act XII of* 1881, *s.* 94.

The plaintiff, a zamindar, sued one Ishri, an occupancy tenant, for ejectment under s. 93 (*b*) of the N.W.P. Rent Act (XII of 1881), and to that suit one C. D., a mortgagee of the occupancy holding who had obtained a foreclosure decree against the occupancy tenant, got himself made a party defendant under s. 112-A of the Act. The pleadings, however, were not amended and the suit proceeded to appeal before the District Judge.

Held that under the above circumstances the suit as against C.D., the intervening defendant (who, so far as the plaintiff was concerned, was a trespasser) was of a civil nature and therefore subject to the ordinary rules of limitation as laid down in the Indian Limitation Act and not to the special limitation prescribed by s. 94 of Act XII of 1881.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Bishambar Nath* and Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—The appellants are representatives of the plaintiff in the suit. The plaintiff brought his suit in a Court of Revenue under s. 93, cl. (*c*), of Act No. XII of 1881 to eject an occupancy tenant who was not a tenant at fixed rates. The tenant was one Ishri. The plaintiff relied for the maintenance of his suit on the fact that Ishri had, on the 4th August, 1881, mortgaged his occupancy holding to one Ganga Din, and that Ganga Din on the 21st December, 1888, had got a

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* Second Appeal No. 90 of 1890, from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 30th November, 1889, confirming a decree of Maulvi Muhammad Jawad, Assistant Collector of Cawnpore, dated the 22nd April, 1889.

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decree for foreclosure of his mortgage. After the suit had been instituted, Ganga Din, on his [224] own application, was made a party to the suit under s. 112 (*a*) of Act XII of 1881. No amendment of the pleadings took place, but the suit proceeded against Ishri and Ganga Din. The Court of Revenue dismissed the suit on the ground of limitation, applying s. 94 of Act No. XII of 1881. The plaintiff appealed to the District Judge and he dismissed the appeal on the ground of limitation, applying the same section as that which has been applied by the Court of Revenue.

From the decree of the district Judge this appeal has been brought by the plaintiff. It is quite clear that, applying the principle of the Full Bench decision in *Madho Lal* v. *Sheo Prasad Misr* (1), the suit, apart altogether from any question of limitation, cannot be maintained as against Ishri. This appeal consequently, as against him, is dismissed. As to the position of Ganga Din, the main difficulty has arisen in this Court from the fact that no amendment of pleadings was made. It is quite clear, however, from the record what his case was. His case was that he, by reason of the mortgage and the decree of foreclosure, took title to the occupancy holding, and if not in possession was entitled to possession, and further that the limitation provided by s. 94 of Act No. XII of 1881 applied to his case. Now the suit originally, into which Ganga Din of his own motion intruded himself as a defendant, was one of ejectment, *i.e.*, a suit by the plaintiff claiming as a relief a decree for possession of the occupancy holding. By intruding himself into the suit, notwithstanding that there has been no amendment of the pleadings, Ganga Din must be taken to be maintaining his right, if any, under the mortgage and decree and his right to have possession of the occupancy holding. So far as Ganga Din is concerned, the suit must be regarded as a civil suit. By reason of s. 9 of Act XII of 1881 no right of occupancy passed to him, and consequently he could not, on the title alleged by him, be entitled to obtain or retain possession of the occupancy holding. If in possession, his possession, being without the consent of the plaintiff, would, so far as the plaintiff is concerned, be the possession [225] of a trespasser. He could obtain from Ishri no greater title than Ishri had. Ishri's title was that of an occupancy tenant who was not a tenant at fixed rates, and that title Ganga Din by reason of s. 9 could not obtain. He, consequently, as against the plaintiff, had no title to the possession of the occupancy holding, the plaintiff, being the zemindar landlord. That disposes of the question of title, subject only to the question of limitation. Now s. 94 of Act XII of 1881 provides only for a limitation with regard to the suits dealt with by that Act, and it does not in this case, so far as this suit is one between the plaintiff zemindar and Ganga Din, the trespasser, supersede the provisions of the Indian Limitation Act of 1877. So far as the suit between the plaintiff and Ganga Din is concerned, it happens that Ganga Din has intruded himself into a suit which was commenced in the Court of Revenue, but the suit as against him must be treated as a Civil suit. The question of jurisdiction is at this stage immaterial, because the appeal went before the district Judge, who had jurisdiction, whether the suit was commenced in the proper Court or not, *i.e.*, he had jurisdiction whether the suit was commenced in the Revenue Court or in the Civil Court. So far as Ganga Din is concerned, the limitation is that provided by the Indian Limitation Act of 1877, and the suit as against him is within time within that Act. The decree which

(1) 12 A. 419.

we pass as against Ganga Din is that the appeal be allowed with costs, and that Ganga Din has, as against the plaintiff, obtained no title to the possession of the occupancy holding, and that the plaintiff do have possession of the occupancy holding as against Ganga Din. The decree below will stand so far as Ishri is concerned, *i.e.*, as a decree of dismissal.

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Appeal allowed.

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14 A. 226 (F.B.) = 12 A.W.N. (1892) 14.

[226] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Knox.

MUHAMMAD NAIM-UL-LAH KHAN (*Defendant*) v. IHSAN-UL-LAH KHAN (*Plaintiff*).* [23rd January, 1892.]

Civil Procedure Code, ss. 206, 582, 588, 591—Letters Patent, North-Western Provinces, s. 10—Amendment of decree—Order of a Single Judge of the High Court amending an appellate decree—Appeal from such order.

Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under s. 206 read with ss. 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its appellate civil jurisdiction to amend its own decrees, it is one to which the provisions of Chapter XLIII of the Code of Civil Procedure are applicable, and from such order no appeal under s. 10 of the Letters Patent will lie. *Hurresh Chunder Chowdhry* v. *Kalisundari Debia* (1) discussed.

[F., 1 Ind. Cas. 137 ; R., 15 A. 359 ; 15 A. 373 ; 16 A. 443 (448) ; 17 A. 438 ; 28 A. 133 = A.W.N. (1905), 218 ; 26 C. 361 ; 20 M. 407 ; 22 M. 68 = 8 M.L.J. 231 (F.B).]

THIS was a reference made by Edge, C.J., and Straight, J., to a Bench of four Judges. The plaintiffs-appellants in the Letters Patent appeal out of which this reference arose, had brought a suit in the Court of the Subordinate Judge of Saharanpur for the recovery of certain property detailed in schedules marked A, B, C, and D attached to their plaint. Before a defence was filed or issues framed the plaintiffs applied to be allowed to amend their plaint by making certain additions to the property detailed in schedules A and B. This application was granted, and a note was made in the plaint of the increase in the amount claimed ; but the list of the property so added was inadvertently omitted to be attached to the plaint. The plaintiffs' suit was in part decreed and in part dismissed by the Subordinate Judge, and the plaintiffs in consequence appealed to the High Court. In that appeal a decree was passed by consent modifying the decree of the Court of first instance. Subsequently to the decision of that appeal the plaintiffs applied to the Court of first instance for amendment of its decree by inserting a detail of the property added on the petition for amendment of plaint, which application was granted. [227] From the order on that application, however, an appeal was preferred to the High Court by the defendants, and this appeal was decreed on the ground that after an appeal had been preferred and decided, the Court of first instance had no jurisdiction to pass any order under s. 206

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* Letters Patent Appeal No. 13 of 1890.

(1) 10 I.A. 4 = 9 C. 482.

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of the Code of Civil Procedure. The plaintiffs, therefore, applied to the High Court for amendment of its decree in the manner previously prayed for in the Court of first instance. That application came before Tyrrell, J., as the remaining Judge of the Bench which had passed the decree, and was granted by him. From that order the defendants appealed under s. 10 of the Letters Patent, and on the appeal coming on for hearing the plaintiffs-respondents took a preliminary objection that the appeal did not lie.

Pandit *Sundar Lal*, for the appellants.

The Hon. *G. T. Spankie* and Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J.—This Letters Patent appeal came on to be heard by a Bench of two Judges, when an objection was taken on behalf of the respondent to the apppeal that no apeal lay. It was urged, on the other hand, that an appeal lay. The Bench was referred to a case decided by their Lordships of the Privy Council and to certain decisions of this Court and the High Court of Calcutta. Thereupon the question as to whether the appeal lay was referred to a Bench of four Judges.

The appeal was brought from an order of our brother Tyrrell by which he amended a decree of this Court on an appeal, so as to bring it into accordance with the judgment which had been delivered in the case. The Judges who were parties to that judgment were Sir Comer Petheram, the then Chief Justice of this Court, and our brother Tyrrell. At the time when the application to amend the decree was made, Sir Comer Petheram had ceased to be a member of this Court, and, following the usual practice of this Court, the application was heard by the Judge who was a party to the judgment, and was still a member of [228] the Court, and he made the order which was questioned in this appeal.

The question which we have to decide depends upon the consideration of s. 10 of our Letters Patent, the statutes relating to the legislative powers of the Governor-General of India in Council, and of the Code of Civil Procedure, as amended. The Letters Patent applying to this Court were issued on the 11th June 1866, and consequently long prior to the Code of Civil Procedure with which we have to deal. It is not contested, and indeed it could not be, that the Governor-General in Council has power to make laws which this Court is bound to carry out and to observe. That is provided for by s. 22 of 24 and 25 Victoria, chapter 67, and by subsequent legislation, and that power of the Governor-General in Council is in terms reserved by s. 5 of our Letters Patent. The right of appeal is a right which is created by statute, or, as in this case, Letters Patent—the Letters Patent being an authority having the force of law. By s. 10 of those Letters Patent, so far as we need consider them in this case, a right of appeal to the Court from the judgment, not being a sentence or order passed or made in any criminal trial of one Judge of the Court, was given. The question is whether that right of appeal has been curtailed or limited by subsequent legislation of the Governor-General of India in Council. In my opinion the judgment referred to s. 10 of the Letters Patent is the express decision of a Judge of the Court which leads up to and originates an order or decree.

Our brother Tyrrell, in making the order for the amendment of the appellate decree of this Court in the case, was acting in the exercise of the appellate jurisdiction of the Court, and, as I think, under s. 206 coupled

with ss. 582 and 632 of the Code of Civil Procedure (Act No. XIV of 1882). It is true that the High Court of Bombay has held that s. 206 of the Code of Civil Procedure does not apply to a High Court on its original side or on its appellate side. That it does not apply to a High Court on its original side is manifest from s. 638, which excludes the application [229] of that section to a High Court in the exercise of its original civil jurisdiction. But, having regard to ss. 582 and 632, I must regard s. 206 as applicable to a High Court on its appellate side, as I regard those sections as practically extending to the appellate side of the Court the earlier provisions, so far as they are applicable to a High Court on its appellate side. It appears to me that if the Legislature had intended that s. 206 should not, so far as may be by reason of ss. 582 and 632, be applicable to a High Court on its appellate side, it would, when excluding by s. 638, s. 206 from application to a High Court on its original side, have likewise excluded the application of s. 206 to a High Court on its appellate side. I may be wrong in the effect which I attribute to ss. 582 and 632 of the Code of Civil Procedure, but I think I am correct in saying that it is the duty of the Legislature when dealing with procedure to lay down in specific and clear language what such procedure shall be, and not to leave Courts and litigants in doubt as to what it intends the procedure to be. Ss. 582, 587 and 647 of the Code of Civil Procedure are fair examples of a method of drafting and legislation which should be avoided, unless the Legislature desires to create confusion and uncertainty, and to leave it in doubt as to whether it or its advisers knew what was the procedure required.

It is not very material in the present case to decide whether s. 206 applies or not. If it does not apply, the Court which has to exercise appellate civil jurisdiction must have an inherent jurisdiction to bring its decrees into accordance with its judgments, and our brother Tyrrell in that event passed his order in the exercise of the appellate jurisdiction of the Court within the meaning of s. 591 of the Code. The question before us really turns on the effect of the sections contained in chapter XLIII of the Code of Civil Procedure. S. 588 of the Code commences by enacting—" an appeal shall lie from the following orders under this Code and from no other such orders." S. 591 provides that, "except as provided in this chapter no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction, but, [230] if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal."

In the case of *Hurish Chunder Chowdhry* v. *Kali Sunderi Debia* (1), their Lordships of the Privy Council, at page 17, said :—" It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the Court to the full Court." I have had occasion to comment on that decision, and to examine to the best of my ability its bearing, in the case of *Banno Bibi* v. *Mehdi Husain* (2). Whether the view which I then took of the meaning of their Lordships of the Privy Council was correct or not I am not now going to discuss. On looking again at that case it has struck me further that if Mr. Justice Pontifex in that case was acting or assuming to act under s. 244 of the then Code of Civil Procedure, an appeal undoubtedly lay. It is not

(1) 10 I.A. 4=9 C. 482. (2) 11 A. 375.

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necessary to consider whether he had any jurisdiction in that particular case to act under s. 244. It has also struck me that if he was not supposed to be acting under s. 244, then he must be supposed to have been acting under some power which he conceived he had under Chapter XLV, which relates to appeals to Her Majesty in Council, aud this leads up to what I am now going to say.

It appears to me that the Code of Civil Procedure (Act No. XIV of 1882), as did Act No. X of 1877, contemplates a High Court in two aspects. It comtemplates a High Court doing the ordinary work of a Court of original and appellate jurisdiction, having the necessary powers of review and revision in certain cases, and certain others powers such as are generally found vested in the Courts of the importance of High Courts. It also contemplates that the High Courts in India should, in certain matters relating to appeals to Her Majesty in Council act for and on behalf of her Majesty in Council, exercising powers more in the nature of ministerial powers than in the nature of judicial powers. Whatever those powers may be, it is quite clear to my mind that the powers [231] conferred on a High Court under Chapter XLV of the Code of Civil Procedure are special powers and entirely distinct from the ordinary powers required by the High Court in the carrying on of its ordinary judicial business. It would be impossible to read Chapters XLIII and XLV together. If the sections contained in Chapter XLIII were to be applied to matters coming under Chapter XLV, that is, to matters arising in appeals to her Majesty in Council, a difficulty would at once arise; for, although s. 588, limits appeals from orders under the Code to the orders specified in s. 588, we find on turning to Chapter XLV that, by ss. 601 and 611, for example; an appeal is given from certain orders made in India in cases falling under that chapter, and those orders are not orders which are included as orders from which an appeal may lie under s. 588. S. 611 provides a procedure by reference for the appeals from the orders referred to in that section. That section enacts:—"The orders made by the Court which enforces or executes the order of Her Majesty in Council, relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees."

I have consequently come to the conclusion that Chapter XLIII cannot be applied to orders made in appeals in cases which are under appeal to Her Majesty in Council. If that view be correct, an appeal in the case which went to the Privy Council from the High Court of Calcutta would apparently have lain from the order of Mr. Justice Pontifex, whether he had or had not jurisdiction to make that order.

It may be said that there may be other matters in the Code of Civil Procedure—orders other than orders made in cases falling under Chapter XLV to which the sections in Chapter XLIII do not apply. It may be said, for instance, that they do not apply to an order made on an application for review of judgment under section 623. With regard to that, even assuming for a moment, I am not going to decide it, that Chapter XLIII does not apply at all to applications for review of judgment, we find that section 629 [232] provides that where the Court makes an order rejecting the application that order shall be final, and where the Court admits the application, an immediate appeal is given by the same section against the order admitting the application. With regard to orders made in revision under section 622 of the Code of Civil Procedure (Act No. XIV of 1882), it appears to me that, whether Chapter XLIII of the Code applies or not,

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it could not have been contemplated by the Legislature that there should be any appeal against an order made under section 622 of the Code. Section 622 can only be applied by a High Court in cases in which no appeal lies to the High Court. It is a section which has been always treated and always considered, by this Court at any rate, as giving purely discretionary power to the High Court to interfere or not. It was a section which obviously was not intended to create or be the foundation of appeals in cases in which no appeal had lain, and, looking at the object of that section and the cases to which that section would apply, that is, cases in which no appeal lay to the High Court, I cannot believe that such an anomaly was intended as would exist if from the orders passed under section 622 in revision, a party has a right of appeal when no appeal lay in the original case to this Court. However, to come back to the subject in hand, I do not think it necessary to refer to the other decisions which have been passed with regard to the rights of appeal under section 10 of our Letters Patent and the corresponding sections of the Letters Patent of other High Courts. They have frequently been referred to; but I may confine myself to saying in conclusion, that I think the order which was passed by our brother Tyrrell when he decided to amend the decree in the case, was an order from which an appeal is excluded by Chapter XLIII of the Code of Civil Procedure. It was an order passed by a Judge not on an appeal, but in the matter of an appeal in this Court, and in the exercise of the appellate jurisdiction of this Court.

I would answer this reference by saying that an appeal did not lie under section 10 of the Latters Patent from the order of our brother Tyrrell.

[233] STRAIGHT, J.—I am entirely of the same opinion as the learned Chief Justice, and I have nothing to add.

MAHMOOD, J.—This reference assumes significance, because I think, though limited to this particular order of my brother Tyrrell, dated the 21st December 1889, it raises, as the argument of the learned counsel for the parties has shown, some important questions of principle—important not only as questions of law, but also as questions relating to the practice of this Court and the practical working thereof.

It is in this view that I desire to deliver a separate judgment by saying as the first observation therein, that I agree in the conclusion arrived at and the answer given by the learned Chief Justice and my brother Straight to the question referred to the Full Bench.

That question is simply this:—Whether when a Judge of this Court, namely, a chartered High Court, acting under section 206 of the Code of Civil Procedure, as that section is rendered applicable by dint not only of section 582 of the Code in appeals but also by reason of s. 632 of the Code of Civil Procedure, makes an order, rightly or wrongly, with jurisdiction, an order of that character is one which can be made the subject of an appeal under section 10 of the Letters Patent?

It must be said, and indeed there can scarcely be any doubt, that section 22 of statute 24 and 25, Victoria, Chapter 67, usually called the India Councils Act, gives ample power to the Governor General in Council to legislate for India, and those powers are so broad and extensive that they have quite recently been made the subject of consideration by the whole of this Court, where they were considered in the case of *Abdulla* v. *Mohan Gir* (1).

(1) 11 A. 490.

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The next enactment is again an Act of Parliament, 24 and 25 Victoria, Chapter 104, wherein the powers of the Governor General in Council to legislate for India, which were given to him under the earlier enactments, have been preserved.

[234] Next come the Letters Patent under which this Court has been established, and section 28, and more fully section 35 of those Letters Patent, not only preserve the power of the Governor General in Council to legislate, but direct us as Her Majesty's Judges to abide by such legislation and carry out its mandates.

I have dwelt upon these preliminary matters in order to give the answer which I am going to give, and limiting it to the case now before me without expressing any opinion as to any other class of orders made by a Judge of this Court, either in the exercise of original civil or appellate jurisdiction. The order of my brother Tyrrell was undoubtedly made, as it seems to me, under section 206 of the Code. It is clear that an order such as that, when made by a Court in the Mofussil, is not appealable, because it is excluded by section 588 of the Code of Civil Procedure. It must be taken to be an unappealable order, and it was indeed upon this ground that in the two Full Bench cases referred to in the referring order, namely, the case of *Surta* v. *Ganga* (1) and *Raghunnath Das* v. *Raj Kumar* (2), where my judgments were upheld by the whole Court, the turning point was that an order under section 206 being an unappealable order can be made the subject of the visitatorial functions of this Court under section 622 of the Code of Civil Procedure. When these cases were before the Division Bench, I had the misfortune of differing upon this point, as to the non-appealability of the orders made under section 206, because, if those orders can be made appealable to this Court, this Court, under the express prohibition of section 622, had no power to interfere in revision.

If orders under s. 206, such as were concerned in the two cases referred to, when made either by Courts of original or appellate jurisdiction in the districts, are not appealable, it becomes necessary to investigate whether, as is contended by Pandit *Sundar Lál*, the order of my brother Tyrrell, which is now under consideration, is to be rendered appealable. The learned vakil has of course relied upon the solitary ground which he could urge, namely, the some-[235] what broad and general provisions of s. 10 of the Letters Patent, and he was quite within his rights when he contended that, whenever under the law a right of appeal is distinctly given, that right is not to be taken away, unless there is express legislation or authority which can abrogate the right so conferred. The proposition thus put is simply the converse of the other well-known rule, that no right of appeal exists unless it is given by statute or by any other authority which would be binding upon the Court.

Whilst conceding the soundness of this part of the argument I hold, as the learned Chief Justice has explained, that the provisions of s. 10 of the Letters Patent have been so amply modified by the various provisions of the enactments passed by the Governor-General in Council under the authority of the Indian Councils Act, resulting in this last enactment, namely, the Code of Civil Procedure (Act No. XIV of 1882), that we are bound to take into account the provisions of that enactment and to refer back to s. 10 of the Letters Patent to see whether those general provisions have or have not been abrogated or modified.

(1) 7 A. 875. (2) 7 A. 876.

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I am of opinion that they have been modified, so far as the question arising in this case is concerned. S. 588 of the Code of Civil Procedure limits the right of appeal to a certain class of orders, and declares that none other than those contained within the four corners of that section are appealable. There are various other sections of the Code also which render decrees and orders non-appealable, and I may, by way of illustration, refer to the last part of s. 522 as to arbitration decrees and also to s. 325 of the Code of Civil Procedure, which is nearer in connection with the facts of this case, because here also a decree was passed upon a compromise.

To hold then that where this statute of ours, namely, our present Code of Civil Procedure, declares a decree or order non-appealable, such decree or order can be made the subject of consideration by the whole of this Court under the Letters Patent, is to hold that wherever no appeal lies to this Court the ceremony of presenting it to this Court to a single Judge of this Court, who [236] would undoubtedly reject the appeal, makes it the subject of consideration by a Bench of the Court. It seems to me that it would be defeating the whole policy of the statute as to the finality of decisions.

I refrain from referring to the various rulings which have been cited in the course of the argument. I am anxious to avoid referring to them, not only because it would lengthen my judgment, but also because, so far as my own view in this case is concerned, it proceeds upon what I have said, and it is independent of the *ratio* adopted in those cases.

To hold that an erroneous order passed by a Judge of this Court, whether in the exercise of original civil jurisdiction or in the exercise of appellate civil jurisdiction under s. 206, is non-appealable to the whole of this Court, may appear at first sight to be a hardship; but it is not so. This Court under the Code of Civil Procedure is the Court of highest appeal in this part of the country, and it is as such a Court, and in no other capacity, that it exercises its powers of revision such as those contemplated by s. 622 of the Code and s. 25 of the Provincial Small Cause Courts Act. These powers can be exercised only by a Court of higher jurisdiction than the Court which made the erroneous order within the meaning of those sections.

A Judge of this Court when acting erroneously under s. 206 may be so acting, but his action cannot be made subject of revisional jurisdiction by this Court, because that jurisdiction does not exist, any more than it exists in cases where an erroneous decree is passed by a Bench of two Judges, which decree, even if erroneous, cannot be made the subject of appeal under s. 10 of the Letters Patent. The remedy, if any, lies by invoking the power of Her Majesty in Council as the higher tribunal. I think that to maintain that the whole of this Court has revisional jurisdiction upon a decree made by a Judge of this Court, is to hold that orders and decrees which are distinctly rendered final and non-appealable by the Code of Civil Procedure become non-final and appealable by dint of s. 10 of the Letters Patent.

[237] I wish to add one more observation, and that is this; that in the two Full Bench cases to which I have referred, reported in the 7th volume of the Allahabad Reports, the point now under consideration was not raised, and also having carefully considered what was ruled by the learned Chief Justice and my brethren Straight and Tyrrell in *Naubat Ram*

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v. *Harnam Das* (1), and again by the learned Chief Justice and my brother Tyrrell in *Banno Bibi* v. *Mehdi Husain* (2), I consider that nothing which has fallen from his Lordship the Chief Justice to-day is inconsistent with the *ratio* upon which those cases proceeded, and those two rulings are wholly consistent with each other.

My answer to the reference, therefore, is the same as that given by the learned Chief Justice.

KNOX, J.—In the case before us the prayer addressed to this Court was that the Court might be pleased to rectify a mistake which, it was alleged, had found its way into a decree passed by the Court on the 12th January 1886. My brother Tyrrell considered that the decree as framed needed amendment, and passed accordingly his order amending the decree so as to carry out the intention of the Court which passed that decree. There is nothing on the record, so far as I can see, which shows that this order made by him was an order passed under s. 206, as rendered applicable by ss. 582 and 632 of the Code of Civil Procedure. It may or may not have been so. I am satisfied that, independently of these sections, this Court has power to amend its decrees. I am not free from some doubts whether s. 206, or rather the last two paragraphs of it, were intended to apply to the appellate jurisdiction of Courts governed by the Code of Civil Procedure. At present I incline to the view that s. 579 was intended to be, so far as appeals are concerned, the correlative section to 206, which applies, at any rate primarily, to decrees in original suits, and was intended to be complete in itself. But from this standopint also no appeal would lie from the order passed, as the order in any event was clearly made in the exercise of the appellate jurisdiction of the Court [238] within the meaning of s. 591 of the Code. I concur with the learned Chief Justice that the order passed by my brother Tyrrell when he decided to amend the decree, was an order from which an appeal was excluded by Chapter XLIII of the Code, and I therefore answer the reference in the terms given by him.

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14 A. 238 = 12 A.W.N. (1892) 97.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell, and Mr. Justice Knox.

MADHO DAS (*Plaintiff*) *v.* RAM KISHEN AND OTHERS (*Defendants*).*
[10th May, 1892.]

Mortgage, equitable—Deposit of title-deeds in Calcuta—Immoveable property in mofussil —Act IV of 1882 (*Transfer of Property Act*), s. 59.

It is not necessary to the validity of a mortgage by deposit of title-deeds under s. 59 of the Transfer of Property Act (IV of 1882) that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed.

Varden Seth Sam v. *Luckpathy Royjee Lallah* (3) and *Manekji Framji* v. *Rustomji Naserwanji Mistry* (4) referred to.

[F., 4 Bur. L. T. 169 = 11 Ind. Cas. 721 (722) = 6 L.B.R. 23.]

THIS was a suit brought in the Court of the Subordinate Judge of Mirzapur by one Madho Dass, against Ram Kissen, an insolvent, and the

* First Appeal, No. 138 of 1890, from a decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 9th April, 1890.

(1) 8 A.W.N. (1888) 37. (2) 11 A. 375. (3) 9 M.I.A. 303. (4) 14 B. 269.

official assignee for the recovery of a sum of Rs. 1,35,304-12-9 with interest, and, in default of payment, for sale of certain immoveable property of the first defendant situated in Benares, Mirzapur and Ghazipur. The suit was based on an alleged equitable mortgage said to have been entered into by the defendant Ram Kishen in February 1888, by deposit of the title-deeds relating to the property in suit with the plaintiff's firm in Calcutta. Ram Kishen did not defend the suit but the official assignee appeared and pleaded, *inter alia*, that the title-deeds in question were either never voluntarily delivered by the defendant Ram Kishen to the plaintiff, but were wrongfully obtained by him, or if they were voluntarily delivered, such delivery did not [239] take place until after Ram Kishen had been adjudicated an insolvent, and in either case their delivery could not operate to create a charge or interest in favour of the plaintiff. The suit was transferred to the Court of the District Judge of Mirzapur, and a further issue was added as to whether in any case a delivery of title-deeds in Calcutta could effectuate a valid mortgage of property in the North-Western Provinces. The District Judge, holding on the main issue in the case that the deposit of title-deeds with the plaintiff or his agents in Calcutta in February 1888, was not proved, dismissed the plaintiff's claim. The plaintiff thereupon appealed to the High Court.

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Munshi *Madho Prāsad* and Munshi *Jwala Prasad*, for the appellant.

The Hon. *G. T. Spankie*, Mr. *A. Strachey* and Mr. *Greenway*, for the respondents.

JUDGMENT.*

TYRRELL and KNOX, JJ.—We come now to the legal arguments on which the decree dismissing the suit was supported. Mr. *Strachey*, on behalf of the respondent, contended that the provisions of the third paragraph of s. 59 of the Transfer of Property Act, 1882, do not apply to a case, where, as in the present, the immoveable property covered by the title-deeds is situate beyond the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. The clause in question, he pressed upon us, was a saving and not an enacting clause. He allowed that the only recorded precedent which he could find on this question was against him. The case was one heard by the Sadar Diwani Adalat at Madras. That Court, it is true, refused to enforce a lien against property situate beyond the town of Madras, of which property the title-deeds had been deposited as a security for a loan by parties living and contracting within the local limits of the Supreme Court of Madras. The principle which guided them to the refusal was that "such a transaction was not recognized" in Indian law, and they held that the principle of the English law applicable to a similar state of circumstances ought not to govern their decision. But this decision did not approve itself to their Lordships of the [240] Privy Council who reversed the decision, on the ground that the transaction was not one forbidden by law, and not being so forbidden, to refuse recognition was in the case before them a violation of justice, equity and good conscience. The case will be found reported in 9 Moo, I. A. at p. 307 and is known as the case of *Varden Seth Sam* v. *Luckpathy Royjee Lalluh*. The learned Counsel in dealing with this ruling laid great stress upon the facts that when the contract then under consideration was entered into, *viz.*, in the year 1851, there was no special

* [N.B.—This judgment which is a reprint of what is given in the I. L. R does not purport to be a complete judgment delivered in the case. It contains only so much of the judgment as deals with the question of the law involved in the case.—ED.]

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law governing the transfer of immoveable property and no law requiring transactions affecting it to be registered. He maintained that this fact had led their Lordships to the decision at which they arrived, and that it might be fairly argued that if there had been in existence then, as now, laws regulating the transfer of property and the compulsory registration of mortgages affecting immoveable property their Lordships would have given effect to the law and not have arrived at a contrary conclusion, regard being had to the saving clause contained in s. 59.

Positive local law now exists enacting how such contracts can and should be made, and it is a matter of public policy that the provisions of that law should be maintained and enforced. It would now be against justice, equity and good conscience to give effect, to a mortgage which violated all registration rules and virtually defeated the provisions of the law. In short, a decision validating such a transaction is "opposed to the policy of the Registration Law; it would lead to evasion of stamp duty, and it is at variance with the principle of making the system of transferring land, as far as possible, a system of public transfer." This was the substance of Mr. *Strachey's* contention.

Now, it seems clear and patent to us, from the precise and positive language contained in s. 59 of the Act, that the Legislature was not only aware of transactions of the kind with which we are dealing, but proceeded of set deliberation to recognize the practice and to record to it the full sanction of law. There is in the section not one word which forbids effect to be given to an agreement **[241]** whereby parties express their intention to create a lien on immoveable property by a mere deposit of the title-deeds as security. Moreover, it seems to us that the question where the property affected may be situate is not a matter which should affect our decision. Had it been the intention of the law that transactions of this kind should only affect immoveable property situate within the narrow circle of the Presidency Town, nothing would have been easier than to give expression to such an intention. We find nothing in the Transfer of Property Act or in the Registration Act of 1877 which forbids such a transaction. It was beyond all doubt the intention of the contracting parties in February 1888, that the deposit should operate as a hypothecation or pledge, and it would be a violation of justice and equity under such circumstances to refuse to give effect to it. As regards the rest of Mr. *Strachey's* contention, it seems to us that no greater violence is done to the Registration Law in giving effect to an equitable mortgage in respect of property in Benares than in respect of similar property in Calcutta. Our attention was directed by Mr. *Banerji*, who appeared for the appellant, to the case of *Manekji Framji* v. *Rustomji Naserwanji Mistry* (1) in which upon another question the Bombay High Court recognised a deposit in the town of Bombay of title-deeds affecting property situate outside the limits of that Presidency Town as effecting a legal mortgage falling within the provisions of s. 59 of Act IV of 1882.

This case is valuable as showing that the deposit of title-deeds of property lying outside a Presidency Town operating as a legal mortgage is recognized and given effect to in Presidency-Towns. We are, therefore, unable to accede to Mr. *Strachey's* contention, and we agree with the decision at which the lower Court arrived when dealing with this point.

The suit and the appeal are decreed with costs in both the Courts.

Appeal allowed.

(1) 14 B. 269.

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[242] APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Knox.

QUEEN-EMPRESS *v.* HARGOBIND SINGH AND OTHERS.*
[7th June, 1892.]

Criminal Procedure Code, ss. 342, 366, 367 *and* 540—*Sessions trial—Accused person, examination of—Witnesses, treatment of, by Court—Order of examination—Judgment—Sentence.*

Qestions put by the Court to an accused person under the provisions of s. 342 of the Code of Criminal Procedure, 1882, must be strictly limited to the purpose described in that section, *i.e*, "of enabling the accused to explain any circumstances appearing in the evidence against him." The evidence referred to in that section is the evidence already given at the trial at the time when the Court puts questions to the accused.

It is not intended by s. 540 of the Code of Criminal Procedure, 1882, that a Judge shall reverse the order of a Sessions trial and call the witnesses summoned for the defence before the case for the prosecution is closed.

It is illegal on the part of a Court to threaten witnesses with the penalties of the law unless they are evidently giving wilfully false evidence or persistently refusing to give evidence of facts which must be within their knowledge.

A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial before the judgment required by s. 367 of the Code of Criminal Procedure, 1882, has been written is illegal.

[F., 27 M. 237 (238)=2 Weir. 440; R., 19 A. 502 (503); 23 C. 502 (504); 1 Bom. Cr. C. 55 (58)=13 Bom. L.R. 635 (608)=12 Cr. L J. 457 (458)=11 Ind. Cas. 993 (994); 9 Cr. L.J. 56 (57)=4 N.L.R. 163.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *W. M. Colvin*, Mr. *J. E. Howard*, Mr. *T. Conlan*, Mr. *A. Strachey* and Mr. *R. Malcomson* for the appellants.

The Public Prosecutor (the Hon. *G. T. Spankie*) for the Crown.

JUDGMENT.

EDGE, C. J. (TYRRELL and KNOX, JJ., concurring). Hargobind Singh, Rajwant Singh, Buddhu, and Jhulai were, on the 21st of January 1892, found guilty of the murder of one Sambhal Singh, and sentenced to death by the Sessions Judge of Benares. They appealed, and their appeal was heard by us on the 2nd, 3rd and 4th of this month. On the hearing of the appeal Mr. Spankie, Public Prosecutor, appeared for the Crown, and Mr. Strachey for the appellants. The main grounds upon which we were asked to reverse the findings of the Sessions Judge were that, [243] on the evidence on the record, the appellants were entitled to be acquitted; that the Sessions Judge had during the course of the trial committed such illegalities and irregularities as rendered the trial bad; and that his conduct of the trial was such as precluded a fair trial of the appellants, and would, in case of a new trial being ordered, seriously damnify the appellants. It was further alleged on behalf of the appellants that, at the time when sentence of death was passed upon them, no written judgment was in existence, and that the written judgment which now accompanies the record, although signed by the Sessions Judge and bearing date the 21st of January 1892, was not written until after that date. It is hardly

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necessary to say that when a person is convicted of an offence under the Indian Penal Code and has a right of appeal to a High Court, and exercises that right of appeal, he is entitled to allege, and in the best way he can to prove, that there was no valid trial according to law; that the Judge who tried him acted illegally and with material irregularity in the course of the trial; that the Judge by his conduct of the trial precluded a fair trial being had; that the Judge in passing sentence had acted in violation of sections 366 and 367 of the Code of Criminal Procedure, 1882; and that at the time when such sentence was passed there was no record as required by law of the conviction which must precede and be the justification for the sentence. Further, it need hardly be said that when such serious allegations are *bona fide* raised by an appellant in a High Court, it is the duty of the High Court to consider them, and however unpleasant it may be for the Sessions Judge or for the Judges hearing the appeal, it is the duty of the Judges who have to decide the appeal to express their opinions as to the correctness or otherwise of those allegations and as to the effect of them, if substantiated, on the case. When in an appeal, whether it be in a civil or in a criminal case, it appears to the Judges of a High Court that the Judge of a Court subordinate to the High Court has acted illegally or irregularly in the case under appeal, it is their duty, not only to the appellant in the particular case, but in the interests of the Government and of the public, to speak plainly and to point out in what manner the provisions of the law have [244] been violated and its requirements disregarded. It is of greater moment to the Government and the public, if possible, than to one accused of a crime, that Criminal trials should be conducted regularly, decorously, and in accordance with law and statutory procedure, and that no ground for doubting the competency or the impartiality of the Judiciary should be afforded by a departure on the part of a Sessions Judge or a Magistrate from the rules of law, or the rules of procedure, which, as a Judicial Officer, he is bound to follow, or by a High Court passing over in silence and without comment such departures when they are material. High Courts are responsible for the due administration of the law by the Courts subordinate to them, the duty of superintendance having been imposed upon them by their Letters Patent. Indeed, the Government of India in one well-known case claimed the right to rebuke a High Court for the non-performance, as it appeared to the Government of India, of that duty of superintendance. It is necessary in this case to consider not only the evidence on the record, but the circumstances under which that evidence was recorded at the Sessions trial, and the most material of the alleged illegalities and irregularities connected with the trial.

There are in this case four persons who say that they saw committed the murder of which these appellants have been convicted. The most material of those four witnesses was Amir Singh, who was a brother of Sambhal Singh, who was alleged to have been murdered by these appellants at the instigation of one of the zemindars of the village in which Amir Singh and Sambhal Singh had been tenants, and of which many years ago their family had been the zemindars. Not only as a witness for the prosecution was Amir Singh of great importance, but his due and regular examination and cross-examination were of almost vital importance to the defence, as the case for the defence was that Amir Singh, and not the accused was the person who had killed Sambhal Singh, and that Amir Singh had murdered his brother with the object of making a false charge of murder against the zemindars and their servants. The accused alleged

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that the case for the prosecution was what is known in [245] that part and the adjoining parts of these Provinces as a *sesari-muqadama*, of which each of us have had examples before us before now, examples, if this be one, as revolting as the present case.

The accused men when before the committing Magistrate had not given him a list of witnesses whom they wished to have summoned on their behalf for the Sessions trial. Each of the four accused had, in answer to a question put by the committing Magistrate, stated, that he would file a list of witnesses. The committing Magistrate had not cross-examined the accused as to the names of their intended witnesses or as to what those witnesses would be called to prove. Each of the accused had, in his statement which was recorded by the committing Magistrate under section 364 of the Code of Criminal Procedure, 1882, clearly indicated what his defence was and would be. In our opinion, the committing Magistrate acted with sound judicial judgment and in accordance with law. The committing Magistrate would not, in our opinion, have been justified, either in law or in common fairness, in forcing the accused to disclose either the names of their intended witnesses or what those witnesses would be called to prove. An accused is entitled when before a committing Magistrate to reserve his defence and to refuse to disclose the names of the witnesses whom he intends to call at the Sessions trial. We say this not only because the omission of the committing Magistrate to break the law in these respects has been made by the Sessions Judge the occasion and the theme of severe comments upon the Magistrate and his general conduct of the case when it was before him—comments which, in our opinion, were entirely unjustified and uncalled for—but because that omission of the committing Magistrate has been made by the Sessions Judge the pretext for procedure on his part which, in our experience, is unprecedented in modern times in any part of Her Majesty's dominions and was entirely illegal.

A list of witnesses for the defence was, subsequently to the committal, filed in the Magistrate's Court. On the 22nd or 23rd of December 1891, the Vakil for the accused presented to the Court of the Sessions Judge a petition, asking that 11 persons therein [246] named should be summoned as witnesses for the defence. The prayer of that petition was complied with, and the persons named in the petition were summoned as witnesses for the defence.

The Sessions trial commenced on the 6th of January 1892.

The accused had been committed for trial on charges under sections 304 and 148 of the Indian Penal Code. To those charges they pleaded not guilty. We may here state that a great deal of evidence was produced at the trial, tending to show that it was probable that there was no good feeling between the zemindars and the family of Sambhal Singh. With such evidence the record was overloaded. If there was much oppression on the part of the zemindars, it was as likely to have been the cause of the murder alleged by the defence as of that alleged by the prosecution. The first witness called was Amir Singh. He spoke to the connection of his family with the village; to alleged acts of oppression on the part of the zemindars; to alleged false charges brought against him or members of his family by the zemindars or their servants including the accused Hargobind; to the connection of the accused with the zemindars and the village, but did not on the 6th of January utter one word to connect the accused with the crimes with which they were charged, nor did he on the 6th of January give any evidence that a crime

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had been committed. The sole allusion in his evidence on that day to the death of Sambhal Singh was contained in the following sentence: "My brother, Sambhal Singh, was killed on the 13th of September." At the end of the record of the evidence given by Amir Singh on the 6th of January there is the following:—" (Note.—Further examination of this witness deferred, as he is tired of standing)." Whether Amir Singh was or was not tired of standing, the interests of justice required that his examination, cross-examination, and re-examination should be completed before any other evidence as to what had occurred on the 13th of September 1891 was taken on one side or the other.

The next witness called was Muhammad Zahurf a constable who had been employed as a writer in the office of the District Superin-[247]tendent of Police at Benares. He produced a petition which, on the 5th of September 1891, had been presented on behalf of the zemindars of the village. That petition is of such importance that we give the translation of it *in extenso*. The translation is as follows:—

"The petitioner begs to state that all the three brothers, Amir Singh, Sambhal Singh, and Har Naryan Singh, residents of mouza Gaharwarpur police station, Baragaon, are very turbulent and quarrelsome persons, and that Amir Singh has been punished for criminal offences on several occasions; but still they do not cease to do wrong and michief. Owing to their failure to make payment, their entire property, cultivatory lands, mills, trees, bamboo clumps, and dwelling-houses with *dalan*, &c., have been sold at auction in execution of decree. On the 10th August 1891 Amir Singh was fined Rs. 20 by the Criminal Court on a charge of trespass and mischief. The petitioners are now going to remove the mill sold at auction; but there is a strong apprehension on their part of the occurrence of riot and quarrel. Moreover, the aforesaid persons threatened and said that they would beat Sambhal Singh, who is a very old man and will get the zemindar and his karinda implicated, and it is likely that they will commit the offence. Therefore it is prayed that an order may be sent to the officials of the police station of Baragaon, directing them to prevent the commission of the offence of riot and quarrel." By that petition the zemindars, eight days before Sambhal Singh was killed, informed the police that they had heard that a *sesari muqadama* would be got up against them and their karinda. Muhammad Zahur proved that he had put the petition at once before the Assistant Superintendent of Police, whose order was: "Order.—That if there was fear of violence, to put a stop to it." Muhammad Zahur stated that the papers were posted the same day to the Sub-Inspector at Baragaon. The petition was accompanied by a Mukhtarnama purporting to be signed by the zemindars. The Sessions Judge having heard the evidence abovementioned of Amir Singh and of Muhammad Zahur, and having read the petition, Mukhtarnama and order of [248] the Assistant Superintendent of Police, framed a charge against the accused of wilful murder, under section 302 of the Indian Penal Code, and read and explained that charge to the four accused. To that charge they pleaded "not guilty."

The next witness called was Jawahir Lal, head constable, who, on the 13th of September 1891, was in charge of the Harahua outpost of the Baragaon police station. His evidence showed that Gaharwarpur, the village where the murder is said to have been committed, was distant about two miles from his outpost. His evidence is distinctly favourable to the defence. He proved that at seven o'clock on the morning of the 13th September Hargobind Singh, who is said by the prosecution to have

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taken an active part in the murder, came to the outpost at Harahua with one Bhukan Das, and asked him (Jawahir Lal) to go with them to Gaharwarpur, as their men were assembled and they were going to remove the mill. Jawahir Lal refused to go, as he had not got any orders. Hargobind Singh and Bhukan Das told Jawahir Lal that they had presented a petition for police assistance, and therefore expected him to go with them. Hargobind Singh and Bhukan Das left the outpost of Harahua, according to Jawahir Lal, by 7-30 A.M. and at 8 A.M., or rather before than after 8 A.M. Prayag Singh, the son of Sambhal Singh came to the outpost and reported that a scene of violence had occurred and that his father had been killed. Jawahir Lal went at once to Gaharwarpur with Prayag Singh, and on the road met Bahadur Singh and the accused, Rajwant Singh, Prayag Singh told him (Jawahir Lal) who the two men were. Jawahir Lal told the two men to go with him, as Prayag Singh was complaining of them. When passing Karoma, Jawahir Lal directed the two men to stay at the Karoma *chhaoni* until he should send for them, and they obeyed his orders. Jawahir Lal went on to Gaharwarpur, and when he arrived there it was near nine o'clock A.M. At Gaharwarpur Jawahir Lal found Amir Singh standing by the corpse of Sambhal Singh. There was dead silence in the village, and although the village contained about one hundred inhabitants, not a man, excepting Amir Singh, was to be seen there. At this period of the trial an Inspector [249] of Police named Bhairo Shankar and a headconstable named Bija Narayan Singh were interposed to produce and prove a plan of Gaharwarpur; and then Jawahir Lal was recalled and examined on the plan and as to the position of the corpse, some signs of digging, the beginning of the construction of an embankment, the condition and position of a cane-press, the position of a sugar-boiling house, of the buildings of the deceased man, of a mango grove and a well, and as to whether the construction of the embankment would not interfere with a footway from the houses and with the access to the well, and such like matter. Jawahir Lal said: "I found Sambhal Singh quite dead. I should say from the appearance that he had been dead an hour or an hour and a half. The blood had ceased to flow. The blood had flowed from four or five wounds. On the ground there was a clot of blood about the size of the palm of a man's hand."

Jawahir Lal's evidence above referred to closed the evidence which was recorded on the 6th of January. Beyond the fact that Jawahir Lal had stated that when he met Bahadur Singh and the accused, Rajwant Singh, between eight and nine o'clock on the morning of the 13th of September, he told them to go with him, "as Prayag was complaining of them," there was not one word of evidence given on the 6th of January connecting the accused men, or any of them, with the crime. At the close of the evidence on the 6th of January the Sessions Judge made an order, the only material part of which was "arrangements to be made to keep the accused apart until they are examined."

On the morning of the 7th of January the trial was resumed. The part of the record relating to that day begins thus:—

"Trial resumed. Present as before. Read and heard application of the Government Pleader to examine all the defence witnesses as witnesses for the Crown, as the Deputy Magistrate has omitted to question them, though they are (more or less) summoned to prove that Sambhal Singh was murdered by men who are witnesses for the Crown.

"Application refused. At the earliest possible moment the Court will examine the accused and then, if necessary, proceed under section

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[250] 540, Criminal Procedure Code. Amir Singh, recalled, re-sworn, states: 'My brother Sambhal Singh was knocked down in my sight by *lathi* blows, and died on the spot by the embankment which was being made some five or seven cubits westward from the *charri* or feeding troughs. I saw the blows struck. The first blow was struck by Bahadur Singh: this did not knock him down. He was then simultaneously struck by Rajwant Singh, Jhulai Ahir, Budhu Keori, and Hargobind Singh. Each one struck him with a *lathi*. There were some 15 or 20 other men there armed with *lathis*, all ready to fight on the side to which Bahadur Singh was allied."

Then the Sessions Judge makes an order that the prisoners be examined.

It is now necessary to refer to the petition which had been presented by the Government Pleader. We have above set out what the Judge's record of that morning states concerning it. Let us now turn to the judgment. Speaking of the case for the defence, the Sessions Judge in his judgment says:—

"Assuming for a moment, for the sake of argument only, that this countercharge be false, then a more heinous and revolting attempt to procure judicial murders cannot be conceived by man.

"Extermination by the halter is meant.

"A Magistrate invested with first class powers, one whose whole life has been passed in this land of intrigue and perjury, has been content to pass on this most dangerous case without taking the precaution of reducing to writing what could be said against the theory he adopted. He left it open to one side to produce men in relays tutored to say whatever might be deemed expedient to cause to be said. When examining the two accused, Rajwant and Jhulai, he did not take the trouble to insist on their saying who else besides themselves could have seen the murder of one brother at the hand of another. When committing the four prisoners, he again neglected his most important duty by allowing them to reserve the names of their witnesses. Lists were subsequently filed; but then, again, it was [251] left open to the friends of the prisoners to utillize each man so named in any way which might thereafter be deemed expedient. In other words, the Magistrate neglected—culpably neglected—to insist on a specification of the nature and scope of the expected evidence of each witness then named.

"Worse was to follow. After the records came into this Court, those then concerned with the defence found means to have substituted lists of witnesses brought on to the record, so that, when the trial in this Court commenced, the prosecution had no knowledge of the names of many of the witnesses who were attending to rebut the evidence for the prosecution; and among the additional witnesses secretly added are two avowed eye-witnesses of the murder of Sambhal Singh by the members of his own family,—the chief witnesses for the prosecution.

"This culpable neglect of duty by the committing Magistrate has added vastly to the labour of the Court—to its difficulties,—and has placed the Judge in a most invidious position. At the earliest possible stage, after discovering what had been done, the Government Pleader applied to have all the witnesses for the defence made witnesses for the Crown. This was refused, but as it would have been at the risk of fearful miscarriage of justice to allow tutors of false witnesses a chance of instructing willing pupils to swear away the lives of men sent up as witnesses for the prosecution; and as, on the other hand, the statements of

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these men, supposing they had been telling a true story, would have had very little weight if their examination were delayed, the statements of all those likely to be able to give evidence outside of those sent up as Crown witnesses were recorded as quickly as possible."

Entertaining grave doubts as to the *bona fides* of that petition of the Government Pleader, we asked him, whilst this appeal was being heard, under what section of the Code of Criminal Procedure he had presented it. He said he did not know. We asked him if he had ever presented any similar petition before, and he said he had not. We then asked him to explain the circumstances under which he came to present it. His explanation was as follows: According [252] to him, when he went to the table of the Sessions Judge at the close of the evidence on the evening of the 6th of January, to get his certificate of attendance signed, the Sessions Judge told him to put in a petition asking that the witnesses for the defence should be examined for the Crown, on the ground that the committing Magistrate had not fully taken down the statements of the accused. The Government Pleader stated that he did not then draw up the petition, and that when, on the following morning, the 7th of January, the Sessions Judge asked him if the petition was ready, he said it was not, as he did not know under what law he was to present it, and thereupon the Sessions Judge said to him that it was not under any particular law, but he was to file it for the ends of justice; and he then went and drew it up at once and presented it, and the Sessions Judge rejected it. We asked the Government Pleader if it was *bona fide* intended by him to make the witnesses for the defence witnesses for the Crown—that is, witnesses whose evidence the Crown intended to accept—and he said it was not *bona fide* intended to make those witnesses witnesses for the Crown. Such was the account given to us by the Government Pleader. Forming our opinion from the record of the trial as to the conduct of the trial by the Sessions Judge and as to his bias, we see no reason to doubt that the statements of the Government Pleader may be accepted as correct. If they are correct, they show an unwarranted interference by the Sessions Judge with the conduct of the prosecution, which should have been left in the hands of the Government Pleader who had been instructed to conduct it, and further show that the least that can be said is that the opening passages from the Judge's record of the 7th of January and the extract relating to the petition which we have given from his judgment are the reverse of candid. That it was never intended *bona fide* to make the witnesses for the defence, witnesses for the Crown we have not a doubt.

Whoever instigated the presenting of that petition, the object, beyond doubt, was to reverse the order of a criminal trial and to place the accused men at a disadvantage by having their witnesses, [253] called and all that they could say disclosed before the evidence of Amir Singh should be completed or the other genuine Crown witnesses should be called. By such a course Amir Singh and the other witnesses for the Crown would be put upon their guard, and any cross-examination which could be administered to them would be practically futile. Such a course would be the last which any sane man who hoped to ascertain the truth and had not already made up his mind that the accused were guilty, and that nothing was to be said or believed in their defence, would adopt. And yet that course, but in another form, was adopted by the Sessions Judge.

After the evidence which we have quoted from the Judge's record had been given by Amir Singh on the morning on the 7th of January, the

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Sessions Judge ordered that the prisoners should be examined, and he proceeded to examine them accordingly. We asked Mr. Spankie under what section of the Code of Criminal Procedure the Judge was justified in examining the accused at that stage of the trial, and the only section he could suggest was section 342. That section, so far as it is material for present purposes, is as follows: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It requires no knowledge of law to understand that section, and to understand that it is not for the purpose of ascertaining what witnesses the accused intends to call, or what evidence they will give, or what his defence is, that a Court is justified or authorized in examining an accused under that section. A Court is only authorized under section 342 to examine an accused "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." The evidence in that section referred to is the evidence already then given at the trial.

[254] At that stage of the trial the Sessions Judge put 21 questions to Hargobind Singh, 28 questions to Rajwant Singh, 22 questions to Buddhu Koeri, and 24 questions to Jhulai. The direct and only object of those questions was to get from the accused by a species of cross-examination the names of their witnesses, what evidence those witnesses would be called to give, what means of knowledge of the facts those witnesses had and the particulars of the defence of each of the accused. We doubt looking at those questions from a point of view most favourable to the Sessions Judge, if there was one single question of those 95 questions which was authorized by section 342, or was in any way directed towards enabling any of the accused "to explain any circumstances appearing in the evidence against him." Here are some examples. Amongst other questions the following were put by the Sessions Judge to Hargobind Singh :—

"Q.—To what point is Badal, Gadaria, your witness?"

"Q.—On which side of the road did you come across with Badal, Gadaria?"

"Q.—Strain your memory and tell anything more besides this that Gadaria, Badal, may have said to you."

Here are some of the questions put to, and the answers given by, Rajwant Singh :—

"Q.—Who are the witnesses in your defence? Name them. A.—Chhotu Chamar, Panchu Chamar, Phulman Chamar, Sukhdeo, Pande, and Sheonandan Pande—altogether five persons. These are my witnesses, and no other besides them.

"Q.—Do you know whether Kuar Singh is included in the list of your witnesses or not? A.—I do not know, as I was in custody.

"Q.—What can Kuar Singh say in your defence? A.—I don't know what deposition he will give.

"Q.—Did you see Kuar Singh on the spot? A.—No, I did not see him on the spot, but on the day of this occurrence I saw him in his juar field.

[255] "Q.—Why did you not get Kuar Singh summoned in your defence? No answer."

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Here are a few examples from the examination of Jhulai :—

" Q.—Were there any others who could see Amir Singh, &c., striking Sambhal Singh or not? If there were, name them.

A.—I don't think any one else saw the affair besides those whose names I have already mentioned.

" Q.—Now state again fully the whole affair as you saw it."

We have no hesitation in saying that the procedure and those questions were entirely illegal. The Sessions Judge, having got all the information he could from the accused as to their witnesses, proceeded to call and examine the witnesses for the defence. We should here say that the Sessions Judge had given the witnesses for the defence into the custody of the police. This is his euphemistic account of that proceeding. "The fact is, it would seem, that the action of the Court on the second day of the trial in suddenly putting every witness available for the defence under surveillance till he had declared what he had to say came as a total surprise on witnesses not yet prepared to say their say."

Avoiding euphemism, we should say that the Sessions Judge had been guilty of what is commonly known as wrongful restraint. This is what he did: he picketed the witnesses for the defence in twos in custody of the police, each two men being placed back to back, so that there might be no communication between them. Much as the witnesses may have been surprised by that action of the Sessions Judge, there was a still greater surprise in store for them.

Immediately after the accused had been examined in the manner referred to, the Sessions Judge proceeded to call the witnesses for the defence and to examine them. It is alleged on behalf of the appellants that the Sessions Judge, as each of the witnesses for the defence was called, or shortly after his examination commenced, caused section 194 of the Indian Penal Code to be read to the witness. Referring to the witnesses for the defence, [256] this is what the Sessions Judge says on the subject in his judgment :—

" However, what they have deposed has been declared by them with a full knowledge of the provisions of section 194, Indian Penal Code. "

The record of the evidence of the first seven witnesses for the defence who were examined by the Sessions Judge shows that the attention of six out of the seven must have been drawn to section 194 of the Indian Penal Code, and that they misunderstood that section. Their evidence shows that as they were aware that Amir Singh was accused of having killed his brother, Sambhal Singh, they considered that they might be transported for life if they gave false evidence at the trial of Hargobind Singh, Rajwant Singh, Buddhu, and Jhulai in their favour. The fact is that the section was entirely inapplicable to the witnesses, unless they gave false evidence at the trial, intending thereby to cause, or knowing it to be likely that they would thereby cause, these four appellants or some or one of them, to be convicted of the murder with which they were charged. The Sessions Judge could not have imagined that the witnesses for the defence were likely to give false evidence against the four accused or any of them. The only event in which section 194 could possibly have applied to them was the event of the action of the Sessions Judge so far intimidating the witnesses as to induce them to give false evidence against the accused. The witnesses for the defence may be excused for not knowing the law when it is apparent that the Judge himself was ignorant on the subject.

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We have no hesitation in saying that it is illegal of a Judge to threaten a witness with the penalties of the law, and that no Judge should allow anything of the nature of a threat to be administered to a witness, unless and until the witness has shown by his evidence that he is wilfully saying what is false or is persistently refusing to give evidence on facts which must be within his knowledge. To threaten witnesses for the defence of a man who is on his trial for his life is to deny him a chance of proving his innocence, and is, in [257] our experience, before this present case, unheard of on the part of a Judge. It is easy to conceive what must have been the effect on any but the stoutest witness of what had happened and was happening. There could not have been any official, pleader or witness, about the Sessions Judge's Court, attending to what was going on, who could have doubted on the 7th of January that the Sessions Judge had made up his mind that the accused were guilty, and that their case was false.

The Sessions Judge had administered at that early stage of the case an illegal and inquisitorial cross-examination to the prisoners. He had picketed all the witnesses available for the defence in twos in custody of policemen. He was making use of section 540 of the Code of Criminal Procedure in a way in which that section was never intended to be used. He was reversing the ordinary and legal course of a criminal trial. He was acting in violation of the spirit, if not of the letter, of sections 289 and 290 of the Code of Criminal Procedure, and he was beginning the examination of the witnesses for the defence by what must have seemed to them a threat of transportation for life if they should say in their evidence that it was Amir Singh, and not the prisoners, who had murdered Sambhal Singh; and yet the issue which the Sessions Judge had to try was, did the prisoners, or some or one of them, murder Sambhal Singh; and at that period of the trial the only direct evidence which had been given connecting the prisoners, or any of them, with the murder had been the evidence of Amir Singh, who himself was accused by the defence of the murder, whose evidence in chief had not been concluded, and who had not then been submitted to cross-examination.

What we have already pointed out would make it impossible for us to consider the trial a judicial one, or to allow the conviction of these appellants by the Sessions Judge to stand.

There are, however, other matters connected with the conduct of that trial by the Sessions Judge which we should be failing in our duty if we were to pass over in silence. The calling and examination by the Sessions Judge of the witnesses for the defence [258] proceeded under the conditions to which we have referred. On the 8th of January the prisoner, Hargobind Singh, was further examined. He admitted that he had caused the petition of the 5th of September 1891 to be drawn up and presented to the police, and then the following question and answer are recorded by the Sessions Judge :—

"Q.—When you stood in the dock before the trial had fully begun, when the inquiry was made as to what class of Rajputs Amir Singh belonged to, did you not call out that he was a bastard Rajput?. A.—I did."

That question put by the Sessions Judge to Hargobind Singh needs no comment. Amir Singh was recalled on the 8th of January and further examined. He was then cross-examined. At the close of his cross-examination he was not re-examined by the Government Pleader, but he was again examined by the Sessions Judge. In that re-examination, or whatever it may be called, by the Sessions Judge, Amir Singh

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committed, as we believe, deliberate perjury on a material question having regard to the case for the defence. He said Sambhal Singh was not ill for a single day. After that re-examination by the Sessions Judge the calling and examination by him of the witnesses for the defence was again proceeded with, some witness being interposed to prove localities or that one of the zemindars and Bhukan Das had absconded.

We give the following extracts from the Judge's record of the 11th of January as showing how the trial was being conducted. The Judge's record is silent as to the 9th of January, and the 10th was a Sunday. This is the Judge's record of the examination of one Beni Pande, who was called and examined by the Sessions Judge, but was not, apparently, a witness for the defence. "Called by Court—Beni Pande, son of Romjan Pande, age 30, states on solemn affirmation.—The witness is led around through much irrelevant inquiry which it is unnecessary to record. After describing his fields lower south of Gaharwarpur:

"Q.—What servants have you? A.—One. Q.—Is he here to-day? A.—No. Q.—What is his name? A.—Wahi Dalganjan. [259] Q.—What explanation have you to placing the word 'Wahi' before the single name 'Dalganjan'? (No answer.)

Cross-examination.—I have *jajmans* in Gaharwarpur among the Sarwars Thakurs. I can eat *puris* and sweets at their hands. I know Amir Singh and Sambhal Singh.

Q. (disallowed)—'Would you now drink water at the hands of Amir Singh?'"

Musai Pande was called and examined by the Sessions Judge at some length. He was cross-examined, and at the end of the record of his evidence there is the following note:—

"(Demeanour very hostile to the prosecution. Discharged.)" Then follows this memorandum, or order, of the Sessions Judge:—"Being now night, and it being impossible to examine further witnesses, the defence are called on to declare the points on which they expect their remaining witnesses to be able to testify. Sundar and Dasaudi: it is explained that nothing is known of what they can speak to. They were named as persons who could give evidence, by the witnesses for the prosecution in the Magistrate's Court; but as they have not been examined for the prosecution, they have been called to be present for the defence. The Amin is again sent to make more exact observations regarding the width between the southern extremity of the old Kawal and Amir's well and to make sections of the embankment." Then Amir Singh is recalled and further examined, and the trial is postponed.

On the 12th of January Amir Singh is re-called by the prosecution and further examined. Then the Amin is examined, and then the Sessions Judge calls and examines Sundar Dasaudi, who was mentioned in his order of the 11th. At the end of the record of Sundar's evidence is the following note by the Sessions Judge: "(Witness is very impatient to relate a conversation with Amir Singh)" and the conversation is not recorded. The Sessions Judge, who had committed nearly every conceivable irregularity in aid of the prosecution, short of sentencing the prisoners to death without a trial, draws the line when Sundar, who was called by [260] himself, proposed to speak to a conversation with Amir Singh. The Sessions Judge may have been right, as it is possible that the conversation may have been irrelevant, or Amir Singh may not have been cross-examined as to it. Then a witness for Hargobind Singh is called by

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the Sessions Judge and intimidated. Then one Dasmi * Bind is called and examined by the Sessions Judge. The Sessions Judge, who just previously had prevented Sundar speaking to a conversation with Amir Singh, deliberately invites Dasmi * Bind to give hearsay evidence against the prisoners. Here is the record of the question put by the Sessions Judge and the answer to it:—

"*To the Court.*—Q.—You know that a fresh start has been made with a new bit of embankment between the extreme points at which you began and left off your work. Can you tell by whom that work was done? You can mention names from hearsay. A.—I know nothing about it."

Apart altogether from the Judge's invitation for hearsay evidence, that was as vicious and irregular a question as was ever put in a Court of Justice, the witness had not said one word to suggest that he knew that any "fresh start" had been made.

The record of the 12th of January concludes as follows:—

"Pragash Dasondi, Sajan Pande or Somer Pande.—Defence does not want them. Bisseswar Singh has been summoned but has not attended. Warrant for his arrest to issue. Madho Singh is conveniently absent, Warrant for his arrest to issue. Case postponed till to-morrow." We are not surprised to find that witnesses required for the defence did not attend.

The Judge's record is silent as to the 13th of January.

The Judge's record for the 14th of January is so comical that it would be difficult to believe that it was the record of a criminal trial, if the record was not before us. It opens as follows:—

"Trial resumed. Present as before.

"Reported that Madho Singh cannot be found; also that the patwar cannot be found. Fresh summons for the patwari through [261] Collector under docket. Bisseswar Singh, called by Court after summons, states on solemn affirmation. Discharged. Note, that the defence state that it was another Bisseswar Singh they wanted.

It appears there are two Bisseswar Singh of Dharanagar— one the employee of the pheridars, know in as Kanja Bisseswar Singh; the other, the alleged purchaser of the Kulwara, &c. Amir Singh tenders any information that could be got from the latter, who is the man intended by the defence," and Amir Singh is again examined apparently by the Judge.

So anxious was the Sessions Judge to get hold of a witness for the defence, that he orders a warrant to issue for the arrest of a Bisseswar Singh without taking the trouble to ascertain that he is issuing it against the right man. When the wrong man is brought before him and examined, the Sessions Judge bethinks himself of enquiring of the defence as to who was the Bisseswar Singh who was required as a witness for the defence, and as the right Bisseswar Singh was not present, he recalls Amir Singh to give the evidence which he supposes the defence intended to obtain from their own witness. Then one Wahaj-ud-din is examined by the Sessions Judge; but as apparently he could not give the information which the Sessions Judge required, the Judge makes a note: "Amir Singh offers to give information," and Amir Singh is accordingly further examined. Then comes the record of the evidence of apparently the wrong Bisseswar Singh. Then the Sessions Judge further cross-examines the prisoners Jhulai and Rajwant Singh on matters of their defence. Then Jawahir Lal is re-called, and the record for the 14th of January closes with some further examination of Amir Singh.

[* In 12 A.W.N. (1892) 83 (89) for "*Dasmi*", we find "*Dhuni.*"—E.D.]

On the 15th of January Jawahir Lal is further examined. 1892

On the 16th of January Umar Khan, a constable of Baragaon, was the first witness called. He was a witness for the prosecution. He said that Sambhal Singh's body was thin, and that he surmised that Sambhal Singh had been ill because his hands and feet were swollen. JUNE 7. —— APPELLATE CRIMINAL. —— 14 A. 242 = 12 A.W.N. (1892) 83.

[262] The next witness for the prosecution was Bhairo Sankar, an Inspector of Police. He said "Rajwant Singh from the outset said he had seen the killing of Sambhal Singh, but he did not commit himself to naming any other person as having witnessed it. Jhulai, Abir, declared he had seen it, but he also refrained from disclosing any name as that of a spectator;" and later on "Rajwant said he saw Amir killing Sambhal; Jhulai, too, said he saw Amir killing Sambhal."

Brij Narayan is then called and examined, and the trial adjourned to the 18th of January.

On the 18th of January Jawahir Lal was put in the witness-box for cross-examination. The prisoners declined to cross-examine him. He had said nothing to implicate them. On the contrary, his evidence so far had been damaging to the prosecution. When the prisoners declined to cross-examine Jawahir Lal, the Sessions Judge proceeded to examine him further. In the course of that examination Jawahir Lal said: "No formal record was made of the time of the visit of Bhukan Das and Hargobind Singh at the outpost. I assign for their visit the hour of 7 A.M. at a guess—the best I can;" and later on: "I have no personal knowledge that Sambhal had been ill. I wrote that he had been suffering from fever because Amir Singh said so. Amir Singh did not try to conceal this from me. When I was investigating, my belief was that when Bhukan Das and Hargobind came to the outpost Sambhal Singh was alive. I did not think that Bhukan Das and Hargobind could have got back in time to see the death of Sambhal Singh. The time of Pryag's arrival was written down, (entered as near 8 A.M., see special diary)." Jawahir Lal further said: "I went to the scene of the murder through Karoma. I met Bahadur Singh and Rajwant Singh on the Panchkosi road in the limits of mauza Ghatoli, about half a *kos* from Karoma and rather less than a mile from the outpost." Then the Sessions Judge of his own motion calls Pryag Singh, the son of Sambhal Singh. As to the calling of Pryag Singh, the Sessions Judge's record shows the following: "Called by Court (suddenly [263] and with precautions against any communication reaching him.")

Pryag Singh said that as he was going back from the Harahua chauki with Jawahir Lal, they met five men. "Those men were Bahadur Singh, Rajwant Singh, Jhulai, Abir, Bhukan Das, and Hargobind Singh. They came from the direction of Karoma. I pointed them out to Bahadur (Jawahir) Lal as the men who had killed my father. We had two constables with us. One was Umar Khan, the other was Khairati. The jamadar ordered all these five men to go to the *chhaoni* and stay there, as there was a charge against them;" and further on: "We went on, I urging the jamadar not to give them a chance of escape, as murder had been committed by them. I swear that there were five and not two men so met by us."

Then Umar Khan is recalled: "(Every precaution has been taken to prevent communication)." He said that he followed Jawahir Lal to Gaharwarpur, walking about a gunshot distance behind, and that he had no recollection of any one being met on the road and turned back by the head constable. Then there is this note of the Sessions Judge: "(*Note.*

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—Umar Khan and Pryag are confronted the latter is made to repeat his story and directed to look straight into the constable's face, the latter stands the ordeal: Pryag Singh does not do so satisfactorily").

The Sessions Judge omits to mention in his record the ordeal of the *pipal* leaves. Jawahir Lal was then recalled, and said: "It will be found recorded that I met Bahadur Singh and Rajwant Singh. I was asked by the Inspector, and I told him of it." He also said "Pryag is not correct as to the spot where I met these men. It was 400 or 500 paces further east, towards Harahua. Pryag is wrong in saying there were more than two men." We believe Jawahir Lal; he is, in our opinion, a truthful witness.

The patwari is then called, and then comes the second witness called for the prosecution, who professed to have seen the murder committed.

[264] The first of the four professed eye-witnesses for the prosecution was Amir Singh. The next was Garib. If Garib's evidence is true, the four appellants and Bahadur Singh killed Sambhal Singh. According to Garib, he and one Sital Pande went together to Gaharwarpur. He says that one of the zemindars gave the order for Sambhal Singh to be struck. He is contradicted by Sital Pande as to what was going on and as to who was there when he arrived. He contradicted part of the evidence which he had given before the committing Magistrate, and then veered round and said that the evidence which he had given before the Magistrate was correct. He flatly contradicted the evidence of Amir Singh, and on this point we believe him. He said: "I saw Sambhal Singh two days before his death at his house, the one to the south of Ramdin Singh's field. He was on his cot; he had fever. I did not see his hands. I saw his feet: they were swollen." And later, in reply to the Sessions Judge, he said: Sambhal had strong fever when I saw him."

Then Jawahir Lal was recalled. Then Sheodhan Singh was called by the Sessions Judge and produced a number of records. Then came the third eye-witness for the prosecution, namely, Sital Pande, who was called on the 19th of January. According to him Sambhal Singh was killed by the appellants and Bahadur Singh. His evidence does not agree with that of Garib as to what was being done and as to who was there when they arrived at Gaharwarpur. In cross-examination he denied that he lived at Rameshwar. A question as to where a witness lived is a perfectly relevant question. The cross-examination on the point was to his credit, and also, no doubt, was suggestive that he was not at Gaharwarpur on the morning in question.

He was further asked: "Have you a concubine in Rameshwar, or a second wife? That question was disallowed by the Sessions Judge. It was a relevant question, and arose on his denial that he lived in Rameshwar. This is what the Sessions Judge says in his judgment as to that question, which he disallowed: "It is not always that a Judge is strong enough to peremptorily order a pleader to stop. This had to be done more than once in this trial. [265] I give an example—"Sital Pande, who gives his age at 60, who is apparently close on 70, was asked if he was not keeping a woman. The questioner had not one title of evidence or probability on his side. An indignant negative, however, would not wipe out, amongst those who form his little world, the recollection that the poor old man had been asked that insulting question in public, and the recollection of it will not tend to make others more willing to risk being similarly insulted. Can we be surprised that so many actual witnesses find it more convenient to say that they were looking the other way, or that they were elsewhere?'

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It would possibly have been more conducive to the interests of justice if the Sessions Judge, instead of indulging in all that rhodomontade, had allowed Sital Pande to answer the question and express for himself an indignant negative, had he chosen to run the risk of doing so. The Sessions Judge, before he disallowed the question, might at least have asked the pleader if there was serious foundation for it, or he might have refreshed his memory by looking at the committing Magistrate's record, where he would have found that this was what Sital Pande's friend, Graib, the witness of that name for the prosecution, had said on the subject: "I know Sital Pande of Ausanpur. His residence is in Ausanpur, but he lives in Rameshwar. Sometimes he lives in Ausanpur. In Rameshwar there is a kept-woman of Sital, and in Ausanpur his wife. In Ausanpur there is one and a-half bigha cultivatory holding of Sital and his brothers. He has *shaikmi* cultivation both in Rameshwar and Ausanpur. Sital, lives apart from his wife and sons. He lives in Rameshwar. His house in Rameshwar is less than a mile from his house in Ausanpur. There is a river between. Sital's sons take care of their mother, and Sital, too, assists her." It is said on behalf of the appellants that there pleader endeavoured to get that information from Garib in the Sessions Court, and that he was stopped by the Sessions Judge and told that Sital Pande was the proper person to whom such a question should be addressed. On that allegation we express no opinion.

The fourth and last eye-witness for the prosecution was next called. He was Ajudhia Singh, a son of Amir Singh. According [266] to him one of the zamindars and Bhukan Das gave the order to strike Sambhal Singh, and, according to him, the appellants and Bahadur Singh killed him. Ajudhia Singh had almost as vital an interest in this case as his father, Amir Singh, had, and consequently his evidence must be regarded with caution. Ajudhia Singh had made a report to the police on the morning of the 13th of September. According to the cheque-receipt this is what he reported: "Gobind Das is constructing a ridge by demolishing my manger. My uncle, Sambhal Singh, and I warned them not to do so. On this Sambhal Singh and I were beaten to-day at 7 A.M. My uncle, Sambhal Singh, has received serious injuries and is unable to come; I have therefore come to make the report." The cheque receipt gives the names of the persons then accused by Ajudhia Singh as "Gobind Das, Bhukan Das, Hargobind Singh, and Buddhu Keori, residents of Karoma." That report made no mention of two of the prisoners, appellants here, whom Ajudhia knew perfectly well, and who, at the Sessions trial, he swore took part in the murder—namely, Rajwant Singh and Jhulai: The four men whom Ajudhia did name in his report were the men whom he most probably would have named if this is a case of *sesari-muqadama*. When Jhulai was examined before the Magistrate on the 20th of September 1891, he said that he had asked Amir Singh why he was beating Sambhal Singh with a *lathi*, that Amir Singh asked him to give evidence to the effect that "at the request of Gobind and Bhukan, Buddhu, and Hargobind had killed Sambhal. I refused to give false evidence: hence he has charged me."

If the evidence of Jawahir Lal is true, and we believe it, it is nearly, if not almost impossible that Bhukan Das or Hargobind Singh could have been present when Sambhal Singh was killed. Jawahir Lal evidently did not belive that those men were present.

The record of the report of Pryag Singh was not drawn up at the time he made it or until later in the day, and by that time Amir Singh

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had accused Jhulai as a party to the murder, and accordingly in the heading of the report the name of Jhulai is mentioned in the list of names of the accused. But in the body of the [267] report no mention is made of Jhulai. According to the prosecution, Pryag Singh was not present when his father, Sambhal Singh, was killed.

After the examination of Ajudhia had been concluded, the prisoner Rajwant Singh was again examined by the Sessions Judge. The proceedings of the 19th of January closed with this note by the Sessions Judge: "The defence must have ample time to consider what witnesses, if any, they will have examined. To-morrow the Court will continue closed, as it will be a day of National mourning. The trial is adjourned to Monday, 21st January 1892." It is only those who were responsible for the defence of these men charged with the crime of murder, or those who know what such a responsibility is, and what had taken place at this trial, who could fully appreciate the irony of that order. All the witnesses for the defence whom the Sessions Judge could get hold of had been called and examined by him, and what they had deposed had been declared by them "with a full knowledge of the provisions of section 194, Indian Penal Code."

The defence elected to call no witnesses except one to produce some documents. Then follows this note of the Judge: "Reported by the Judge's record-keeper that the record of the case 'Babu Lal, Lohar, *versus* Amir Singh' is not traceable. Amir Singh offers to give any information required."

Then the defence call Gauri Shanker to produce documents, and then Amir Singh is recalled. Some documentary evidence was then read, the Government Pleader summed up the case for the prosecution, and Mr. Howard on behalf of the prisioners addressed the Court and the assessors. The Muhammadan assessor gave it as his opinion that the prisioners were guilty of the offence charged under section 302, Indian Penal Code. The two Hindu assessors were of opinion that the prisioners were not guilty, one of them being of opinion that Amir Singh killed Sambhal Singh "to land a false charge against the zemindars." The other assessor was of opinion that Sambhal Singh had died a natural death. The opinion of the assessors was recorded late in the afternoon of the 21st of [268] January 1892, and before 5-20 P.M. of that day the Sessions Judge had passed sentence of death on each of these four appellants. Before referring to the question as to what the Judge was bound by the law to do before passing sentence, we shall very briefly state our conclusions on the facts of this case.

On the part of the prosecution there were only four alleged eye-witnesses of the murder to support the case that these appellants had committed the murder. Those witnesses were Amir Singh, his son Ajudhia Singh, Garib, and Sital Pande. The two latter on some points which are not immaterial contradicted each other. Garib further contradicted evidence as to Ajudhia Singh which he had given before the committing Magistrate and then veered round to that evidence again. Garib contradicted the evidence of Amir Singh as to the state of health of Sambhal Singh, and in that respect supported the evidence for the case of *sesari muqadama* set up by the defence.

Amir Singh's evidence as to the state of Sambhal Singh's health is rendered untrustworthy by the evidence of Jawahir Lal and Umar, witnesses for the prosecution.

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The evidence of Jawahir Lal, in our opinion, proves that the evidence of Amir Singh, Ajudhia Singh, Garib, and Sital Pande as to Hargobind Singh having taken part in the murder is false evidence. The report of Ajudhia Singh makes it exceedingly doubtful that Rajwant Singh or Jhulai were parties to the murder of Sambhal Singh, and that doubt is strengthened as to Jhulai by the record of the report made by Pryag Singh, if there is any truth in the case for the prosecution. Hargobind Singh, Rajwant Singh, Buddhu, and Jhulai all took part in killing Sambhal Singh. If we do not believe the evidence for the prosecution as to any one of the four accused, we cannot believe the evidence as to the others. That evidence cannot be separated, as there can be no suggestion that the witnesses for the prosecution are mistaken as to the identity of one of those men, and are speaking the actual truth as to the others. On the evidence for the prosecution, we acquit these four appellants of the charges preferred against them, and direct them to be released. [269] We may say that, even if the leading evidence for the prosecution were not open to the comments which we have just made, we would not consider it safe to act upon it, having regard to the illegal and irregular procedure which was adopted by the Sessions Judge, and particularly to the fact that three of the alleged eye-witnesses were not called until almost the close of the evidence, and until the Sessions Judge had extracted from the prisoners and their witnesses the whole case for the defence. For a similar reason we would not have considered it safe to act upon the evidence of Amir Singh.

Now as to the question whether the Sessions Judge complied with the provisions of the Law, which he was bound to obey, in sentencing the appellants when and as he did. As we have said, the opinion of the assessors was given and recorded late in the afternoon of the 21st of January 1892. The Sessions Judge sentenced these men to death before 5·20 P. M. that day.

Mr. Howard in his affidavit of the 15th of February 1892, of which, at latest, on the 29th of February 1892 the Sessions Judge had received a copy, swore in the 18th paragraph: "That the learned Judge, in my presence, when passing sentence of death upon the prisoners immediately after the verdict of the assesors had been delivered, in the absence of any judgment, written, delivered or explained to the prisoners, directed that the prisoners be hanged," &c. The rest of the paragraph is immaterial for present purposes.

Mr. Spankie, Public Prosecutor, admitted that no judgment had been written at the time when the sentences were passed. The Government Pleader who was engaged at the trial has stated to us in the course of this appeal that at the time when the Sessions Judge passed sentence the Sessions Judge had not written his judgment, and that what the Sessions Judge did at that time was to sign something which he had written or then wrote, as the Government Pleader thought, with a pencil, and which occupied about half a sheet of paper.

The judgment, or rather what purports to be the judgment, of the Sessions Judge and is now within the record, bears the heading, 'Grounds for conviction of these four prisoners for the wilful [270] murder of Sambhal Singh, charged under section 302, Indian Penal Code," and is signed by the Sessions Judge and dated "21st January 1892." In that Judgment there is the finding of the Sessions Judge that all four prisoners were guilty of wilful murder, but it does not contain the sentence.

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There is a separate document on the record which, with the exception of a few words and the signature of the Sessions Judge, and possibly the date, "21st January 1892," is not in the writing of the Sessions Judge. The following is a copy of that document:—

"In the Court of the Sessions Judge, Benares.

Present—G. J. Nicholls, Esquire, Sessions Judge.

Sessions Trial No. 79 of 1891.

Queen-Empress *versus* (1) Hargobind Singh, (2) Buddhu, Koeri, (3) Rajwant Singh, and (4) Jhulai, Ahir.

"Committed to Sessions for trial under sections 148 and 304, Indian Penal Code, by Babu Balbhaddar Singh, Deputy Magistrate, 1st class, Benares, on 12th November 1891.

FINDING AND SENTENCE.

"Agreeing with the opinion of one assessor and differing with that of the two others, the Court finds that the offence of wilful murder, punishable under section 302, Indian Penal Code, is sufficiently proved by clear and consistent evidence against the prisoners (1) Hargobind Singh, (2) Buddhu, Koer, (3) Rajwant Singh, and (4) Jhulai, Ahir, and it accordingly directs that all the four prisoners be hanged by the neck till they be dead, at such place as may hereafter be determined by the Local Government.

(Sd.) G. J. NICHOLLS,

Sessions Judge.

21st January 1892.

It is needless to say that what we have just quoted is not the judgment which is required by sections 366 and 367 of the Code of Criminal Procedure, 1882. It could not have been considered [271] by the Sessions Judge to have been the judgment required by those sections, as what he has appended to his record as his judgment occupies very nearly 20 pages of rather closely-printed foolscap. That document cannot be the paper which the Government Pleader saw the Judge sign, if his memory is to be trusted.

The judgment bears internal evidence that it could not have been written or completed between the time when the assessors gave their opinions on the case on the 21st of January and the time when the Court closed on that day after the sentences had been passed. The opinion of one of the assessors is referred to in a part of the judgment, which is fourteen printed foolscap pages, from the conclusion of the judgment. Having regard to the position in the judgment of the reference to the opinion of the assessor, we doubt that, even if the judgment had on the 21st of January been written down to that point, it could have been completed sooner than the 22nd or 23rd at the earliest. We cannot assume that a Judge, before the evidence in a case was concluded, would begin to write his judgment.

It appears from the record that the Sessions Judge was on the 25th of January, that is, four days after he had passed sentence, most irregularly completing his record by having evidence which had been given on the 7th of January read over to a witness. It is a hardly necessary to say that no judgment as required by sections 366 and 367 of the Code of Criminal Procedure was pronounced or delivered in open Court in the presence of the prisoners, or at all, and that no judgment was dated or signed by the Sessions Judge in open Court at the time of pronouncing it. What justification there can be for the date "21st January 1892" being put on

a judgment which was not in existence on that date we are entirely unable to understand.

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The judgment prescribed and required by sections 366 and 367 of the Code of Criminal Procedure, 1882, is a written judgment which "shall contain the point or points for determination, the decision thereon, and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pro-[272]nouncing it. It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative. If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty," &c.

There can be no pretence for suggesting that the judgment required to be delivered and pronounced under sections 366 and 367, whether it be a judgment of conviction or a judgment of acquittal, need not contain the particulars required by sections 367, or need not be pronounced, that is, read out in open Court, and need not be dated and signed by the presiding officer at the time of pronouncing it.

Further, there can be no pretence for suggesting that Sessions Judges, who are appointed and paid to administer the law in accordance with the law, are not bound to obey the specific mandates of the Legislature, and may act in violation of the provisions of the Code of Criminal Procedure, 1882. Inasmuch as the sentence in the case of a conviction, and the direction to set the accused at liberty in the case of an acquittal, can only follow on the decision and cannot precede it and inasmuch as the decision must be contained in the written judgment, and there only, it necessarily follows that when, in cases like the present, to which section 367 applies there is no written judgment when the sentence is passed, the sentence is illegal.

The requirements of sections 366 and 367 are no mere matters of form. The provisions of those sections are based upon good and substantial grounds of public policy, and whether they are or not, Sessions Judges must obey them and not be a law to themselves.

Any Judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of [273] the trial, might pass sentence on a prisoner and find it impossible honestly afterwards to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded. It is as much to the interest of the public that a guilty man should not be acquitted as it is that an innocent man should not be convicted.

We ought not to conclude this judgment without expressing our opinion on two matters: one is that the sweeping condemnation by the Sessions Judge of the Civil, Criminal and Revenue Courts of the Benares district, in which the family of Amir Singh had been concerned in litigation, is entirely unjustified. The other is that, strange as it may appear after what we have been compelled to say in this judgment, we are, from our

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knowledge of the Sessions Judge and his work, willing to believe that in adopting the extraordinary procedure which he did, he was solely influenced by strong personal views as to zamindars and their tenants, and an honest desire that men whom he believed to be guilty should not escape being convicted.

In conclusion, we should say that we are satisfied, from our experience of the Sessions Judges of these Provinces and their work, that the procedure of the Sessions Judge in this case, upon which we have been obliged to comment, is unique, and, speaking generally, that Sessions trials are conducted with regularity, fairness, and decorum, and in accordance with law.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Mahmood, Mr. Justice Knox, and Mr. Justice Blair

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SETH CHITOR MAL (*Defendant*) *v.* SHIB LAL (*Plaintiff*).*
[29th June, 1892.]

Co-sharers—Payment of arrears of Government-revenue by one co-sharer, effect of—Charge—Lien—Act XIX of 1873 (*N.W.P. Land Revenue Act*), ss. 146, 148, 150—166, 173—*Act XII of* 1881 (*N.W.P. Rent Act*), ss. 93, 171, et seq.—*Act IV of* 1882 (*Transfer of Property Act*), s. 100.

A co-sharer in a mahal, who was also the lambardar, paid arrears of Government revenue for the years 1882, 1883, and part of 1884, in respect of certain lands [274] in the mahal which were the exclusive property of another co-sharer. These lands were subject to simple mortgages executed in 1873, upon which decrees were obtained in 1884, and had been sold in execution of these decrees in 1887. The co-sharer-lambardar, having obtained a decree in a Court of Revenue against the mortgagors under s. 93 (*g*) of the N.W.P. Rent Act (XII of 1881) for recovery of the arrears of revenue paid by him, sought to execute that decree under s. 177 of the Act by sale of the lands which had been sold in 1887; and thereupon the auction-purchaser at that sale objected under s. 178, and, the objection having been overruled, brought a suit as authorized by s. 181 in a Civil Court to establish his title to the lands and to have them protected from sale in execution of the Court Revenue decree. This suit was decreed, and the decree, not having been appealed against, became final. Subsequently, the co-sharer-lambardar brought a suit in the Civil Court in which he claimed a decree for enforcement of lien by sale of the lands for the amount of the Court of Revenue decree, and for a declaration that the said lien "which is on account of Government," be declared preferential to the mortgages of 1873, the decrees thereon of 1884, and the sales under those decrees of 1887. He claimed this lien not only in respect of the arrears of Government revenue paid, but also in respect of future interest.

Held by the Full Bench (Mahmood, J., dissenting) :—

(i) That the Legislature had not given or recognized in the North-Western Provinces any such right of charge or lien in favour of a person paying Government revenue as was claimed here, or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments.

(ii) That no Civil Court had jurisdiction to entertain the suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immoveable property could be sold to the prejudice of incumbrances to which it was subject.

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* Second Appeals Nos. 210 and 211 of 1890.

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(iii) That it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest, by declaration or otherwise, a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882.

(iv) That there is no general principle of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) approved.

(v) That the principle of Maritime Civil Salvage had no application to the case, and that no analogy could exist between the case of a salvor in Maritime Civil Salvage and the case of a co-sharer in a mahal to whom s. 146 or s. 148 of the North-Western Provinces Land Revenue [275] Act (XIX of 1873) applied. *Leslie* v. *French* (2) and *Falcke* v. *Scottish Imperial Insurance Company* (3) referred to.

[**Diss.**, 26 M. 686 ; **F.**, 26 B. 437 ; **R.**, 18 A. 471 ; 16 A.W.N. 154 ; 7 C.P.L.R. 42 ; 11 C.P.L.R. 111 ; 6 O.C. 346 (350) ; **D.**, 26 A. 407 = A.W.N. (1904) ; 74 (**F.B.**).]

THIS was a reference made to the Full Bench by Edge, C. J., and Blair, J. The facts of the case are fully stated in the judgment of Edge, C.J.

The Hon. Mr. *Spankie* and Babu *Durga Charan Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENTS.

EDGE, C.J.—These two second appeals arise out of the same suit, and are brought by Seth Chitor Mal, a defendant in the suit. The respondent in each appeal is Shib Lal, who was the plaintiff in the suit. The suit was brought in the Court of the Haveli Munsif of Aligarh. From the decree of the Munsif there were two appeals to the Court below, and in each appeal a decree was passed. Seth Chitor Mal was dissatisfied with each of the decrees of the Subordinate Judge, and accordingly has brought these appeals.

The facts necessary for understanding the questions which arise in these appeals are shortly as follows:—

At the time of the making of the mortgages, to which I shall presently refer, Mukha, Lekha, Fatteh, Bhagwan, and Radha were co-sharers in a mahal in which they owned plots numbered in the khewat 49 and 50 as their share.

Plot numbered 49 contained 54 bighas, 8 biswas, and plot numbered 50 contained 29 bighas, 5 biswas.

On the 24th of June 1873 Mukhal, Lekha, Fatteh, and Bhagwan executed a simple mortgage, as a simple mortgage is defined in section 58 of the Transfer of Property Act, 1882, in favour of the Seth Chitor Mal, by which they purported to mortgage 44 bighas, 10½ biswas of the 54 bighas, 8 biswas. On the 1st of July 1873, Mukha, Lekha, and Fatteh executed a simple mortgage in favour of Seth Chitor Mal, by which they purported to mortgage 28 bighas, 3 biswas in the mahal.

On the 28th of March 1884 Seth Chitor Mal, in a suit in which he was the plaintiff, and Sri Ram, adopted son of Lekha, [276] deceased, Mukha and Fatteh were defendants, obtained, apparently under section 88 of the Transfer of Property Act, 1882, a decree on his simple mortgage of the 1st of July 1873 for sale of 28 bighas, 3 biswas of land. On the 31st of March 1884, Seth Chitor Mal, in a suit in which he was the

(1) 14 C. 809. (2) L.R. 23 Ch. D. 552. (3) L.R. 34 Ch. D. 234.

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plaintiff, and Sri Ram, adopted son of Lekha, deceased, Mukha, Jewan and Kanhaiya, minor sons, and Musammat Hira, widow of Bhagwan, deceased, and Fatteh were defendants, obtained, apparently under section 88 of the Transfer of Property Act, 1882, a decree on his simple mortgage of the 24th of June 1873 for sale of 44 bighas, 14 biswas of land. What were the proceedings which took place under those decrees between the dates of those decrees and the dates of the auction sales held in execution of them do not appear on the record of this suit, except that 54 bighas, 8 biswas and 14 bighas, 12½ biswas were advertised for sale under those decrees.

On the 23rd of February 1887, at an auction sale under those decrees Seth Chitor Mal purchased 14 bighas, 12½ biswas of land out of 29 bighas, 5 biswas. The sale certificate is dated the 25th of April 1887, and that sale was duly confirmed. On the 21st of October 1887, at a further auction sale under those decrees, Seth Chitor Mal purchased 54 bighas and 8 biswas of land. The sale certificate is dated the 24th of December 1887, and that sale was duly confirmed.

Shib Lal, the plaintiff, respondent here, who was a lambardar and a co-sharer in the mahal in which the lands in question were, having paid certain arrears of land revenue for the years 1289, 1290, and part of 1291 Fasli, corresponding roughly with the years 1882, 1883, and part of 1884 of the Christian era, brought a suit in a Court of Revenue, under clause (*g*) of section 93 of Act No. XII of 1881, against Mukha, Sri Ram, Musammat Hira, widow, and Jiwan and Bhodar (*sic*) sons of Bhagwan, deceased, Fatteh and Radha to recover Rs. 402-5-1, principal and interest, and Rs. 23-12-0 costs, and obtained on the 7th of April 1885 a decree for Rs. 426-1-1. The Rs. 402-5-1 included the arrears of land revenue paid by Shib Lal. [277] Seth Chitor Mal was not a defendant to that suit. Shib Lal endeavoured to execute that decree under section 177 of Act No. XII of 1881 by sale of the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas which had been purchased, as already mentioned, by Seth Chitor Mal. Seth Chitor Mal, before the day fixed for the sale, appeared under section 178 of Act No. XII of 1881, claimed a right and interest under his mortgage decrees and sale certificates in those lands, and objected to their being sold in execution of Shib Lal's Court of Revenue decree. On that claim the Collector of the district finally made an order under sections 179 and 180 against Seth Chitor Mal. Thereupon, and within one year from the date of that order, Seth Chitor Mal brought his suit as authorised by section 181 of Act No. XII of 1881 in a Civil Court of competent jurisdiction against Shib Lal, Sri Ram, adopted son of Lekha, deceased Mukha, and Jewan Lal and Kanhaiya, sons, and Musammat Hira, widow, of Bhagwan, deceased, to establish his right to the 54 bighas, 8 biswas, and the 14 bighas, 12½ biswas and to have them protected from sale in execution of Shib Lal's Court of Revenue decree, and on the 4th of September 1888 obtained the decree which he asked for in his suit, namely, a decree establishing his title to the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas and protecting them from sale in execution of Shib Lal's Court of Revenue decree. That decree was appealable, but no appeal was brought against it, and whether it was justified by the facts or in law is now immaterial, as the decree long since became final as between Seth Chitor Mal and Shib Lal.

On the 18th of January 1889, and after Seth Chitor Mal's decree of the 4th of September 1888 had become, by reason of the Indian Limitation Act, 1877, non-appealable, Shib Lal brought the suit out of which these

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two appeals have arisen. The object of this suit is to get behind Seth Chitor mal's decree of the 4th of September 1888, and to get from a Civil Court a decree for sale of the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas which would confer on a purchaser at an auction-sale held in execution of it, priority of title over such title and interest as Seth Chitor Mal has in the lands.

[278] The reliefs which Shib Lal claims in this suit are, as translated, as follows :—

"(*a*) A decree be passed in plaintiff's favour for enforcement of the hypothecation lien on account of Rs. 426-1-1 paid as Government revenue and recorded in the decree, together with costs and future interest, and for the auction sale of the zemindari property, in extent 54 bighas, assessed at Rs. 128-4-6 and 14 bighas, 10 biswas, for which revenue has been paid, and plaintiff's hypothecation lien, which is on account of Government, be declared superior and preferential to the hypothecation lien in favour of defendant, the second party, and the aforesaid property be sold by auction without any regard to other demands, liabilities or liens.

"(*b*) The costs of this suit, together with future interest, be caused to be paid.

"(*c*) Any other reliefs or directions which the Court may consider necessary be likewise given to the plaintiff."

The defendant described in that prayer for relief as the "defendant, second party" is Seth Chitor Mal and the decree in which it is stated that the Rs. 426-1-1 was recorded is Shib Lal's Court of Revenue decree of the 7th of April 1885.

It may be noticed that Shib Lal in relief (*a*) is claiming a lien or charge more extensive than that which the Government had for the arrears of land revenue, for he claims a lien not only in respect of the arrears of land revenue which were actually paid, but also in respect of future interest, whereas section 148 of Act No. XIX of 1873 enacts that " no interest shall be demanded on any arrear of land revenue." He is also seeking to have the charge, which he claims to be entitled to, enforced by the Civil Court, which is not the tribunal by the aid of which the Government can enforce the charge which it has for arrears of land revenue.

Having regard to the relief which Shib Lal claims, it is necessary not only to consider whether by the payment of the arrears of land revenue Shib Lal obtained the charge which the Government had, which was a charge enforceable by sale and having a priority over all [279] mortgages and incumbrances upon the land, but whether Shib Lal has by such payment obtained any other charge in enforcement of which he is entitled to bring the lands to sale by the aid of the Civil Court in this suit. It will also be necessary to consider whether a Civil Court had any jurisdiction to entertain this suit.

In considering the questions arising in this case, it is necessary to bear in mind that when the arrears of the land-revenue, in respect of the payment of which Shib Lal claims a charge upon the lands in suit were accruing, accrued, and were paid, Shib Lal had no interest of any kind in those lands, and that his interest was in other lands in the mahal which might in certain events have been sold as part of the Mahal by the Collector of the District in satisfaction of the arrears of the land-revenue, for which the entire mahal and the proprietors, as that word is used in section 146 of Act No. XIX of 1873 (the North-Western Provinces Land-Revenue Act, 1873), as amended by Act No. VIII of 1879, were

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jointly and severally responsible to the Government. Even if it were a true proposition that there is a general principle of equity that whoever, having an interest in an estate, makes a payment in order to save the estate, thereby obtains a charge upon the estate, and if Shib Lal could be said to have had, when he paid the arrears of land revenue, an interest in the lands in suit, in which in fact he had no interest whatsoever, it would be necessary to consider whether the Legislature intended that a co-sharer or a lambardar in a mahal who paid an arrear of the land-revenue should, in respect and by force of such payment, obtain a charge upon lands in the mahal the exclusive property of another co-sharer, and provided any means by which any such charge could be enforced.

It must not be assumed that the proprietors or co-sharers in this mahal were co-sharers in each other's share. In truth the proposition which Shib Lal contends for is, that there exists a principle of equity applicable to land by which, apart from express contract or legislative enactment, one of several debtors jointly and severally liable as principals, and not as *co-sureties*, for a debt charged on their separate lands who pays that debt in order to prevent his own [280] particular lands, together with the separate lands of his co-debtors being sold, obtains thereby, not merely a right of contribution enforceable in the ordinary way by means of a decree for money, but a charge over such separate lands of his co-debtors on which he can obtain a decree for sale of those separate lands of his co-debtors and a decree for sale which would confer on a purchaser at a sale in execution of it, priority of title over all previous mortgages and incumbrances. That is a startling proposition when one comes to consider it carefully. It is all the more startling as applied to this case from the fact that the means by which Shib Lal could alone, if at all, enforce the charge which he claims were not open to the Government for the enforcement of the charge which it had, and that the means by which the Government could have enforced its charge are inapplicable, to the enforcement of a charge by Shib Lal.

In endeavouring to arrive at a conclusion as to whether Shib Lal did by his payment of the arrear of land revenue obtain any such charge as that which he claims, I propose to consider the Acts of the Indian Legislature in order to see what light they throw upon this question, and in doing so to see whether if Shib Lal has any such charge the Legislature provided any means by which he could enforce it. If it appears that the Legislature has not only not recognized the existence of any such principle as that contended for, as apart from legislative creation, but has provided no means by which such a charge as that claimed by Shib Lal could in these Provinces be enforced, and has in other Provinces created by legislative enactment rights of charge on behalf of certain classes of persons paying under certain circumstances arrears of Government revenue, I think it may be safely concluded that the Legislature did not intend except in those cases for which it has expressly provided by enactment that lambardar, co-sharer or other person having an interest in a mahal or in any part of it, should, by payment of an arrear of land revenue acquire any charge, much less a charge taking priority over all mortgages and incumbrances on the land, and it may further be concluded that no such right of charge exists in these Provinces.

[281] Before examining the legislative enactments which may throw any light upon this case, I shall again briefly state what Shib Lal is contending for. It is contended on behalf of Shib Lal that by reason of his payment of the arrear of land-revenue which became due for the years

1289, 1290 and part of 1291 Fasli, he acquired either a charge on the lands in suit, or a right to have a charge declared and enforced by sale of the lands in suit, and that such charge or right of charge took priority over the mortgages of 1873, the decrees upon those mortgages in 1884, and the sales under those decrees in 1887.

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If such a charge or right of charge exists, it must arise in this case, either by legislative enactment or by virtue of some principle of equity, not inconsistent with the statute law in force in these Provinces.

So far as Act No. XIX of 1873 (the North-Western Provinces Land-Revenue Act, 1873) as amended by Act No. VIII of 1879, is concerned, the only sections which appear to have any bearing on this subject are the sections contained in Chapter V of that Act.

The inferences to be drawn from those sections are in my opinion adverse to the contention of Shib Lal. I think it necessary to refer to a few only of the sections contained in Chapter V.

Section 146 enacts that "in the case of every mahal, the entire mahal and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the mahal. *Explanation.*—Proprietor in this chapter includes also a farmer and a mortgagee in possession." Seth Chitor Mal at the time the arrears of land revenue were paid by Shib Lal was not a proprietor in the mahal within the meaning of section 146, nor was he then a person responsible to Government for the revenue for the time being assessed on the mahal. Section 148 enacts "any sum not so paid becomes thereupon an arrear of revenue, and the persons responsible for it become defaulters. No interest shall be demanded on any arrear of land-renenue. If the settlement has been made with a lambardar on behalf of the proprietary body both the lambardar and the persons so responsible shall be deemed defaulters." [282] By section 150 certain processes are provided by which an arrear of land revenue may be recovered by the Collector of the district on behalf of the Government. Amongst other processes provided by that section, there are the following: "(*e*) by transfer of such share or patti to a solvent co-sharer in the mahal," "(*g*) by sale of such patti, or of the whole mahal;" and "(*h*) by sale of other immoveable property of the defaulter." Section 157, so far as is material, enacts "when the arrear is due in respect of a share or patti of a mahal, the Collector of the district may, with the previous sanction of the Commissioner of the Division, in cases where the annual revenue payable in respect of such share or patti does not exceed fifty rupees, and in other cases with the previous sanction of the Board, transfer such share or patti for a term not exceeding 15 years from the first day of July next after the date of the sanction, to any or all of the other co-sharers, on condition of their paying such arrear and on such terms as the Commissioner or Board (as the case may be) in each case may think fit . . . . . . A transfer under this section shall not affect the joint and several liability of the co-sharers of the mahal in which it is enforced."

Section 166 enacts so far as is material "when an arrear of land revenue has become due, and the Collector of the district is of opinion that the other processes hereinbefore provided are not sufficient for the recovery of such arrear, he may, in addition to, or instead of, all or any of such other processes, and subject to the provision hereinafter contained, and with the previous sanction of the Board, sell by auction the patti or mahal in respect of which such arrear is due." The proviso to 166 does not affect the question we have to consider. Section 167 enacts "land

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sold under the last preceding section shall be sold free of all incumbrances, and all grants and contracts previously made by any person other than the purchaser in respect of such land shall become void as against the purchaser at the auction sale. Nothing in the former part of this section applies (*a*) in districts or portions of districts permanently settled, to farms granted in good faith at fair rents, and for specified areas, by a former proprietor for terms not execeeding 20 years, [283] under written leases duly registered; (*b*) in all districts, to lands held under *bona fide* leases at fair rents, temporary or perpetual, for the erection of dwelling-houses, or manufactories, or for mines, gardens, tanks, canals, places of worship, burying-grounds, such lands continuing to be used for the purposes specified in such leases.

Section 168 enacts that in the events therein mentioned a defaulter's interests in any other mahal, may be sold, "provided that no other interests save those of the defaulter alone shall be so proceeded against, and no incumbrances created or contracts entered into by him in good faith shall be rendered invalid by such proceedings." Section 173 enacts "if the defaulter pay the arrear in respect of which the land is to be sold at any time before the day fixed for the sale, to the person appointed under section 147 to receive payment of the land-revenue assessed on such land, or to the Collector of the district, or the Assistant Collector in charge of the Sub-division of the district in which the land is situate the sale shall be stayed."

It is to be observed that not only is the patti or mahal in respect of which arrears of land-revenue remain unpaid liable to be sold for the recovery of such arrears, but that every person who is, under section 146 or section 148, responsible to Government for the land-revenue so in arrear, is a defaulter, and may be proceeded against as such, although he may have paid to the Government what represented as between him and his co-sharers in the patti or mahal his quota or share of the land-revenue, the liability for the payment of the land-revenue being joint and several, and those being the terms upon which the co-sharers hold the patti or the mahal.

There are, besides the processes for the recovery by the Government of arrears of land-revenue provided by the sections from which I have quoted, other processes provided by Chapter V by which the Government may recover arrears of land-revenue.

Chapter V of Act No. XIX of 1873, which enacts what are the liabilities of proprietors and co-sharers and how the land-[284]revenue may be collected and arrears of land-revenue may be recovered, does not enact that a co-sharer or lambardar who pays the particular quota of land-revenue of his co-defaulter shall have any lien on his co-defaulter's share in respect of such payment, except in the case and in the manner specified in section 157, the manner specified being a transfer of the co-defaulter's share for a period not exceeding 15 years by the Collector with the sanction of the Commissioner or the Board of Revenue, as the case may be, to any or all the other co-sharers on condition, amongst possibly others, of their paying the arrear. The Legislature, if it had seen fit, might have enacted in Act No. XIX of 1873 that a lambardar or a co-sharer, on payment of an arrear of land-revenue, should have a charge on the share of the co-sharer who was the primary defaulter, but it has not done so. If the Legislature intended that a lambardar or a co-sharer who, in order to prevent the patti or mahal being sold under section 166, paid the arrear of land-revenue should have a charge in respect of such payment

the appropriate place to have inserted words which would have given effect to such an intention would have been in section 173; but neither in that section, nor elsewhere in Act No. XIX of 1873, is any such intention expressed, or any words used from which such an intention could be inferred.

I have been unable to find anything in the Indian Contract Act, 1872, (Act No. IX of 1872) from which I can infer that a lambardar or co-sharer is entitled to a charge in respect of arrears of land-revenue paid by him.

Section 100 of the Transfer of Property Act, 1882 (Act No IV of 1882), would not apply, unless the property, the subject of this suit, was "by act of parties or operation of law made security for the payment" to the plaintiff of the money paid by him in respect of the arrears. No such "act of parties" is alleged; and so far as I can see, the property was not by operation of law made security for any payment to the plaintiff. If however, section 100 of the Transfer of Property Act, 1882, does apply and plaintiff has, within the meaning of that section, a charge on the property in [285] suit, it is not the charge which he contends for, that is a charge which would give him priority not only over the decrees on the prior mortgagors and the certificates of sale, but over those prior mortgages which were made many years before the arrears of land-revenue which were paid by Shib Lal accrued due, but a charge by which he would stand *qua* his charge in no higher position than that in which a second mortgagee stands to a first mortgagee. The rights of a second mortgagee as such against the first mortgagee are, so far as redemption, foreclosure and sale are concerned, defined by section 75 of the Trasfer of Property Act, 1882, and are the same rights as the mortgagor has against the first mortgagee, and no more. A mortgagor could not as against his mortgagee obtain, except by legislative enactment or as the result of a contract, a prior charge on, or a right to sell with priority of title, the mortgaged property in respect of a discharge by a payment made by the mortgagor of a liability on the property which first arose after the making of the mortgage. The principle of the shield, even if the shield could be used as a weapon of offence, could not apply in such a case.

The result so far is that I find nothing in Act No. XIX of 1873, the Indian Contract Act, 1872, or the Transfer of Property Act, 1882, which suggests that any such charge as is contended for here, has been given by the Legislature in any of those enactments.

I now propose to show that the Legislature not only before but since the passing of Act No. XIX of 1873, must have considered that, except by legislative enactment, no person interested for the protection of his own interests as a tenant, a co-sharer or an incumbrancer in having Government revenue paid, would by the mere payment of an arrear of the Government revenue obtain any charge whatever upon lands liable to be sold by the Government in satisfaction of the arrear. And further I propose to show, so far at least as these Provinces are concerned, that any such charge as is contended for by Shib Lal would be at variance with the policy of the Government as disclosed in its legislative enactments, and that in these Provinces no means has been provided by which a lambardar or co-sharer could enforce any such charge if he had it.

[286] Act No. I of 1845 was an Act for the realization of land-revenue. By sections 26, 27, 28, and 29 of that Act the purchasers at a sale by the Government for arrears of land-revenue of the estates therein referred to, acquired those estates with certain exceptions free from all

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incumbrances. By section 29 it was enacted "and it is hereby enacted that excepting co-partners of estates under Butwarrah who may have saved their shares from sale under sections 33 and 34, Regulation XIX, 1814, any recorded or unrecorded proprietor or co-partner, who may purchase in his own name or in the name of another the Estate of which he is proprietor or Co-partner, or who by re-purchase or otherwise may recover possession of the said estate after it has been sold for arrears under this Act; and likewise any purchaser of an estate sold for other arrears or demands than those accruing upon itself, shall by such purchase, acquire the estate subject to all its incumbrances existing at the time of sale, and shall not acquire any rights in respect to ryots and under-tenants which were not possessed by the previous proprietor at the time of the sale of the said estate." Section 9 of Act No. I of 1845 was as follows: "And it is hereby enacted, that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit from any part not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset as aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party so depositing, whose money shall have been credited to the estate in the manner aforesaid, shall be a plaintiff in a suit pending before a Court of justice for the possession of the same or any part hereof it shall be competent to the Judge of the zilla in which such estate is situated, to order the said party to be put into temporary possession of the said estate, subject to the rules in force for taking security in the cases of appellants and defendants. And if the party depositing whose money shall have been credited as aforesaid shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall [287] be entitled to recover the amount of the deposit with interest, from the proprietors of the said estate."

"Act No. XI of 1859 is an Act to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency." Section 9 of Act No. XI of 1859 is almost in terms similar to those of section 9 of Act No. I of 1845, except that it contains an addition in the following words: "And if the party so depositing, whose money shall have been credited as aforesaid, shall prove before such a Court that the deposit was necessary, in order to protect any lien he had on the estate or share or part thereof, the amount so credited shall be added to the amount of the original lien."

Act No. II of 1864 (Madras) is "an Act to consolidate the laws for the recovery of arrears of revenue in the Madras Presidency." By section 35 of that Act, when arrears of public revenue are paid by a tenant, he is entitled to deduct the amount paid from the rent then or afterwards due by him to the defaulter; and the arrears, "if paid by a *bona fide* mortgagee or other incumbrancer upon the estate, shall constitute a debt from the defaulter to him, and shall be a charge upon the land, but shall only take priority over other charges, according to the date at which the payment was made."

I have not sufficient information as to the tenures in the Presidency of Bombay to enable me to refer with any certainty to the provisions of Act No. V of 1879 (Bombay); but it appears from section 136 of that Act that when land-revenue for which the registered occupant or superior holder is primarily responsible to the Government is recovered from a

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co-occupant, co-sharer, inferior holder or person in actual possession of the land, such co-occupant, co-sharer, inferior holder or person in actual possession of the land does not obtain a charge, but is entitled to credit in account with the registered occupant or superior holder or with his landlord for the amount recovered from him.

I think it appears from Act No. I of 1845, Act No. XI of 1859, and Act No. XIX of 1873, Act No. II of 1864 (Madras) and, so far as I understand it, from Act No. V of 1879 (Bombay), that when [288] it was intended that there should be a charge or lien or any other protection in respect of a payment made in respect of arrears of land revenue the charge, lien or protection, as the case might be, was specifically given by legislative enactment.

The lien given in Lower Bengal by section 9 of Act No. XI of 1859, and that given in Madras by section 35 of Act No. II of 1864 (Madras) fall far short of the charge contended for here, which is a charge with priority over all previous mortgages and incumbrances. Further, the lien given by section 9 of Act No. XI of 1859 is only given when it is proved that the payment of the arrear was necessary in order to protect any already existing lien, and only entitles the party who obtains it to add the amount paid to the amount of his original lien. The charge given in Madras by section 35 of Act No. II of 1864 (Madras) is not given to any one except a *bona fide* mortgagee or incumbrancer upon the estate, and only takes priority over other charges according to the date at which the payment was made.

That any such charge as is contended for here would be at variance with the policy of the Government, at any rate as applied to these Provinces, is, I think, apparent from a consideration of sections 150 to 166 inclusive of Act No. XIX of 1873, and of section 171 of Act No. XII of 1881. Sections 150 to 166, inclusive, of Act No. XIX of 1873 show that it is the policy and intention of the Government that when its processes for the recovery of arrears of land revenue are put in action it is only when all the other processes fail that a sale of the immoveable property of the defaulter shall be resorted to. Section 171 of Act No. XII of 1881 shows that it is the intention of the Government that a sale of Immoveable property in execution of a decree of a Court of Revenue for the payment of arrears of rent or Revenue or of money under that Act shall not be resorted to unless satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor. Sections 322 to 324 inclusive of the Code of Civil Procedure afford further evidence of what the policy of the Government is. If the charge claimed in this case exists and can be [289] enforced, a lambardar or recorded co-sharer would on payment of an arrear of land-revenue on the day after it became due obtain a charge on immoveable property which he could proceed to enforce by obtaining a decree for sale of the immoveable property, and selling the immoveable property in execution of that decree, and would thus frustrate the obvious intention of the Government as disclosed in legislation that all other means shall be resorted to before an owner shall be deprived by sale of his holding unless he has by contract specifically mortgaged or charged the same with the payment of money and a decree thereon for sale has been passed.

I now intend to show that even if a lambardar or co-sharer does on payment of an arrear of land-revenue obtain by the application of any principle of equity a charge on the mahal or on any part of it, no means

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has been provided by which he can in these Provinces enforce such charge by a sale under a decree for sale of immoveable property, or obtain a declaration that he has such a charge or any right to any such charge.

The jurisdiction of Courts in these Provinces to entertain suits is conferred by legitlative enactment or by Regulation. There is no Regulation which applies in this case. If there is a jurisdiction in any Court to entertain this suit, assuming that section 13 of the Code of Civil Procedure does not apply to it, the jurisdiction must be found in the Code of Civil Procedure or in Act No. XII of 1881 (the North-Western Provinces Rent Act, 1881). If any section of the Code of Civil Procedure gives a Civil Court jurisdiction to entertain this suit it is section 11. Section 11, so far as it is material, is as follows:—

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force."

In order to ascertain if the cognizance by a Civil Court of this suit is barred by any enactment for the time being in force, we must turn to Act No. XII of 1881. The first paragraph of section [290] 93 of Act No. XII of 1881 is as follows:—"Except in the way of appeal, as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise." That is as distinct a prohibition as the Legislature could by any possible use of words have enacted. Not only does section 93 enact that the Courts of Revenue are to be the Courts of first instance for all suits of the nature mentioned in the section, but it prohibits any Court except a Court of Revenue, or a Court of Appeal as such sitting in Appeal from a Court of Revenue, from taking cognizance of *any dispute or matter* in which any such suit might be brought. Clause (*g*) of section 93 is as follows: "Suits by lambardars for arrears of Government revenue, payable through them by the co-sharers whom they represent, and for village expenses and other dues for which the co-sharers may be responsible to the lambardars." Clause (*k*) of section 93 is as follows: "Suits by recorded co-sharers to recover from a recorded co-sharer who defaults arrears of revenue paid by them on his account." It follows that no Court other than a Court of Revenue can as a Court of first instance take cognizance of a suit of the nature of a suit by a lambardar for arrears of Government revenue payable through him by the co-sharers whom he represents, or of a suit of the nature of a suit by a recorded co-sharer to recover from a recorded co-sharer who defaults arrears of revenue paid by him on account of such defaulter, *or of any dispute or matter* in which a suit of the nature mentioned in clause (*g*) or in clause (*k*) might be brought.

It cannot be contended that the dispute in this suit is not a dispute as to the recovery by the plaintiff of moneys paid by him as lambardar for arrears of Government revenue which were payable through him by the co-sharers whom he represented. The fact that the plaintiff seeks in this suit a decree or declaration that he is entitled to recover such moneys in a particular way or by a particular process does not make the dispute any the less a dispute of the nature which I have [291] mentioned, or any less a dispute in which a suit of the nature mentioned in clause (*g*) might be brought, although in a suit under clause (*g*) the plaintiff could not obtain the decree or declaration which he seeks to obtain in this suit, even if Seth Chitor

Mal had been a mortgagee in possession and a co-sharer at the time the arrears became due and were paid and could have been made a defendant to a suit under clause (*g*). Effect must be given to the words "dispute or matter" in section 93, as they were obviously inserted in that section with the object of limiting the jurisdiction of Civil Courts further than that jurisdiction would probably have been limited if the section had not contained those words, and had run as follows: "Except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any suit mentioned in this section, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act and not otherwise." If section 93 were so worded, it might be possible to contend successfully that as a suit under clause (*g*) is a suit in which a Court of Revenue could not give a decree for sale, or what is called sometimes an hypothecation decree, the jurisdiction of a Civil Court to entertain and determine this suit is not barred. I consequently come to the conclusion that section 93 of Act No. XII of 1881 bars the Civil Courts from taking cognizance of this suit and of any similar suit not authorized by section 181 of that Act to be brought in a Civil Court.

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This suit, as I shall presently show, is not a suit to which section 181 of Act No. XII of 1881 applies. It consequently remains to be seen whether a Court of Revenue in these Provinces could make a decree for sale of immoveable property in a suit by a lambardar or a recorded co-sharer, or could make a declaration that a lambardar or a recorded co-sharer, had a charge on immoveable property in respect of arrears of land-revenue paid by him.

It is obvious, from a consideration of Act No. XII of 1881, that a Court of revenue cannot make a decree ordering the sale of immoveable property, or a decree declaring a charge upon immoveable property. The whole procedure for executing a decree of a Court of [292] Revenue negatives the existence of any such jurisdiction in a Court of Revenue. The sections of Act No. XII of 1881 immediately dealing with the execution against immoveable property of a decree of a Court of Revenue for the payment of arrears of revenue or money commence with section 171. The provisions of sections 173, 174, 174-A, 175, and 176 are entirely at variance with the notion of the decree in execution being one for sale of immoveable property. Section 177 shows that where immoveable property is sold, it is sold not by force of a decree for sale, but under an order of the Board of Revenue in aid of a decree for money. If the Board of Revenue orders the property to be sold, section 177 enacts that "the sale shall be made under the rules in force for the sale of land for arrears of land-revenue, but without prejudice to the incumbrances (if any) to which such property may be subject." No words could show more conclusively than those which I have just quoted that a decree under clause (*g*) or under clause (*k*) of section 93 could not declare a priority of charge, or any charge, or create a right of charge, or operate as a charge. Beyond all doubt, as it appears to me, those words show that the charge which the Government has for arrears of land-revenue does not pass to the lambardar or co-sharer who pays the arrears. Section 178 enables a third party to appear before the Collector of the District or Assistant Collector and claim a right or interest to or in any of the property about to be sold under section 177. Sections 179 and 180 deal with the adjudication of the Collector or Assistant Collector on a claim made under section 178. Section 181 enacts "(*a*) No appeal shall lie

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from any order passed under section 179 or section 180 by the Collector of the district;

"(b) But the party against whom the same is passed may institute a suit in the Civil Court to establish his right at any time within one year from the date of the order;

"(c) Provided that, if the order be for the sale of the property taken in execution, and the property is moveable, the suit shall not be for the recovery of such property, but shall be for compensation from the judgment-creditor by whom it was brought to sale."

[293] No order under section 179 or section 180 of Act No. XII of 1881 was made against Shib Lal, and the result appears to me to be that no Court had jurisdiction to entertain this suit by him for a decree for sale of the immoveable property or for a declaration that he had or was entitled to a charge. Further, as any suit which Shib Lal could have brought for the recovery of arrears of land-revenue paid by him must necessarily, according to section 93 of Act No. XII of 1881 and section 11 of the Code of Civil Procedure, have been brought in a Court of Revenue and not in a Civil Court, and as a Court of Revenue has no jurisdiction to make a decree for sale of immoveable property, or a decree in execution of which immoveable property could be sold, to the prejudice of the incumbrances to which such property was subject, I fail to see how a Civil Court could in a suit authorized by section 181 of Act No. XII of 1881 or in any other suit for arrear of land-revenue make a declaration that a decree of a Court of Revenue operated as a decree for sale, or operated to create a charge, or could decree a sale of the immoveable property, to the prejudice of the incumbrances to which it was subject, or make any decree which could have that effect.

In a suit authorized by section 181 of Act No. XII of 1881 a Civil Court could decree that the immoveable property was or was not subject to the incumbrances or to the right or interest claimed by the objector who preferred his claim under section 178 of Act No. XII of 1881, and presumably could declare whether or not such right or interest was one which would disentitle the judgment-creditor from bringing the immoveable property to sale under section 177 of that Act.

It was contended that as questions of title to land are, as a rule, for a Civil Court and not for a Court of Revenue, this suit was maintainable in the Civil Court as it raised a question of title. That contention is based on an incorrect reading of Act No. XII of 1881 and on the assumption that in order to obtain the decision of a Civil Court on a question of proprietary title to land, it is necessary in all cases that a suit should be brought in the Civil Court.

[294] By section 189 of Act No. XII of 1881 an appeal lies to the Civil Court from the decision of a Collector or Assistant Collector of the 1st class in all suits mentioned in section 93, in which the proprietary title to land has been determined between parties making conflicting claims thereto. By section 183 of Act No. XII of 1881 an appeal lies to the Collector from all decisions of an Assistant Collector of the second class in suits mentioned in section 93. Under section 178, as we have seen, a third party may appear before the Collector or Assistant Collector and claim a right or interest to or in any of the property about to be sold in execution of a decree of a Court of Revenue, and under section 181 the party against whom an order of the Collector is passed under section 179 or section 180 may within one year from the date of the order institute his suit in a Civil Court to establish his right.

Seth Chitor Mal, the defendant-appellant here, whose claim was disallowed under section 179 of Act No. XII of 1881, brought in the Civil Court within 12 months of the order made against him his suit to establish his right, and obtained in that suit a decree which rightly or wrongly established his title against Shib Lal, the respondent here. That decree has become final, and I fail to see how it can be questioned in this suit, or how if this suit were otherwise maintainable any decree in this suit, which is between the same parties, could be passed which would detract from or interfere with the decree obtained by Seth Chitor Mal in his suit. Further, and apart altogether from any question arising under section 13 of the Code of Civil Procedure, there appear to me to be two grounds at least upon which this suit must fail. One of those grounds is that Shib Lal, the plaintiff-respondent here, having obtained in a Court of Revenue the only decree which that Court had jurisdiction to pass, seeks by this suit to have it executed by sale of immoveable property as if that immoveable property was not subject to the incumbrances of Seth Chitor Mal; in other words, Shib Lal is seeking a sale not authorized by section 177 of Act No. XII of 1881, which enacts that the sale under that section shall be made "without prejudice to the incumbrances (if any) to which such property may be subject." The [295] other ground to which I allude is that no order having been passed against Shib Lal, under section 179 or section 180 of Act No. XII of 1881, by the Collector of the District, Shib Lal has no right of suit under section 181, and so far as I am aware is not given under any other section or Act the right of suit which he contends for here.

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To sum up my views on this case, so far as legislation affects it or shows what was or was not the intention of the Legislature. In my opinion no Civil Court had jurisdiction to entertain this suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immoveable property could be sold to the prejudice of incumbrances to which it was subject. No such right of charge as is claimed here has been given or recognized in these Provinces by the Legislature, and any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments; and it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest by declaration or otherwise a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882. Such on this subject is my opinion of the effect and object of, and of the inferences to be drawn from, legislation, so far as these Provinces are concerned.

Holding the opinion which I have above expressed as to the effect of the legislation so far as these Provinces are concerned, it is hardly necessary for me to consider the abstract question as to whether a lambardar or co-sharer who, on behalf of a person who is a proprietor within the meaning of section 146 of Act No. XIX of 1873, or on behalf of any other person, pays his arrear of land-revenue can, except by reason of a contract with such proprietor or person, obtain or be entitled to, by subrogation or otherwise, a charge on immoveable property for money paid by him in satisfaction of land-revenue for the payment of which such property was liable. It is clear to my mind that a lambardar could not except by express legislation obtain the charge which the [296] Government has for arrears of land-revenue, for no means has been provided

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by which he or an assignee of such charge could enforce it. The means by which the Government can, under section 150 and the following sections of Act No. XIX of 1873, enforce its charge for arrears of land-revenue are entirely inapplicable in the case of a lambardar proceedings for the recovery of money paid by him in satisfaction of an arrear of land-revenue. So far as I am aware, the Government has no means of enforcing its charge for arrears of land-revenue as a charge upon the land other than those given to it by section 150 and the following sections of Act No. XIX of 1873.

A co-sharer to whom section 146 or section 148 of Act No. XIX of 1873 applies, who pays an arrear of land-revenue, his own share of the land-revenue, calculated as between himself and his co-sharers having been paid in due time, cannot in my opinion be treated as standing in the position of a surety to the Crown who has paid to the Crown the debt of his principal, for the land-revenue is payable out of the whole mahal and out of each and every part of it, and every co-sharer is severally in his capacity as a sharer or proprietor of a share or land in the Mahal, and not in the capacity of a surety for his co-sharer, liable for the whole of the land-revenue assessed upon the Mahal and for every part of it. It may be doubted whether section 69 or section 70 of the Indian Contract Act, 1872, applies to such a case, and it may be noticed that the illustration to section 69 is an example of a payment made by a person who, so far as appears from the illustration in that section, was not bound to make it. However that may be, a right, but not such a right of suit as is contended for in this case, is impliedly, if not expressly, given to a lambardar by clause (*g*) of section 93 of Act No. XII of 1881, against any person who was responsible for the payment of the arrear of land-revenue through the lambardar, and to a recorded co-sharer by clause (*k*) of that section against a recorded co-sharer who defaults for arrears of land-revenue paid on his account by the recorded co-sharer.

[297] It appears to me that a co-sharer or a lambardar who pays an arrear of land revenue to prevent the arrest and detention under section 152 of Act No. XIX of 1873, of a defaulter, or to prevent a sale under section 153 of a defaulter's moveable property, or to prevent an attachment under section 154 of a defaulter's share in which the paying co-sharer was not a co-sharer, could not, on any principle of equity or, except by express contract, obtain a charge in respect of his payment, as his interest could not be affected by any process which affected only his co-sharer's liberty or property, and consequently that the broad proposition that a lambardar or other co-sharer in these Provinces who pays an arrear of land-revenue primarily due by another co-sharer obtains a charge in respect of such payment by reason alone of such payment cannot be maintained in its integrity upon any considerations depending on Act No. XIX of 1873.

I fail to understand upon what principle of justice, equity or good conscience a lambardar or a co-sharer who, being liable as a debtor to Government, pays an arrear of land-revenue should be in a better position than would be a second mortgagee of the whole mahal who being in possession paid such an arrear out of his own pocket, the income of the mahal being insufficient for the purpose. Such a mortgagee, would by such a payment obtain no priority over the first mortgagee, and would only be entitled under section 72 of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, to add the money so paid to the principal

money of his mortgage, at the rate of interest payable on the principal, and where no such rate was fixed at the rate of 9 per cent. per annum.

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A Full Bench of the Calcutta High Court in *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) consisting of Mitter, Prinsep, Wilson, Tottenham, and Norris, JJ., held (Mitter and Norris, JJ., dissenting) that there is no general principle of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the [298] estate obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. Although I have held and expressed a contrary view as regards the rights of lambardars and co-sharers in these provinces, I am now, after mature consideration, of opinion that my view was unsound, and that the view expressed by the majority of the Calcutta High Court is correct on general principles, and that there is no such general principal of equity. I agree with the observations in that case (I. L. R. 14 Calc. at pages 827 and 828) of Wilson, J., on the dictum of their Lordships of the Privy Council in *Nugender Chunder Ghose* v. *Kaminee Dossee.*

Further, I may point out that there is no evidence on the record to show that any sale for arrears of land revenue was imminent or threatened, or that any proclamation of sale had been issued under section 169 of Act No. XIX of 1873, or even that any sale of any immoveable property was ever contemplated by the Collector, and that Shib Lal was not as lambardar or co-sharer intersted in the land or share in suit, and that if the mahal had been in danger, imminent or otherwise, of being sold under section 166 of Act No. XIX of 1873, he paid the arrear of land-revenue, not to save the land and shares in suit from being sold, but to save his own share as a co-sharer in the mahal from being sold as the share of a defaulter and part of the mahal.

The doctrine, which apparently had its origin in the Courts in Ireland, that a charge upon land may arise on the principle of Maritime Civil Salvage has, I think, been satisfactorily exploded as a principle of equity by the decisions of the English Courts in the cases of *Leslie* v. *French* (2) and *Falcke* v. *Scottish Imperial Insurance Co.* (3).

In my opinion no analogy can exist between the case of a salvor in Maritime Civil Salvage, and the case of a co-sharer in a mahal to whom section 146 or section 148 of Act No. XIX of 1873 [299] applies, for the first principle of Maritime Civil Salvage is that no one can be a salvor entitled to salvage whose legal duty it was to do the act by which the ship or cargo was saved. A salvor is defined by Lord Stowell to be a person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel (*per* Lord Stowell, *The Neptune*, Clark, 1 Hagg. Ad. 227, 236; Maclachlan's *Merchant Shipping*, 2nd ed. p. 570). Using the word "duty" in a sense other than that of legal duty, for the breach of which a Court could award damages, Lord Stowell in *The Waterloo*, Bird, 2 Dods. Ad. 433, 437, said: "It is the duty of all ships to give succour to others in distress, none but a freebooter would withhold it: but that does not discharge from liability to payment where assistance is substantially given." Although on principles

(1) 14 C. 809. (2) L.R. 23 Ch. D. 552. (3) L.R. 34 Ch. D. 234.

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of public policy salvage is allowed in maritime cases, I have never heard it suggested that a man who as a volunteer stops a horse running away with a cart, in which are goods of his and also goods of others liable to be damaged or destroyed, is entitled to a salvage lien; and yet according to the argument on behalf of Shib Lal such a volunteer would be entitled to a salvage lien on the horse, the cart and its contents.

Justice, equity, and good conscience are captivating terms; but before a Judge applies what may appear to him at first sight to be in accordance with justice, equity and good conscience, he must be careful to see that his views are based on sound general principles, and are not in conflict with the intentions of the Legislature or with sound principles recognized by authority. In my opinion justice, equity, and good conscience do not require us in India to go so far a field as the Irish Courts, in order there to seek for, and thence to import into India, novel principles of equity, based on unsound analogy, and rejected as unsound by Judges of such authority as Bowen and Fry, L.JJ., and not followed by such an authority as the late Lord Justice Cotton in *Falcke* v. *Scottish Imperial Iusurance Co.*, and which further are at variance with the Transfer of [300] Property Act, 1882, of the Indian Legislature, and with the policy of the Government as disclosed in its Legislative enactments.

In addition to the authorities to which I have referred, many other authorities were referred to in the course of the arguments; but as they do not show that the opinions expressed in them were arrived at after any critical examination of the legislative enactments bearing on the questions, and appear as a rule to have been based on a supposition that the novel principle, which I have mentioned, was a sound principle of equity, I have not thought it necessary to refer to them in my judgment.

On every view of this case I would allow these two appeals with costs, and dismiss the suit with costs in all Courts.

TYRRELL, J.—I fully concur in the judgment and decree of the Chief Justice.

KNOX, J.—I fully concur with the Chief Justice in the judgment and order proposed.

BLAIR, J.—I agree with the judgment and order proposed by the Chief Justice.

MAHMOOD, J.—I have had the advantage of perusing the judgment which the learned Chief Justice has prepared in this case, and the facts of the case are so lucidly stated therein that I have struck out of this Judgment what I had written on that part of the cases; and, indeed, I should have omitted the rest of this judgment also, had it not been that I find myself unfortunately unable to agree in the conclusions at which he has arrived on the questions of law which arise in this case.

This being so, it it necessary to appreciate exactly the points upon which most stress was laid in the argument before the Full Bench.

Now I understand that the argument of the parties raises the following questions for determination:—

(1) Whether, with reference to the decree obtained by the plaintiff from the Revenue Court on the 7th of April 1885, the present suit is barred by s. 43 of the Code of Civil Procedure?

[301] (2) Whether the decree obtained by the defendant Chitor Mal against the plaintiff from the Civil Court on the 4th September 1888, bars the present suit under s. 13 of the Code of Civil Procedure?

(1) L.R. 34 Ch. D. 234.

(3) Whether the payment of Government revenue by the plaintiff, lambardar, on behalf of his defaulting co-sharers, such as those whose rights the defendant Chhitar Mal has purchased, gives the plaintiff a charge by way of salvage or otherwise on the defaulting shares so as to enable him to enforce it against the purchaser in execution of hypothecation decrees enforcing prior mortgages such as the defendant Chhitar Mal in this case?

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Upon the *first* of these points I agree with the lower appellate Court in the view that the principle of the ruling of Stuart, C.J., and Straight, J., in *Banda Hasan* v. *Abadi Begam* (1) justifies the conclusion that the present suit was not barred by s. 43 of the Code of Civil Procedure. The plaintiff's suit in the Revenue Court, which ended in the decree of the 7th of April 1885, was a suit of the nature contemplated by clause (*g*) of s. 93 of the Rent Act (XII of 1881), and it could not have included any such relief as is prayed for in this suit. In the first place, the Revenue Courts have no jurisdiction to enforce any such charges as the plaintiff claims in this suit, and in the second place, suits of that nature do not contemplate intervention of third parties—that is to say, persons in the position of the present defendant-appellant, Chhitar Mal, who at the time was only a simple mortgage, *without* possession and was not a co-sharer, as his purchase was not made till 1887. I may here observe in passing that the joint liability of the co-sharers of a *mahal* for payment of Government revenue arises from the provisions of s. 146 of the Land Revenue Act (XIX of 1873), which originally did not impose any such liability upon any class of mortgagees, and even in the amendment of that section by s. 12 of Act VIII of 1879 the Legislature has limited the extension of such liability, by the *explanation*, to farmers and mortgagees in *possession*. It is, therefore, clear that to the revenue suit, which ended in the [302] decree of 7th of April 1885, the present defendant-appellant, Chhitar Mal, could not have been made a party-defendant, and it follows that the relief of enforcing a charge against him such as that claimed in this suit could not have formed part of the relief prayed for in that suit. The rule contained in s. 43 of the Code of Civil Procedure has therefore no application to the present case. And if it were necessary to pursue the subject further. I would explain in detail the principle of the Full Bench ruling of the Calcutta High Court in *Syed Eman Momtaz-ood-deen Mahomood* v. *Rajcoomar Dass* (2), which was apparently misunderstood in *Doss Money Dossee* v. *Jonmenjoy Mullick* (3), but again explained in a later Full Bench ruling by Garth, C.J., in *Jonmenjoy Mullick* v. *DossMoney Dossee* (4). These cases related to the effect of a summary decree obtained under the special provisions of s. 53 of the Registration Act (XX of 1866), which allowed by its procedure only simple money decrees upon registered mortgage bonds, and it was held that such a summary decree would not debar the mortgagee from seeking his further remedy by enforcing his lien where the mortgaged property had passed into the hands of third parties, against whom such lien was sought to be enforced. These rulings, indeed, go beyond the exigencies of this case, for there the mortgagee's remedy by the summary procedure of s. 53 of the Regulation Act (XX of 1866) was optional, and in the present case, by reason of the body of s. 93 of the Rent Act (XII of 1881), read with clause (*g*) of that section, the plaintiff, in his suit which ended in the decree of the 7th of April 1885, had no choice but to go to the Revenue Court with a plaint by which

(1) 4 A. 180. (2) 14 B.L.R. 408. (3) 3 C. 363. (4) 7 C. 714.

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he could not implead the defendant-appellant, Chhitar Mal, and by which he could not seek to enforce the charge now claimed against the defendant. The procedure of the Revenue Courts under the Rent Act (XII of 1881), in suits of the character described in s. 93 of that enactment is of a summary character, excluding consideration of the claims of third parties, and the jurisdiction thus conferred upon them is necessarily of a circumscribed character. But because the jurisdiction of such Courts is circum-[303]scribed, it does not follow that the jurisdiction of the Civil Courts under s. 11 of the Code of Civil Procedure is totally ousted. It is, of course, ousted to the extent of the express provisions of the enactment, but I hold that a suit like the present, where the relief prayed for could not have been entertained by the Revenue Court, there can be no ouster of jurisdiction, and since the case is thus entertainable for adjudication upon reliefs which could not have formed part of the revenue suit which ended in the decree of 7th of April 1885, there can be no plea based upon s. 43 of the Code of Civil Procedure which would bar this action.

Upon the *second* point also I agree with the Courts below in holding that the suit is not barred by the rule of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure. The plea was based upon the Civil Court's decree obtained by the defendant, Chhitar Mal, against the plaintiff on the 4th of September 1888, but that decree has not been produced in evidence in this suit, nor has the defendant filed copies of the pleadings of the parties in that suit. He has, however, produced an attested copy of the judgment which ended in that decree, and it shows that the main point for consideration before the Court in that case was whether the present plaintiff's Revenue Court's decree of the 7th of April 1885, could be so executed by proceeding in the Revenue Court as to subject the rights purchased by the present defendant, Chhitar Mal, to sale. The Court answered the question in the negative, following the ruling of Oldfield and Tyrrell, JJ., in *Lachman Singh* v. *Salig Ram* (1) and I wish to quote a passage from that judgment, as it not only deals with the point now under consideration, but will be introductory to what I am going to say upon the third and most important point in this case. Oldfield, J., said :—

"No doubt by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested therein for the sum paid, and this has been laid down by their Lordships of the Privy Council in *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (2), but that case is also an [304] authority for the view I take in this case, that a charge of this nature cannot be enforced under a decree which is merely a personal decree against the judgment-debtors, against whom it was passed by a Revenue Court not competent to do more than pass a personal decree. If the defendant wished to establish a charge against the property in the hands of the plaintiffs, he should have established the same by suit against them in a Court of competent jurisdiction."

What is sought to be enforced in this suit is the very remedy of enforcement of lien which the revenue Court could not have granted; for, as I have already explained, it was a matter entertainable only by the Civil Court. The suit therefore is not open to the objection of any pleas *in limine* such as want of jurisdiction, or such pleas as may be founded upon the provisions of ss. 13 and 43 of the Code of Civil Procedure.

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(1) 8 A. 384. (2) 11 M.I.A. 258.

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I proceed now to consider the *third* question in the case, as already enunciated by me in a somewhat concrete form with reference to the circumstances of this particular case; but that question is the same as that which in a more concise and abstract form was referred to a Full Bench of the Calcutta High Court by Wilson and O'Kinealy, JJ., in *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1), in which they formulated the question in the following words:—

"Where one or two co-sharers in a revenue-paying estate pays the whole revenue in order to save, and so does save, the estate, is he entitled to a charge upon the share of his co-sharer to the extent of the latter's share of the revenue as against a purchaser?"

In referring the question to the Full Bench, the learned Judges observed that "no such charge is given by any express statutory enactment," and to show the gravity of the question I may state here in passing that the Full Bench which had to consider the question consisted of five Judges who were not unanimous in their answer, Mitter and Norris, JJ., answering the question in the affirmative, and Wilson, Prinsep and Tottenham, JJ., answering the question in the negative. Since the same difficulty has arisen in this Court, it would scarcely be enough for me, sitting here as a member [305] of the Full Bench, to content myself by saying that I agree in the principles upon which the judgment of Mitter, J., concurred in by Norris, J., proceeded in that case. I shall therefore deal with the question, not of course as *res integra*, but at greater length than would be necessary if there was no conflict of decision.

It seems that in the argument before the Full Bench of the Calcutta High Court in the case above cited, as also in the case before Cotton, Bowen and Fry, L.JJ., in *Falcke* v. *Scottish Imperial Insurance Company* (2), the expression "*salvage*" or "*salvage lien*" was employed for purposes of representing a charge such as the one claimed by the plaintiffs in this suit. In the Calcutta Full Bench case, as also in the English case just mentioned, the use of the term was disapproved, since Wilson, J., in the Calcutta case, following Bowen, L.J., in the English case, held that "*salvage*" or "*salvage lien*" were limited to maritime law, and that such a doctrine did not apply to any matters which did not arise out of the perils of the sea. Into the discussion of this question it will presently be my duty to enter; but I may say here in passing that I agree in what has been said by Dr. Rashbehary Ghose with reference to certain legislative enactments which proceed upon the doctrine of salvage other than "*maritime*" salvage. Referring to these enactments the learned author observes:—

"These enactments rest upon a plain principle of equity, the charges created by them being recognized in most systems of law under the name of *salvage liens*, an expression not wholly useless nor absolutely misleading, and conveying, notwithstanding the recent protest of an eminent English Judge, a definite meaning, a recommendation not always possessed by some of even the most familiar terms in the English law. (*Law of mortgage in India*, 2nd edition, page 316.)

With these remarks, I have already said, I concur, and, if it is a true proposition of our Indian law, as distinguished from the English or other systems, that the doctrine of salvage is limited to the perils of the sea, or what I may call the *maritime* salvage, then it must at once be conceded, as was held by Wilson, J., and two other [306] of learned Judges in the Calcutta Full Bench case following the dictum of Bowen, L.J.

(1) 14 C. 809. (2) L.R. 34 Ch. D. 234.

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in the English case abvementioned, that the plaintiff must fail in this suit.

This renders it necessary for me to consider in the *first* place, what the exact notion of the doctrine of *salvage* is in the English law, and in the *next* place to ascertain upon what principle it is based. Salvage is well defined by a modern writer on the present laws of England in the following words :—

"*Salvage* is a compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or when wrecked on the coast of the sea or on a public navigable river or lake, where interstate or foreign commerce is carried on. The amount of the compensation rests in the sound discretion of the Court upon a full consideration all the facts of the case." (*Commentaries on the present Laws of England* by Brett, Vol. II, p. 1068.)

This being so, I will before proceeding further, and at the risk of prolixity, quote a passage from the judgment of Lord Justice Bowen in *Falcke* v. *Scottish Imperial Insurance Company* (1) which deals with the theory of salvage in the English law. The passage runs as follows :—

"The general principle, is beyond all question, that work and labour done, or money expended, by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be enforced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mentioned it because the word 'salvage' has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the respondents. With regard to salvage, general average and contribution, the maritime law differs from the common law. That has been [307] so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

That this is a correct enunciation of the English *maritime* law of salvage I have no doubt. But, with all the profound respect which is due to the dicta of Lord Justice Bowen, I may say that there is nothing by way of distinction shown or explained by his Lordship why the same principle should not apply to similar perils on the land, and perhaps of a worse nature than any perils which arise in the sea. There is no juristic reason explained in the judgment, and sitting here as Judge, bound neither by the techinicalities of the English Common Law nor by technicalities of the rules of Chancery in England, I am free to ask myself the question why this doctrine of salvage lien is limited by the English Courts to perils of the sea as distinguished from the perils of the land. As an Indian Judge and a member of a Court which deals with disputes of parties living in a land the vast majority of whose inhabitants have never seen the sea, and are therefore not in a position to appreciate the dangers arising out of the upheaval of the billows of the ocean, I find it difficult to accept over

(1) L.R. 34 Ch. D. 234, *vide* p. 248.

questions of maritime salvage liens that any such sanctity can be attached to the perils of the sea as to place them upon a separate juristic footing from similar perils which arise on the land. As I understand Lord Justice Bowen's dictum in the case which I have cited, the man who saved a vessel from sinking would be entitled to a salvage lien because this would be a peril of the sea, but a person who saved Pompeii from destruction by the eruption of Mount Vesuvius at the risk of his life and at the expenditure of his money would not be entitled to such a salvage lien, because the eruption took place on land and not in the sea, and it follows from that dictum that the dangers of the sea for purposes [308] of the doctrine of salvage rest on a far higher footing than the perils of fire or earthquakes which occur upon land.

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That such is the doctrine of English law, I accept to be a true proposition, for Lord Justice Bowen, in ending the passage which I have already quoted, said, with reference to salvage as to the perils of the sea :—"No similar doctrine applies to things lost upon land, nor to anything except ships or goods in perils at sea :—" and if I felt myself bound by the English law in administering justice in this case, I should have held as easily as was held by Wilson, J., in the Full Bench case of the Calcutta High Court, *Kinu Ram Dass* v. *Muzaffar Hosain Shaha* (1) that the plaintiff's case in a suit of this character must fail.

But with all the respect which is due to the evolution of juristic principles by the English Courts of Justice, and with all the respect which is due to eminent Judges who have presided in those Courts, I have not before me even one authority or one judgment cited which would furnish me with any juristic reason for supposing that the perils of the sea upon which the English doctrine of salvage is based are in all conditions greater than the perils of the land. It is of course natural to suppose that in sea-girt countries like England or other maritime countries like the Ionian Islands the terrors of the sea with its storms and the billows of the ocean may present a spectable to the inhabitants of the islands and the maritime countries with a sensation of greater sanctity and effect than much greater perils that sometimes arise on the land whether by the act of Nature, by accident or by the effect of stringent legislative enactments which must be obeyed.

I do not take the instructive passage of Lord Justice Bowen's judgment in *Falcke* v. *Scottish Imperial Insurance Company* (2) in any sense other than showing what the English law, as a matter of fact, is upon the subject of salvage, and as such I adopt it.

But I respectfully think the English law upon the subject is an unreasonable law as far as it restricts the salutary doctrine of salvage purely to maritime salvages. I have endeavoured to ascer-[309]tain the historical origin of this limited form by the doctrine of salvage. Sir Patrick Colquhoun's *Roman Civil Law* (s. 977, Vol. II, p. 44) has the following :—

"The Rhodians were a maritime nation in the height of prosperity long before the Romans occupied themselves with such matters. The Romans incorporated many of the Rhodian laws into their own Codes. Harmenopulos tells us that most of these laws were very ancient, and Strabo speaks of the Rhodians as possessing the empire of the sea. Should a ship be stranded or cast away, every one must save as much of his property as he can, as in case of a fire; thus, as has been above remarked, it is not to be inferred that he who throws things overboard for the purpose

(1) 14 C. 809. (2) L.R. 34 Ch. D. 234, *vide* p. 248.

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of lightening the vessel intends to abandon them after the fashion of a derelict, but is to be likened to a man overladen with too heavy a burden, who might put part of it down by the roadside and return afterwards with others to fetch the remainder."

In the same section (977) the same learned author states :—

"The law which regulated the question of lightening a ship under pressure of necessity was the *lex Rhodia de jactu*, which requires a passing notice in this place. It was provided in s. 8 of that law that goods thrown overboard were not derelicts, but still belonged to the former owner, and this was the adopted maritime law of Rome. Every one who by damage to his own property on shipboard shall have saved that of another, can demand an appropriate indemnification of *salvage*, for the recovery of which an action can only be brought against the master of the vessel, who was bound to procure for the loser *salvage* from those whose goods had been preserved. The greater part of the provisions of this law relate to similar contributions and indemnifications, under certain circumstances, respecting goods thrown overboard and damage done to the vessel."

How this rule gradually affected the English law as to wrecks is described in the next section (s. 978) of the same work, but it is needless to go into the details of that history. However, before [310] proceeding any further, I wish to quote a passage from another learned author, Sir Robert Phillimore, who in his celebrated work on International Law, Vol. IV, s. DCCCXXVIII, has the following :—

"When the preservation of the ship has required the throwing overboard or sacrifice of a portion of the goods, *equity demands* that a general contribution be made by all towards a loss sustained by some for the benefit of all, and this is called in England by the name of *general average*." And then after stating that "the law on this subject was transplanted from the Maritime Code of Rhodes into the Roman Law," the learned author goes on to say that, "the principle of this rule has been adopted by all commercial nations, but with considerable variation in practice as to the kind of losses which demand its application and as to the nature of the interests compellable to contribute." Before making any observations of my own, I wish to point out that Sir Robert Phillimore distinctly, in the passage which I have quoted, rests the English Law doctrine of *general average* on equitable considerations, and it is therefore necessary to ascertain the exact scope of the notion of *general average* in English law. I again resort to Brett's *Commentaries on the present Laws of England* (Vol. I, p. 271), where the author has the following :—

"General average is a contribution by the owners of the ship, freight and charge to compensate the owner of a particular part of the ship or cargo, whose property was sacrificed for their common good, *ex. gr.*, a *jettison* of cargo. The whole adventure must have been in imminent danger of being lost for a right to *general average* to exist, for the sacrifice must have been for the general good."

Now, whatever distinction in matters of detail may exist between *maritime salvage* and *general average*, as understood in maritime law, one thing is certain, that, failing statutory provisions, they must rest upon one common footing. The origin of these liens appears to be more ancient than any statute law in England, for these notions are based, as the authorities show, upon the customs of the inhabitants of Rhodes, an island of Asiatic Turkey, near the [311] coast of Asia Minor, 36 miles long, with a breadth of 18 miles at its widest part and consisting of an area of 420 square miles, and situate in the Mediterranean Sea, so close to the islands of

Greece that it must have been affected by the Greek superstition as to *Oceanus.* "A powerful deity of the sea, who, according to Homer, was father of all the gods." The Romans, as the history of law shows, borrowed these doctrines from the Rhodians, and from the Romans the doctrine was borrowed by England along with other maritime countries with certain variations and limitations which Sir Robert Phillimore has explained.

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The question then is, whether we in India are to hold that, because England, with her sea-girt shores, has chosen to adopt the Rhodian principle of salvage, limiting it to the perils of the sea, and excluding the doctrine of salvage as resting upon a higher footing of equity than the perils arising out of the waves of the ocean, we are bound to adopt such a limitation, which, I respectfully think, is based in its historical origin on ancient maritime superstition.

My answer to the question must necessarily rest upon my ascertaining first of all what my duty as a Judge is under the law which I am called upon to administer. I agree with what was said by Wilson, J., in *Kinu Ram Dos* v. *Mozaffer Hosain Shaha* (1) that there is no "*expres statutory enactment*" providing a charge such as that claimed in this case. But, whilst conceding this, I may also observe in passing that my endeavours have been futile in ascertaining whether the English law of *maritime* salvage, restricted as that salvage is to the perils of the sea, had its origin in any statute law in England. Nor have I been able to ascertain whether the common law doctrine of implied contracts, with all its requisite fictions as to request, had its origin in any statute law.

Now, the provisions of s. 37 of the Civil Courts Act (XII of 1887), reproducing as they do much earlier provisions of statute law, are clear in laying down that, with the exception of certain branches of the Hindu and the Muhammadan law, the Courts are to follow legislative enactments, and in cases not provided for by such enact-**[312]**ments, "the Court shall act according to justice, equity and good conscience." This much was indeed conceded by Wilson, J., in the Full Bench case just mentioned; but the learned Judge went on to say towards the end of his judgment:—"We are not, under these circumstances, in my opinion, at liberty to treat the matter as if it were *res integra*, and under the name of equity and good conscience to adopt whatever rule we think most likely to work well."

It is perfectly true that in dealing with questions not covered by *express* legislative provisions the Judge must not forget that he is a Judge and not a legislator. But it is equally true that a Judge sitting in one country is not to administer the laws of another country. To the English system of jurisprudence, common law and the principles of equity administered in the Courts of Chancery in England, India owes a vast debt of gratitude for the improvements in the administration of justice. How far the principles of the English system have been imported into India is apparent not only from our Statute book, but also from the vast body of decided cases, which I may describe as judge-made law. Notions of justice, equity and good conscience are necessarily incapable of exact and exhaustive definition; and in administering them the Judge has to take exceptional care whether he is or is not importing foreign notions too far, or giving too much preference to the notions of equity in one country over the notions of another.

(1) 14 C. 809.

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I have already endeavoured to describe what in my opinion is the origin and history of *maritime* salvage in England. I have also said that I have been unable to find in the English cases cited any juristic exposition of the reasons why *maritime* salvage should be the only kind of slavage recognized by the courts. Lord Justice Bowen, in the passage which I have already quoted from his judgment in *Falcke* v. *Scottish Imperial Insurance Company* (1) states that the special supremacy of maritime slavages over any other class of slavages that may exist (notwithstanding their repudiation by the English law) rests upon public policy for the advantage of trade and the nature of sea perils. That such [313] a rule rests upon sound considerations of equity I have no doubt. But why that equity should stop at the sea-shore, I frankly and respectfully confess I am unable to conceive, for I cannot help feeling that doctrines of equity are no more governed by the peculiarities of the sea than by the peculiarities of the land. A legislative enactment may indeed modify the operation of equitable doctrines by restricting them either to the sea or to the land, but, as I have already said, in British India no such legislative interference has taken place, and so far as this part of the country is concerned, the broad principles of equity, justice and good conscience must prevail under statutory mandate, regardless of foreign systems, though of course they may be referred to for purposes of comparison.

In this connection it becomes necessary to investigate whether the doctrine of salvage itself (irrespective of any considerations as to lien) has not a broader foundation in equity than the perils of the sea, or the grounds restricted by the English *maritime* law of salvage. I will quote from a jurist of as great eminence as Jeremy Bentham.—

"A surgeon has bestowed his services upon a sick man who had lost his senses and who was not in a condition to ask for assistance. A depository, though not requested to do so, has employed his labour, or has made pecuniary advances for the preservation of a deposit. A man has exposed himself in a fire to save valuable property or to rescue persons in danger. The effects of a passenger have been thrown overboard to lighten the ship and to preserve the rest of the cargo. In all these cases, and in a thousand others which might be cited, the laws ought to insure a recompense equivalent to the value of the services. This title to indemnity is founded upon the best reasons. Grant it, and he by whom it is furnished will still be a gainer; refuse it, and you leave him who has done the service in a condition of loss. It is a promise of indemnity made beforehand to every man who may have the power of rendering a burdensome service, in order that a prudent regard to his own personal interest may not come into opposition with his benevolence." And then the author, whilst laying down [314] this general juristic foundation of the rule of equity, goes on to say :—"Three precautions must be observed in arranging the interest of the two parties. *First* to prevent a hypocritical generosity from converting itself into tyranny and exacting the price of a service which would not have been accepted had it not been supposed disinterested. *Secondly* not to authorise a mercenary zeal to snatch rewards for services which the person obliged might have rendered to himself or have obtained elsewhere at a less cost. *Thirdly* not to suffer a man to be overwhelmed by a crowd of helpers who cannot be fully indemnified without counterbalancing by

(1) L.R. 34 Ch. D. 234, *vide* p. 248.

an equivalent loss the whole advantage of the service." (Bentham's *Theory of Legislation*, Hildreth edition, pp. 191-92.) 1892 JUNE 29.

Another passage from a more modern jurist needs quotation before I proceed to discuss the Indian Law. I quote from Professor Holland's work on Jurisprudence (p. 169) :— FULL BENCH.

According to Roman law a *negotiorum gestor*, or person who volunteered to render some necessary service to property in the absence of its owner, had a claim to be compensated by the owner for the trouble he had taken, and the owner had also a claim for any loss which had resulted from the interference of the *negotiorum gestor*. Of a similar character are the rights given by English law to the salvors of ships in distress and recaptors of ships which have been made prize by the enemy, and to those who have applied necessaries to persons who, being lunatics or in a state of drunkenness, were incapable of binding themselves by contract." 14 A. 273 (F.B.) = 12 A.W.N. (1892) 117.

I have quoted from Jeremy Bentham and Professor Holland for the purposes of maintaining the proposition, which I hold, that in jurisprudence the fundamental doctrine of salvage is neither limited to the perils of the sea nor to any particular class of perils, but that it is based upon sound foundations of the doctrines of equity. *Maritime* salvage as understood in the English law, is only a *species* of the *genus*, and if England or other maritime countries restrict themselves to one or more species of salvage it does not follow [315] that other countries which are not maritime, like the territories over which this Court exercises jurisdiction, should limit themselves to any species of salvage adopted by maritime countries to the exclusion of other species of salvage falling under the general genus of the equitable doctrine.

I will now consider how far this fundamental principle has been accepted by the Indian Legislature. In order to avoid the complications arising out of the fictions of English law in such cases, Sir Fitz-James Stephen's Contract Act (IX of 1872) in Chapter V, deals with what are called implied contracts in English law under a general category of "*certain relations resembling those created by contract.*" The first of these sections (s. 68) deals with necessaries supplied to persons incapable of contracting, and the next section is more to the point here, because it lays down the general proposition of equity as much as of law, "that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other." That the doctrine is shared by the English common law with equity is certain, and the difference, if any, lies in the fact that the common law relies upon fictions of implied requests, while equity jurisprudence is independent of such fictions. This section 69 of the Contract Act is specially important in this case because of the *Illustration* which is appended to it, which runs as follows :—

"B holds land in Bengal on a lease granted by A, the zemindar. The revenue payable by A to the Government being in arrear, his land is advertized for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid."

I shall later on have to refer to this s. 69 of the Contract Act, as also to the *Illustration* which I have just quoted. But meanwhile I must proceed to show that the next section (s. 70) of the chapter deals with the

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obligation of persons enjoying benefits of [316] non-gratuitous acts, and to that section is appended *Illustration* (*b*), which runs as follows :—

"A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously."

I have quoted this in passing to show that salvage from the dangers of the fire, as distinguished from the perils of the sea, may possibly be recognized, though the *Illustration* limits itself to the case of a salvor who "intended to act gratuitously," and though there is no *Illustration* appended to the section applicable to the case of a person who, though a volunteer, does *not* intend to act gratuitously, but incurs risk of life and expense to save property from imminent danger from fire. The remaining two sections of the chapter of the Contract Act (ss. 71 and 72) are unimportant for the considerations of the questions which arise in this case.

In order to guard against being misunderstood I must here observe that in discussing the questions from Jeremy Bentham and Professor Holland, as also the sections of the Contract Act, I have used the word *salvage* and *salvor* in their broad juristic sense as distinguished from maritime salvage with its peculiar restrictions, incidents and rules. Further, I have used the words as *not necessarily* implying a *lien* upon any specific property, so that, according to my notions, there may be a right of simple salvage *without* a lien and also a salvage *with a lien*. I must also add that in using these terms I bear in mind the distinction between a mere volunteer who officiously renders service, or incurs expense to save the property of another, and a person who in order to save his own property makes payments which another is bound by law to pay to save his property.

Bearing these distinctions in mind, it would be a useless task for the purposes of this case to enter unto a disquisition as to the question in what cases a mere volunteer may be entitled to simple salvage without lien, and in what cases he would be entitled to salvage with lien. It is enough to say that these matters in any case must depend upon some doctrine of equity, for the English [317] common law theory of implied requests has, I hope, been abandoned by jurists by this time as a fiction.

What we are concerned with here is not the case of a mere volunteer who acts officiously, but the case of a person who, impelled by necessity under the stringent rules of the revenue law, has made payments the default of which would imperil not only his own property but also the property of others. The question being thus limited, it is important to ascertain the exact nature of the peril from which the plaintiff saved the property in suit against which he seeks to enforce his charge, which I call salvage lien. The statute law upon the subject is clear so far as it delineates the nature of the peril and the liability. S. 146 of the land Revenue Act (XIX of 1873) provides that "in the case of every *mahal* the entire *mahal* and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the *mahal*." The next (s. 147) provides as to the times and places for payment of such revenue, and s. 148 declares that any sum not so paid becomes thereupon an arrear of revenue, and the persons responsible for it become defaulters." Then follows s. 149, which lays down that "a statement of account certified by the *Tahsildar* shall be *conclusive evidence* of the existence of the arrear, of its amount, and of the person who is the defaulter. This seems drastic enough, conferring as it does upon the certificate of an executive officer the importance of conclusiveness which

it would not enjoy in a Court of justice under the ordinary rules of evidence. What follows is even more important and more drastic, namely, the provisions of s 150, which I will quote in full, relating to process for recovery of arrears of revenue. The section runs as follows :— 1892 JUNE 29.

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An arrear of revenue may be recovered by the following processes :—

(a) by serving a writ of demand (*dastak*) on any of the defaulters;
(b) by arrest and detention of his person;
[318] (c) by distress and sale of his moveable property;
(d) by attachment of the share or *patti* or *mahal* in respect of which the arrear is due;
(e) by transfer of such share or *patti* to a solvent co-sharer in the *mahal*;
(f) by annulment of the settlement of such *patti* or of the whole *mahal*;
(g) by sale of such *patti* or of the whole *mahal*;
(h) by sale of other immoveable property of the defaulter."

I will not here discuss the question whether these perils are not greater than the perils of the sea, or at least equally great to invoke the aid of equity, which must necessarily be, even in ancient times, the foundation of the doctrine of salvage and general average as understood by the maritime countries of Europe. A sinking ship may sink if the salvor does not appear, but it may also escape sinking even if the salvor was not there, and, even if there, did not choose to run the risks and incur the expense of saving a sinking vessel by offering his officious services. But a joint estate such as that contemplated by s. 146 in our zemindari tenures must sink (not unlike a ship into the depth of the ocean) into vanishment by dint of the law and its drastic rules as contained in s. 150 of the enactment. Passing by the peril indicated by clause (b) of that section—namely, or "arrest and detention of his person" (which I suppose would not be regarded as wrongful confinement, especially as the *Tahsildar's* certificate under s. 149 as to the existence of the arrear and of its amount would be conclusive evidence), I refer to the peril indicated in clause (g) of the section, and also by clause (h) which follows it.

The point contemplated by clause (g) of s. 150 is represented by what may happen under s. 166 of the Act, the body of which section I wish to quote, leaving out the provisos, which have no application to this case. The section itself prescribes the following rule :—

" When an arrear of land revenue has become due and the Collector of the district is of opinion that the other processes herein-[319] before provided are not sufficient for the recovery of such arrear, he may, in addition to, or instead of, all or any of such other processes and subject to the provision hereinafter contained, and with the previous sanction of the Board, sell by auction the *patti* or *mahal* in respect of which such arrear is due."

Then comes the most important section of the enactment for the purposes of this case, of which I must quote the body, leaving out again the latter part of it, which has no application to this case. Referring to the preceding section, namely, s. 166, which I have already quoted, the enactment in s. 167 goes on to say :—

" Land sold under the last preceding section shall be sold *free of all incumbrances*, and all grants and contracts previously made by any person other than the purchaser in respect of such land shall become void as against the purchaser at the auction sale."

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These provisions of law leave no doubt in my mind that the Legislature, for reasons of public policy and public weal, rendered land-revenue payable by zamindari estates the *first and most paramount* charge upon the land, that in order to secure its punctual payment especially drastic provisions have been made, to such an extent that the effect may be briefly stated to be that neither the person nor the property of the zamindar can escape serious jeopardy whenever default of the payment of revenue takes place. Drastic as these provisions may seem at first sight, they are based upon sound public policy and principles of good government in an agricultural country like India. Historically these provisions, which are sometimes reproachfully called oppressive, do not owe their origin to the British rule, but are traceable to the principles of land revenue administration inaugurated by the Emperor Akbar, who has well been called the Muhammadan Augustus Cæsar of India. The British rule in adopting and improving those principles has proceeded upon sound considerations of public policy and good government quite as important as the public policy of maritime salvage, and they have worked with success.

I have dwelt upon this aspect of the matter at such length in order to point out that Lord Justice Bowen in his judgment, from [320] which I have quoted, does not rest the doctrine of *maritime* salvage upon any higher footing than "the purposes of public policy and the advantage of trade," and to these he adds "the nature of sea perils and the fact that the thing saved was saved under great stress and exceptional circumstances." Now, this being so, I hope I have said enough to indicate that whilst for maritime countries whose manufactures and commerce depend largely upon the safety of ships and cargo, so as to give a good foundation for rendering such safety an exception to the general rule, in an agricultural and non-maritime country, like the territories within the jurisdiction of this Court, similar considerations of public policy suggest that the rules of equity upon which in their origin the doctrines of maritime salvage and general average are based should be applied to promote the security which the state possesses under the law for collection of land revenue. That security enhances in proportion to the security given to the *lambardar* for recovery of money paid by him as arrears of Government revenue on behalf of his defaulting co-sharers. I wish to say again that in this case no exigency arises to deal with the case of a mere volunteer, but with the case of a person such as the plaintiff, who in order to obey the drastic rules of law as to the collection of land revenue not only saved himself but also the property and persons of his defaulting co-sharers. I find myself unable to understand why under such conditions the position of a salvor (I again use the word in its broadest juristic sense) such as the plaintiff should be rested upon a lower footing than that of a salvor from the perils of the sea, who officiously and even without the fiction of implied request saves a ship from sinking.

It has been urged, and I think the argument must be carefully considered, that whilst the statute law as contained in the Land Revenue Act (XIX of 1873) contains drastic rules for collection of land revenue, imperilling the liberty and property of the owner in a joint zamindari estate, it is totally silent as to any lien in favour of the *lambardar* or other co-sharer who makes payment of Government revenue on behalf of his defaulting co-sharers, thus saving them and their property from the drastic consequences contemplated by s. 150 [321] of the Act. This is so, and upon this circumstance it has been ingeniously contended that the only remedy which the law awards to a salvor

(I again use the word in its broad juristic sense), such as the plaintiff, is provided by clause (*g*) or clause (*k*) of s. 93 of the Rent Act (XII of 1881), and that since that enactment neither empowers the Revenue Court to deal with questions of lien, nor can such decrees as the plaintiff obtained on the 7th of April 1885, against the defaulting co-sharers be executed as decrees enforcing such liens, therefore the Legislature intended to abrogate the doctrines of equity which, independent of legislative enactment, exist as a rule of decision unless they are expressly abrogated.

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It is perfectly true, as I have already said, following the doctrine of Wilson, J., in the Full Bench case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1), that "no such charge is given by any express statutory enactment." Whatever enactments Wilson, J., had to consider with reference to Lower Bengal, the same observation applies also to our statute law —namely, the Rent Act (XII of 1881) and the Revenue Act (XIX of 1873).

But what are we to gather from the silence of the Legislature? As I understand the rules of the interpretation of statutes, there is no more reason for holding that the Legislature by its silence intended to abrogate any doctrine of equity than there would be for holding that there is no law of torts in British India because the Legislature has not yet enacted upon the subject. And one thing is certain, that so long as s. 37 of the Civil Courts Act (XII of 1887) is allowed to stand in the Statute book of the land (as I hope it will always do), the rule of "*justice, equity and good conscience*" must apply to all cases where there is no legislative enactment one way or the other. Further, that rule, as I understand it, does not mean that we are to disregard the special conditions of the country where it is applied, the principles upon which the laws of that country proceed, and I have no doubt that it does not authorise the importation in a rigid form either of the common law of England or any technical rules of the Courts of Chancery there. Much less is it possible for me to hold [322] that the limitations imposed by the maritime law of England or any other maritime country (partial as such countries naturally must be towards attaching importance to sea perils and perils to commerce) upon the general doctrines of equity (which are as independent of the breezes of the ocean as of the hot winds of India) are to be bodily imported into an agricultural country such as this part of India.

It is now important, before I conclude, to discuss the case-law upon the subject, taking the judgments of Mitter, J., and Wilson, J., in the Full Bench case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) as the starting point of such a discussion. I say so, because in that case the point now under consideration was exactly the point then under consideration, and the Full Bench of five Judges was divided by a majority of three against two, one of the learned Judges of the majority resiling from the views which he had on former occasions expressed in a judgment of his own.

Under these conditions I cannot refrain, at the risk of prolixity, from quoting a whole passage from Dr. Rashbehari Ghose's *Law of Mortgage in India* (2nd ed., p. 318), not only because I fully concur in it, but also because it will be introductory to what will follow in this judgment. The learned author says:—

"Co-parcenary being the rule in India, it is certainly very desirable that the rights and liabilities of co-parceners should be clearly defined, and yet there are perhaps few portions of Anglo-Indian law which are so deservedly open to the reproach of uncertainty. I do not refer here

(1) 14 C. 809, *vide* p. 812.

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to matters which must be governed by the personal law of the parties, but to those altogether outside the pale of that law and regulated either by statute or by the general principles of justice, equity and good conscience, which 'high-sounding phrases' only too often mean an exact reproduction and not a careful adaptation of English law. The Indian Legislature has, it is true, occasionally in dealing with certain special matters embodied in the Statute book some of the general principles of equity, but the result of such fragmentary legislation has been not to assist but [323] rather to embarrass our Judges in applying such principles in analogous cases not governed by statute law. A complete code artistically arranged is, no doubt, a triumph of legislative skill. But a sincere, and indeed fervent, advocacy of legislation proper, as distinguished from judge-made law, is perfectly consistent with a wholesome distrust of the beneficial effect of piece-meal legislation, or, as it has been sometimes irreverently called, legislative tinkering. I cannot find better illustration of what I mean than the recent case of *Kinu Ram Das* v. *Mozaffer Hosain* (1) in which a majority of the Judges came to the conclusion that a part-owner is not entitled to a charge upon the share of his co-sharer for land revenue paid by such co-sharer as against a purchaser whether with or without notice. It seems to me extremely doubtful, however, whether this conclusion would have been arrived at if the matter had been free from the entanglement created by the provisions of an Act which, while laying down the procedure regulating sales of arrears of revenue, incidentally gives a right of this kind to a *mortgagee*, but is wholly silent as to the rights of a part-owner. The inference which was drawn by a majority of the learned judges from the silence of the Legislature was that a *mortgagee* alone was entitled to the benefit of a lien."

Now it is important to consider why in the Calcutta Full Bench case Wilson, J., for whose rulings I have always entertained high respect, limited the lien to the case of a mortgagee only. He had before him the Bengal Revenue Sales Act (XI of 1859), and the latter part of his judgment is devoted to the interpretation of s. 9 of that enactment, which, whilst declaring a lien in favour of a mortgagee, is silent as to any such lien in favour of co-sharers paying arrears of revenue on behalf of the defaulters. He had no doubt in his mind the maxim *expressio unius est exclusio alterius*, and then applying the maxim to the enactment before him arrived at the conclusion that because a lien was expressly declared in favour of mortgagees, and no such declaration was made in favour of co-sharers, therefore no such lien in favour of the latter existed. In this view he was confirmed by what he says:—"The corresponding [324] s. 9 of Act I of 1845 was in similar terms, except that it did not contain the last clause about lien." As to so much of his judgment, therefore, as proceeds upon the interpretation of statutes applicable only to Lower Bengal, much need not be said, because those enactments are not in force in this part of the country. What is important to consider are his views as to the general principles upon which his judgment proceeds. The learned Judge, after referring to the enactments, concedes an important principle when he says:—

"It could not of course be contended that an enactment which purports expressly to confer a narrow and limited right, of necessity excludes a larger right, if the existence of the larger right is clearly established apart from the special enactment." So far I fully concur with the learned

(1) 14 C. 809.

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Judge, and it is important to consider why he did not act upon that general principle. As a qualification of that general principle he goes on to say :—

"But where the existence of a larger right is not clear, but highly doubtful, I think the express creation of the narrower right tends strongly to negative the existence of the larger."

Now on this part of the judgment I wish to make only two observations with due respect. *First*, that the learned Judge in making the observation as to the absence of lien in the nature of salvage such as was claimed in that case, had most probably in his mind the somewhat unqualified dictum of Lord Justice Bowen in *Falcke* v. *Scottish Imperial Insurance Company* (1) that "no similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." That this was so is apparent from what Wilson, J., said with reference to the English case just cited. In the earlier part of his judgment he said: "In the latter of these cases the doctrine of what has been called salvage lien acted upon in some Irish cases, is, I think, authoritatively rejected." But it must be remembered that Lord Justice Bowen was laying down a doctrine of *maritime* law in a maritime and commercial country like England; that there is nothing in his judgment to show that **[325]** he intended the rule which he was laying down to be a rule of universal application to all countries, and in all conditions of the population of those countries; nor do I think I am going too far in undertaking the risk of saying that in all probability there was nothing farther from Lord Justice Bowen's mind when he delivered his judgment than the perils to ownership of zemindari estates under the law in our non-maritime and agricultural India.

The *second* observation, which I make with equal respect, relates to the use of the expression "the express creation of the narrower right" employed by Wilson, J., in the passage which I have quoted. It amounts, I respectfully think, to begging the question, because, according to my humble opinion, the declaration of any right by statute does not abrogate any other existing right by mere implication, and to say that such a right did not exist in equity before the passing of any particular enactment, is to assume the foundation of a contested argument. And I may say that in that very case Mitter, J., with the concurrence of Norris, J, has shown why such an assumption is unassumable.

I have already stated how upon this point the Full Bench of the Calcutta High Court was divided. I have repeatedly perused the judgment of Mitter, J., on the one hand, and the judgment of Wilson, J., on the other as expositions of two opposite views. The judgments exhaustively deal with the case law upon the subject, and it would be a work of supererogation to refer to the numerous cases which were discussed by those learned Judges, and I will therefore refer only to more prominent ones among them. Most important of all is the dictum of the Lords of the Privy Council in *Nugendar Chunder Ghose* v. *Sreemutty Kaminee Dossee* (2), in which Lord Romilly, in delivering the judgment of the Privy Council, made the following observations :—

"Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person **[326]** who had such an interest in the *Talook* as entitled him to pay the revenue due to the

(1) L.R. 34 Ch. D. 234, *vide* p. 249. (2) 11 M. I. A. 241.

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Government and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein for the amount of money as paid."

This dictum of their Lordships of the Privy Council was interpreted in *Syed Enayat Hossein* v. *Muddan Moonee Shahoon* (1), by Markby and Mitter, JJ., to be comprehensive enough to lay down a broad principle of salvage lien in favour of co-sharers of zemindari estates, who by payment of Government revenue on behalf of their defaulting co-sharers saved the whole *mahal* from revenue sale. This interpretation, and the principles which it lays down, was followed in the Calcutta High Court by other Judges, McDonell, Field, Maclean, Jackson, Tottenham and White, JJ., in the various cases referred to by Mitter, J., in his judgment. In this Court the same interpretation was adopted by Oldfield, J., with the concurrence of my brother Tyrrell in *Luchman Singh* v. *Salig Ram* (2), and by me in *Bhup Singh* v. *Gulab Rai* (3) which has not been published in the official Law Reports. The interpretation and principle was however doubted by Pontifex, J., in an *obiter dictum* which he delivered in *Kristo Mohinee Dossee* v. *Kaliprosono Ghose* (4), with the concurrence of Garth, C.J. Thus the question of the interpretation of Lord Romilly's dictum and the principle which it lays down became the subject of serious consideration in the Calcutta Full Bench case, and with all due respect to the judgment of Wilson, J., in that case, I may say that I adopt the views of Mitter, J., as to the scope and interpretation of the dictum for the reasons which he has fully explained in his judgment, among them being the significant circumstance that whilst in the course of the argument before the Full Bench in the Calcutta case it was asserted that Lord Romilly, then Master of the Rolls, "in deciding cases in his own Court has disapproved of the doctrine which it is contended has been laid down by the dictum in question," no case was cited to justify such an assertion. Further, the views of Mitter, J., as expressed in the Full Bench case are in full accord with the views hitherto [327] entertained as to that dictum by this Court in the cases to which I have already referred, and nothing in the argument addressed to us in this case enables me to adopt a different view.

I will now pass on to the consideration of the question how far the other Courts have accepted the principle upon which the judgment of Mitter, J., with the concurrence of Norris, J., proceeded in the Calcutta Full Bench case. So far as the late Sadr Diwani Adalat of Calcutta is concerned, I think it is enough to say that I have perused the cases cited by Wilson, J., and Mitter, J., in their judgments, and I respectfully think that they are not helpful either one way or the other as authorities upon the equitable doctrine of salvage lien now in question, which does not appear to have been urged or argued in those comparatively ancient cases. Similar remarks apply to the rulings of the late Sadr Court of these Provinces.

Coming then to more modern times, it is important to ascertain how the case-law now stands in the four High Courts established by Royal Charter in British India. The state of the case-law in the Calcutta Court is best represented by the Full Bench case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (5), to which such frequent reference has already been made, with the result that in a Bench of five Judges the opinions were so divided

(1) 14 B.L.R. 155. (2) 8 A. 334, *vide* p. 336.
(3) 6 A.W.N. (1886), 269, *vide* p. 273. (4) 8 C. 402, *vide* p. 419. (5) 14 C. 809.

that the majority is represented by what I may respectfully call the casting vote of Tottenham, J., who explained that he had altered his opinion adopted in earlier cases. In Bombay, Sargent, C.J., and Birdwood, J., in *Achut Ram Chandra Pai* v. *Hari Kamti* (1), having before them some of the Calcutta cases, dissenting from the principle upon which the doubts of Pontifex, J., and the judgment of Wilson, J. (in the Calcutta Full Bench case) proceed, went on to say :—

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"This distinction, however, does not appear to us to affect the principle enunciated in *Nugender Chunder* v. *Sreemutty* (2), *viz.*, that such payments are in the nature of salvage payments and which is also the ground on which the decisions in the Irish cases and in [328] *Shaik Idrus* v. *Vithal Rakhmaji* (3) proceed. The payment of the assessment by the part owner is by a person entitled to pay it, and who does so, *ex hypothesi*, under circumstances which make it necessary in order to save the estate for himself and co-owners, and, in either view of such payment, he becomes equitably entitled to a charge on the whole estate as against the other co-sharers, and if this is so the mere circumstance that he has no existing charge on their shares at the time would appear to be no sufficient reason, in equity, justice and good conscience, for not allowing him to realize the payment from the shares of his co-owners for their respective quotas. The judgment of Fry, L.J., in *Leslie* v. *French* (4) doubtless shows that the question as to the effect of analogous payments in England in creating a charge on the other interests which share in the benefit of it is still far from settled, although there are many cases which support the above principle; but, however that may be, we think that the Calcutta decisions to which we have referred as recognizing a charge in those cases in which the assessment is paid by a part owner to save the estate, are in accordance with equity, justice and good conscience, and should be followed in this country."

I have quoted this passage *in extenso* because the Bombay High Court, so far as I am aware, has never departed from the principles which it thus enunciated.

I will now consider how the Madras High Court has dealt with similar principles. In *Sheshagiri* v. *Pichu* (5), Kernan, J., made observations which I wish to quote, as they represent how the law stands in that Court upon these matters of principle. The learned Judge said :—

"The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for revenue without paying the amount due on the whole lands: *Secretary of State for India* v. *Narayanan* (6). It would be against equity and good conscience that the common burden be [329] thrown exclusively on either lot of land or on either of the parties. This subject was much discussed by a Bench of five Judges in Calcutta: *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (7). In that case many authorities were considered, and by a majority of three Judges to two it was decided that a plaintiff in the same position as the plaintiff here was not entitled to a decree that the land of the defendant was subject to a charge to repay the defendant's share of the common liability for rent paid by plaintiff. I agree with the opinion of the minority for the reasons expressed by Mr. Justice Mitter in his judgment."

(1) 11 B., 313, *vide* p. 318.
(2) 11 M.I.A. 241.
(3) Printed Judgments for 1879, p. 407.
(4) L. R. 23 Ch. D. 552.
(5) 11 M. 452, *vide* p. 454.
(6) 8 M. 130.
(7) 14 C. 809.

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The learned Judge then went on to refer to some other cases, and the dicta of Mr. Justice Story in his renowned work on Equity Jurisprudence. These I need not refer to in detail, but I may state that Muttusami Ayyar, J., who was associated with Kernan, J., in that case, in expressing his concurrence, expressly stated that he was inclined to agree with the minority of the Full Bench of the Calcutta High Court in *Kinu Ram Das* v. *Mazaffer Hosain* (1). As against this view, however, a recent case of the Madras High Court—*Thanikachella* v. *Shudachella* (2) has been referred to. That case, so far as the report shows, was heard by Mr. Justice Parker, sitting as a single Judge, and I may say, with all due respect and without any remarks as to the interpretation of the statutes referred to in his judgment, that that judgment is so laconic that it has not been instructive to me as to whether or not the learned Judge intended to rule one way or the other as to the doctrines of equity which Kernan and Muttusami Ayyar, JJ., dealt with in *Sheshagiri* v. *Pichu* (3).

I now come to the state of the case-law in this Court itself. In *Lachman Singh* v. *Salig Ram* (4), Oldfield, J., with the concurrence of my brother Tyrrell, said:—

"No doubt by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested therein for the sum paid, and this has been laid [330] down by their Lordships of the Privy Council in *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (5)." Referring to this case, I made certain observations in *Bhup Singh* v. *Gulab Rai* (6), which I wish to quote here, as they rest in principle upon the same doctrine of salvage lien as this case, with this distinction of detail, that whilst in that case the party claiming lien was in possession and defendant, in this case the party seeking to enforce such lien is not in possession and is plaintiff in the suit. This difference of detail does not alter the applicability of the doctrine, as will appear from what I said in that case. After referring to the ruling of Oldfield and Tyrrell, JJ., in *Lachman Singh* v. *Salig Ram* (7), I said:—

Here the defendants have already purchased the property in execution of a decree which was passed for money advanced by their father on behalf of Dhan Kuar, in payment of the arrears of revenue due by her in respect of this property; and the question is not whether any decree held by them can be so enforced as to enforce the charge, but the point is, whether they, being in possession, can claim that any sale which may take place in enforcement of the plaintiff's mortgage, shall be subject to the extent of the money paid as Government revenue on behalf of Dhan Kuar. I am of opinion that they are entitled to claim that to the extent to which their purchase contributed to pay off the revenue due on the estate which they have purchased, they hold a charge which cannot be defeated by any sale which may take place in enforcement of the plaintiff's lien decreed on the 14th of August, 1882. This view is consistent with the principle upon which the cases already referred to by me proceed, and I respectfully think that the doubts which Pontifex, J., expressed in the case of *Kristo Mohinee Dossee* (8), as to there being no equity in such cases, are explainable by the doctrine upon which Courts of equity allow lien in respect of advances in the nature of salvage. No doubt the general rule is, that a person who spends money upon the property of another, cannot by that fact itself acquire a lien upon such

(1) 14 C. 809. (2) 15 M. 258. (3) 11 M. 452 *vide* p. 454.
(4) 8 A. 384, *vide* p. 386. (5) 11 M.I.A. 241.
(6) 6 A.W.N. (1886) 269, *vide* p. 273. (7) 8 A. 384. (8) 8 C. 402.

property, unless, having some interest in that property, he, in order to save that interest, [331] expends money which also benefits another. This is illustrated by the case of a mortgagee who, in order to save his security, pays off the Government revenue, a charge which, if not paid off, might result in a sale which would defeat not only the mortgagee's interest, but also the ownership of the mortgagor. To such a case the observations of the Lords of the Privy Council, which I have already quoted, are directly applicable, and whilst I am prepared to concede that those remarks are not directly applicable to the point now under consideration, I hold that the ultimate basis of the doctrine of equity upon which they proceed is identical in principle to the charge which a co-sharer in a zemindari *mahal* acquires upon the share of his co-sharer for such advances as he makes in payment of Government revenue, which being the first charge upon such estates, would, if unpaid, result in the sale of the whole estate. In the case of a mortgagee paying revenue due by the mortgagor, the principle is that the payment was made to save the mortgage, and also the rights of the mortgagor. So also, in the case of a joint co-sharer in a zemindari estate paying off the revenue due not only on his own share, but also on that of his co-sharer, the object of payment is to save the whole estate. The distinction between the two cases therefore amounts only to a difference in detail, and, in my opinion, cannot alter the principle. The payment of revenue by one co-sharer on behalf of himself and another co-sharer of a *mahal* is in no sense an officious payment, because, but for such payment, his own zamindari rights of ownership might be defeated by sale in arrears of revenue.'

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14 A. 273 (F.B.) = 12 A.W.N. (1892) 117.

I still adhere to these views, and, following the *ratio* upon which they proceed, I hold that the plaintiff is entitled to the lien which he claims in this suit, and that such lien being in the nature of a charge such as that contemplated by s. 100 of the Transfer of Property Act, can be enforced as a first charge according to the rules, *mutatis mutandis*, applicable to simple mortgages. I also hold that inasmuch as the payment of Government revenue by the plaintiff saved not only the proprietary interest of defaulting co-sharers, but also such interest as the defendant-appellant, [332] Chhitar Mal, possessed under his mortgages of 1873 in enforcement whereof he purchased the property in suit, the plaintiff's charge is paramount to those mortgages and that purchase, and the defendant-appellant cannot resist it, regardless of how much of the property purchased by him was subject to those mortgages and purchased in the enforcement thereof, and how much was free from those mortgages and purchased by him under his decrees. Neither the mortgages nor the decrees under which the sale and purchase by the defendant-appellant took place could override the paramount salvage lien which the plaintiff possesses under the equitable doctrine which I have endeavoured to explain. And to guard against being misunderstood, I wish to say, in the first place, that I do not rest my decision upon the doctrine of *subrogation*, for the plaintiff could not by payment of the Government revenue acquire the right of enforcing his lien in the same manner as the Land Revenue Act (XIX of 1873) entitles the revenue authorities to do by executive processes which I have already described. In the next place, I wish to point out, as I have already said, that in this case we are not dealing with the case of a mere volunteer who officiously makes payments, but with a person who, impelled by the requirements of the law and the exigencies of his own interests in the joint estate, had to make payments of Government revenue to save the whole estate from being sold for arrears of Government revenue, a sale which

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would defeat the present defendant-appellant's mortgages as much as the rights which his mortgagors, the original proprietors whose rights the defendant-appellant has purchased. In the third place, it must be observed that, so far as the defendant-appellant is concerned, we are not concerned with the case of a *bona fide* purchaser for value *without* notice, but with a person who, as is apparent from the facts of the case as stated, purchased with ample notice of the plaintiff's charge upon the estate for having paid arrears of antecedent Government revenue to save the estate from revenue sale, which would defeat the mortgages upon which he obtained decrees and in execution of which he purchased the property which he now wishes to save from the plaintiff's charge.

[333] Limiting my rule, therefore, to these circumstances, and limiting the rule which I have laid down to the exigencies of this case, I would dismiss the appeal, and allowing the cross-objections raised by the plaintiff-respondent, set aside so much of the decrees of the lower Courts as dismiss the suit, and, following the principle of s. 100 of the Transfer of Property Act (IV of 1882), would frame a decree in terms of s. 88 of that enactment, fixing a period of six months for payment of the money, and in default of such payment awarding sale in enforcement of the plaintiff's lien.

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14 A. 333 = 12 A.W.N. (1892) 39.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

HAR NARAIN PANDE (*Plaintiff*) *v.* RAM PRASAD MISR AND ANOTHER (*Defendants*).* [23rd November, 1891.]

Pre-emption—Wajib-ul-arz—Gift—Shankalp.

No right of pre-emption arises where land is assigned without consideration as *shankalp*.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Munshi *Gobind Prasad*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

JUDGMENT.

MAHMOOD, J.—This a is second appeal in regard to a dispute of which the facts are sufficiently clearly sated in the judgment of the lower appellate Court, which Court also framed the issues which arise in the case.

Briefly put, the matter relates to a transaction of the 29th of June, 1887, when the defendant-respondent, Harihar Pande, by an application for mutation of names, applied for and obtained the entry of the name of Ram Prasad Misr, in the Government revenue records in respect of the property now in suit.

[334] Thereupon the present plaintiff-appellant, Har Narain Pande, dissatisfied with the transaction abovementioned, came into Court suing to enforce his right of pre-emption in respect to the transaction of the 29th of June, 1887. Now this transaction is described as *shankalp*, and it has been found that it was a pure gift without any pecuniary consideration for it, and that it was not a sale, and upon this ground both the Courts below have concurred in dismissing the suit.

* Second Appeal No. 1408 of 1889, from a decree of Maulvi Muhammad Mazhar Husain, Additional Subordinate Judge of Gorkhpur, dated the 12th September 1889, confirming a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 24th April 1888.

From these two concurrent decrees, this second appeal has been preferred, and Mr. *Gobind Prasad* in his argument has relied upon the ruling of the majority of this Court in the Full Bench case of *Janki* v. *Girjadat* (1), where the majority of the Court laid down a proposition of law from which I had the misfortune to dissent. The learned vakil has also relied upon two unreported rulings of this Court in F. A. No. 170 of 1886 and F. A. No. 171 of 1886, which were decided by the present learned Chief Justice and my brother Tyrrell on the 22nd of February, 1889.

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Now in disposing of the case I do not wish to consider these various rulings in detail, because in my opinion the whole point upon which Mr. *Gobind Prasad's* argument rests is that according to the terms of the *wajib-ul-arz* in the case not only does pre-emption arise in respect of sale and mortgage, but also in respect of a simple gift without valuable consideration. The learned vakil in so arguing has invited my attention to the terms of the *wajib-ul-arz* in the two unreported cases above mentioned, and I think I may say that there is perhaps some cogency in the analogical comparison which he drew from the terms of the *wajib-ul-arz* in those cases as supplying a rule of interpretation for this *wajib-ul-arz* also. But, be it as it may, I think the exigencies of this case require me only to interpret this *wajib-ul-arz*, which is the document before me, and of which s. 6 relating to pre-emption runs as follows :—

چھٹویں یہہ کہ ھملوگوں میں اپنا حصہ کل یا جزو بذریعہ بیع و رھن
وغیرہ کے جدا کیا چاھے تو پہلے حصہ‌دار کے ھاتھہ بیچے و اگر وہ نہ لیوے تب
اختیار انتقال بدست غیر ھوگا اگر بلا اطلاع حصہ‌دار غیر کے ھاتھہ منتقل
کرے تو وہ حق شفع کی رو سے ناجائز ھوگا فقط *

Now the words upon which Mr. *Gobind Prasad* relies most are two. The first is the use of the word 'وغیرہ', or "*et cetera*" after the words "بیع و رھن," "sale and mortgage," and the second word upon which the learned vakil relies is the word "انتقال" or "transfer," which occurs later on in the pre-emptive clause. I am of opinon that, although the clause is not so clearly worded as it might have been, the rule of interpretation is well recognized, that where words describing one class of objects are employed and followed by the words "*et cetera*," or words of a like signification, it must be understood that they are limited to that class of objects. Here it is clear to my mind what "بیع" and "رھن" mean, one meaning "sale" and the other "mortgage," and the term "*et cetera*," "وغیرہ," which is employed thereafter, does not render the right of pre-emption available in respect of any such transaction as a simple gift, that is to say, gift without consideration or a *shankalp* as in this case. I am fortified in this interpretation by the use of the word "بیچے" that is to say "sell," which occurs later on in the clause, and in view of these words the generic term "انتقال" or "transfer" does not in my opinion

(1) 7 A. 482.

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extend the right of pre-emption to any transfer which may be without pecuniary consideration.

Moreover, I have frequently said that in such cases of pre-emption, though based upon the *wajb-ul-arz*, in case of doubt or difficulty the principles of the Muhammadan law of pre-emption, which originated the right in India, should be applied, and here the finding being clear that the *shankalp* complained of was without pecuniary consideration and was a simple gift, it follows that no right of pre-emption would exist.

I therefore hold that the Courts below acted rightly in dismissing the suit, and I dismiss the appeal with costs, as the respondent is represented by Mr. *Becha Ram* holding the brief of Mr. *Madho Prasad*.

Appeal dismissed.

14 A. 336 = 12 A.W.N. (1892) 21.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

[336] QUEEN-EMPRESS *v.* SUDRA.* [11th December, 1891.]

Criminal Procedure Code, s. 337—Pardon—Trial of person who having accepted a pardon has not fulfilled the conditions on which it was offered.

Where a pardon has been tendered to any person in connection with an offence, he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the tiral of the principal offence, and of any offence connected therewith, has been completed.

[Diss., 20 A. 529 (532) = 18 A.W.N. 152; 29 A. 24 = 3 A.L.J. 615 (616) = A.W.N. (1906) 258; F., 23 B. 493 (494); 27 C. 137 (139); 32 M. 173 = 9 Cr. L.J. 571 (574) = 2 Ind. Cas. 343 (344); 13 C.P.L.R. 123; R., 22 C. 50 (68); 14 Bur. L.R. 306 = 7 Cr. L. J. 245 = U.B.R. 1907, 4th Qr., Cr. P.C. 7 (10).]

THIS was a reference under s. 437 of the Code of Criminal Procedure, 1882, made by the Sessions Judge of Jhansi. The facts of the case sufficiently appear from the referring order, which is as follows:—

"I have, on the trial of Queen-Empress *v.* Nanhe, Muthu and Musammat Sukhrani, charged under s. 302, Indian Penal Code, with the murder of Mohan Lal at Daun, on the 2nd of June last, examined the record of the case of Queen-Empress *v.* Sudra, committed for trial on the charge under s. 411, Indian Penal Code, of having received or retained possession of a bond stolen from Mohan Lal in connection with the murder, and find that on the 20th of June, Mr. Sturt tendered a pardon to Sudra, under s. 337, Criminal Procedure Code (not s. 327, Criminal Procedure Code, as stated), on the condition that he made a 'full confession of the whole of the circumstances within his knowledge relating to the murder of Mohan Lal.' Notwithstanding this the Magistrate has committed Sudra for trial. I may remark that I can nowhere find any record of Sudra's having accepted the conditional tender of pardon, but as he was subsequently examined as a witness against Brijlal and Badli, charged also with the murder of Mohan Lal, it must be assumed that Sudra did accept it.

"S. 337, Criminal Procedure Code, provides that every person accepting a pardon under this section shall be examined as a witness in the case, although it was not when the charges against Nanhe, &c., were under inquiry by the Magistrate that the tender of pardon was made and accepted; it was in the case of the offence of murder-**[337]**ing Mohan Lal that it was made. So that Sudra was in the position of a witness, and the tender of conditional pardon still subsisted while

* Criminal Reference No. 603 of 1891.

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the case relating to the murder of Mohan Lal was pending. His commitment on the charge was therefore illegal, and in my opinion the record of his case must be submitted to the High Court that the commitment may be quashed. I may add that as the trial of Nanhe, &c., on the charge of murder has now been concluded, there is no objection to the Magistrate now acting in accordance with the provisions of s. 339, Criminal Procedure Code. Recently I submitted a somewhat similar case for the orders of the High Court, and the commitment was quashed; but before submitting the record in the present case, a copy of this proceeding will be sent to the Magistrate for any explanation he may desire to offer. The explanation should be submitted to this Court within four days.

* * * * * *

"The Deputy Magistrate has returned an explanation in referene to the above order, but, so far as it is intelligible, I do not think it affords any reason for not sending up the records relating to the case of Sudra for the orders of the High Court. What is important to bear in mind is that the charge against Sudra is of having received or retained a bond or bonds supposed to have been stolen from Mohan Lal at or about the time of his murder. The Deputy Magistrate, when tendering the pardon, gives as his reason for doing so that 'from the facts of the money bonds found in his possession having been the property of Mohan Lal, the murdered man, and known to have been in his possession at the time of his murder, there is strong presumption that the accused was himself directly or in directly concerned in the murder, or at least of his being privy to it.'. I think the pardon must necessarily be held to include a pardon of whatever offence the accused may have committed arising out of, or even in any way connected with, Mohan Lal's murder. The fact that the record of the case against Sudra, who was mixed up only with the charge of murder against Brijlal and Badli, who were not committed for trial, was different from the record of the case against Nanhe, &c., does not prevent the whole of [338] the proceedings being in the case of the murder of Mohan Lal. In my opinion the Deputy Magistrate had no authority to withdraw the pardon tendered to Sudra so long as the charge of murder against any person was pending. I accordingly submit all the records of the two cases for such orders as the Hon'ble High Court may consider necessary."

On this reference the following order was made by KNOX, J. :—

ORDER.

One Sudra received from the Deputy Commissioner of Jhansi an offer of pardon in the case of a murder committed upon the person of one Mohan Lal on the 2nd of June 1891. The tender of pardon was made to him with the view of obtaining his evidence, and it was made presumably on the usual conditions. Apparently the tender was accepted, and in a trial in connection with this murder held against two persons, Sudra was examined as a witness. It further appears that it was found necessary to charge other persons, namely, Nanhe, Muthu and Musammat Sukhrani, with the same offence of murder committed upon Mohan Lal. Before the case against these latter persons had been heard, Sudra, who had originally been arrested on a charge under s. 411, Indian Penal Code, was committed for trial to the Sessions Judge of Jhansi. The Sessions Judge of Jhansi has referred the commitment to this Court with a view of its being quashed, and the ground upon which he refers it is that until Sudra had been examined as a witness in the whole case or cases connected with the murder in respect of which

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tender of pardon had been made to him, he could not be tried for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. The whole question turns upon the interpretation which is to be placed upon the words in s. 337, Criminal Procedure Code, namely, "every person accepting a tender under this section shall be examined as a witness in the case." It is, in my opinion, the intention of the law that a person to whom a tender of pardon has been made in connection with the offence should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard [339] and determined. There may arise cases in which owing to the absconding of offenders the trial at an early date of an approver who had not complied with the conditions on which the tender was made appears necessary or expedient, and I am not prepared to say that in such cases the result of the trial of the principal is always to be waited for. The point does not arise for determination, and I do not determine it. But where, as in the present instance, no such difficulty occurred, the provisions of s. 337 of the Criminal Procedure Code should have been strictly complied with, and in every case connected with the offence, namely, the murder of Mohan Lal, Sudra should have been examined as a witness, and until he had been so examined, his trial for any offence in connection with that murder should not have taken place. I accordingly quash the commitment and return the record. The District Magistrate of Jhansi can of course take any steps open to him in law for the further trial of Sudra if such trial appear necessary in the interests of public justice.

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14 A. 339 = 12 A.W.N. (1892) 12.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

RAM SUKH DAS AND ANOTHER (*Defendants*) *v.* TOTA RAM (*Plaintiff*).*
[5th January, 1892.]

Cross-decrees—Set off—Civil Procedure Code, s. 246.

Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree, under the provisions of s. 246 of the Code of Civil Procedure, to plead such decree in answer to an application for execution of the decree against him singly.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Mr. *D. Banerji*, for the appellants.

Mr. *Niblett*, for the respondent.

JUDGMENT.

[340] MAHMOOD, J.—The plaintiff-respondent, Tota Ram, obtained a decree for Rs. 192-4-0 against Chunni and four other persons. On the other hand Chunni obtained a decree for Rs. 43-14-0 against the above-named Tota Ram. Both these decrees were capable of execution in the

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* Second Appeal No. 203 of 1891, from a decree of Babu Abinash Chandar Banerji, Subordinate Judge of Agra, dated the 18th December 1890, reversing a decree of Babu Baij Nath Prasad, Munsif of Mahaban, dated the 14th June 1890.

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Court of the Munsif of Mahaban, Tota Ram's decree having been transferred to that Court.

Before Tota Ram could take any action to execute his decree, his judgment-debtor sold the decree to Ram Sukh, one of the defendants-appellants, on the 30th of July, 1888, and upon Tota Ram's endeavouring to execute his decree he was met by objections by the said Ram Sukh, and those objections prevailed on the 20th of January, 1889. Tota Ram then instituted the present suit to establish his right to execute his decree against Chunni's decree in the hands of the defendant Ram Sukh.

The first Court dismissed the suit, holding it to be barred by s. 244 of the Code of Civil Procedure, but the lower appellate Court has given sufficient reasons for holding that the section does not apply, and to this finding no objection is taken here before me on the other side.

The main ground upon which Mr. *Dwarka Nath Banerji* has rested his argument on behalf of the appellants is that, although under s. 233 of the Code of Civil Procedure, Ram Sukh must be taken to have purchased Chunni's decree subject to such equities as Tota Ram had against such decree, yet, inasmuch as Tota Ram's decree was not solely against Chunni, but also jointly against four others, therefore no such equities arose as would enable the two decrees to be dealt with under s. 246 of the Code of Civil Procedure. In support of his contention the learned Counsel has invited my attention to illustration (*b*) to the section.

I am of opinion that the learned Subordinate Judge has arrived at correct conclusions. It is true that Tota Ram's decree was against Chunni and four others jointly, but since the decree of Chunni was solely against Tota Ram there seems no reason why Tota Ram should not be entitled to resist the execution of Chunni's decree by reason of his larger decree above mentioned. The **[341]** illustration contemplates cases where there are judgment-creditors and not cases where the sole judgment-debtor is the sole creditor of another decree. I think this distinction is recognizable, and in *Hury Doyal Guho* v. *Din Doyal Guho* (1), it was actually ruled that a judgment-debtor may set-off against the amount of the decree against him the amount of a decree which he has obtained against the decree-holder and other persons.

I think the effect of the learned Subordinate Judge's decree in this case is consistent with the view which I have expressed. I therefore dismiss the appeal with costs.

Appeal dismissed.

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14 A. 341 = 12 A.W.N. (1892) 18.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

BECHAN RAI AND OTHERS (*Defendants*) v. NAND KISHORE RAI (*Plaintiff*).* [8th January, 1892.]

Conditional sale—Wajib-ul-arz—Pre-emption.

The pre-emptional rights of the parties to a deed of conditional sale cannot be affected by a *wajib-ul-arz* prepared subsequently to the execution of the deed of

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* Second Appeal No. 1691 of 1888 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghazipur, dated the 13th August, 1888, modifying a decree of Maulvi Sayyid Zain-ul-abdin, Munsif of Korantadih, dated the 9th January 1888.

(1) 9 C. 479.

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(1892) 18.

conditional sale, but prior to the sale becoming absolute, they not being parties to the *wajib-ul-arz* and the *wajib-ul-arz* not apparently indicating any pre-existing custom of pre-emption in the village. *Raghubir Singh* v. *Nandu Singh*, (1) distinguished.

[D., 24 A. 493.]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of Edge, C.J.

Munshi *Jwala Prasad* and Munshi *Gobind Prasad*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C.J.—This was a pre-emption suit brought under a *wajib-ul-arz* in respect of a sale of a share within the village. The sale arose in this way. The shareholder in the village executed in favour of the present vendees two deeds of conditional sale. Sub-[342]sequently to the execution of the deeds and to the making of the contracts embodied in the deeds a *wajib-ul-arz* was prepared, agreed to and sanctioned in the village. After the making of the *wajib-ul-arz* the mortgage by conditional sale became, on operation of the agreement contained in the deeds of conditional sale and the default of the mortgagor, an absolute sale. It is in respect of this absolute sale that this pre-emption suit has been brought. According to the plaint the plaintiff-respondent here, alleged that by the *wajib-ul-arz* it was agreed that there should be a right of pre-emption in the case of any shareholder wishing to sell, mortgage, &c., his share. The plaintiff did not rely upon any custom of pre-emption existing in the village at the time of the execution of the deeds of conditional sale. He simply relied upon an agreement contained in a *wajib-ul-arz* subsequent in date to the deeds of conditional sale, by which the right of pre-emption was created in the village. It appears to me that no subsequent village contract to which the parties to the conditional sale-deeds were not agreeing parties could alter the rights of the conditional vendee under his deeds. Those rights came into existence on the making of the deeds of conditional sale. The change of the transaction from one of mortgage to one of absolute sale merely followed as the leagal result of events contemplated by the contract of conditional sale. We were referred to the case of *Raghubir Singh* v. *Nandu Singh* (1). With regard to that case, I may point out that there not only was a *wajib ul-arz* agreement relied upon, but the plaintiff also relied upon a village custom. A *wajib-ul-arz* may not only be evidence of the existence of village custom at the date the *wajib-ul-arz*, but it may also possibly afford evidence that such custom was a pre-existing custom in the village. How far these considerations account for the decision of the case I need not consider. In the present case, I am clearly of opinion that the subsequent *wajib-ul-arz* agreement cannot affect the legal and equitable rights which the conditional vendee has by the agreement contained in the deeds of conditional sale acquired. I would allow the appeal and dismiss the suit with costs in all the Courts.

[343] KNOX, J.—I also concur in decreeing the appeal. In fact, I should have had no difficulty in arriving at this decision, but for a reference which was pressed upon us to the judgment in *Raghubir Singh* v. *Nundu Singh* (1), to which I was a party. Upon refernce to the notes taken when that case was argued, I am of opinion that there was this clear distinction between that case and the case now before us, that in the

(1) 11 A.W.N. (1891) 134.

prior case the claim for pre-emption proceeded not merely upon the *wajib-ul-arz*, but also upon a custom alleged in the plaint and borne out by the language used in the *waji-ul-arz*. In the present case no attempt has been made to base the claim upon custom, and I have not been referred to any clause in the *wajib-ul-arz* which indicated that any custom upon this point existed prior to the completion of the *wajib-ul-arz*, which was admittedly completed in the village between the time the deeds of conditional sale were executed between the parties and afterwards became a complete sale.

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Appeal decreed.

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14 A. 343 = 12 A.W.N. (1892) 18.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAM MANOHAR MISR (*Defendant*) *v.* LAL BEHARI MISR AND ANOTHER (*Plaintiffs*).* [27th January, 1892.]

Civil Procedure Code, s. 514—Arbitration—Power of Court to extend time for making award.

A Court has power to act under s. 514 of the Code of Civil Procedure at any time before the award is actually made, whether the time previously limited for making the award has expired or not. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) referred to.

[R., 2 N.L.R. 81 (85); U.B.R. (1897—1901), Vol. II, 24; **Not Appl.**, 7 Ind. Cas. 595 (598) = 4 S.L.R. 26.]

THE facts of the case sufficiently appear from the judgment of the Court.

Mr. *J.E. Howard*, for the appellant.

The Hon'ble Mr. *Spankie* for the respondents.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This is an appeal from a decree passed in accordance with an award. The learned Counsel for the **[344]** appellant desired to argue that the arbitrator had been guilty of misconduct. That point was decided against his client by the Court below, and is not apparently open to him in appeal here. Section 522 of the Code of Civil Procedure enacts how and when the decree is to be drawn up, and further enacts :—" No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." It is not contended that the decree in question is either in excess of or not in accordance with the award. The other contentions put before us on behalf of the appellant are, that no time was fixed by the Court originally for the making of the award ; that no order under s. 508 of the Code of Civil Procedure was drawn up ; that the Judge wrongly exercised his discretion in extending the time for the making of the award, and that some of the orders of extension were made after the time previously limited for making the award had expired. We have gone through the different petitions and orders in this case. On the 16th of July 1886, there is the order

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* Second Appeal No. 873 of 1889 from a decree of J.C. Leupoult, Esq., District Judge of Ghazipur, dated the 15th April 1889, confirming a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 29th March 1884.

(1) 18 I.A. 55 = 13 A. 300.

1892 JAN. 27. — APPELLATE CIVIL. — 14 A. 343 = 12 A.W.N. (1892) 18.

of the Court referring the matter to arbitration, and, as we read that order, it fixed the 16th of August 1886 for the award to be returned to the Court. There was a further order made on the 21st of July 1886. It appears that the arbitrator went to Gaya. It appears also that the Judge went on leave; and it appears by the proceedings that at the desire of the respective parties the matter was suspended during the time of the Judge's absence on leave. When he came back from leave he made an order directing that a formal order should be drawn up, and the papers forwarded to the arbitrators. We must presume that a formal order was drawn up in accordance with the Judge's direction and forwarded to the arbitrators. We may further infer that that was done from the fact that subsequently there was an application for extension of time, and from the fact that the arbitrator himself petitioned for a further extension of time, alleging in that petition that he had been ill with fever. Now on the 17th of December 1886 the last order extending the time was made. By that order the time was extended to the 17th of January 1887. The award was made on the 11th of January 1887, consequently it was made within the extended time given by the Judge. [345] In the case of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1), their Lordships of the Privy Council held that under s. 514 of the Code of Civil Procedure, a Judge has power from time to time to extend the time for making an award. In the case which was before them one of the orders extending the time was made some days after the time which had been fixed by the previous order had elapsed; so that having regard to the facts of the case which was before their Lordships of the Privy Council, we must infer that their Lordships were of opinion that a Judge has power at any time before the award is actually made to act under s. 514 of the Code of Civil Procedure. The award in that case was upset on another ground. Now we have come to the conclusion on the facts appearing in the record of this case that the proceedings were not *ultra vires*, and that the award having been made within the time which was given by the order of the 17th of December 1886 cannot be impeached on any of the grounds to which we have been referred. There was another ground taken by the Counsel for the appellant to which we shall now refer. It was that his client had revoked the agreement to refer, and had done so before the award was made, and at a time when there was no order extending the time for the making of the award. That attempted revocation was put before the Court by means of an application, which was apparently rejected. Now we are of opinion that neither party to this reference had any power to revoke the agreement to refer without the consent of the Court. There are grounds upon which the order of reference may be amended or set aside, but when once a Court has passed its order of reference, as it did here in the appeal which was before it passed that order on the agreement of the parties, we are of opinion that neither party had power to revoke except by consent of the Court and under an order of the Court. We dismiss this appeal with costs.

Appeal dismissed.

(1) 18 I.A. 55 = 13 A. 300.

14 A.346=12 A.W.N. (1892) 19.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

1892 JAN. 30.

REVISIONAL CRIMINAL.

14 A. 346=12 A.W.N. (1892) 19.

[346] QUEEN-EMPRESS *v.* BASHIR KHAN AND ANOTHER.* [30th January, 1892.]

Criminal Procedure Code, s. 192—Transfer—Procedure to be followed where a case has been transferred after the evidence for the prosecution has been recorded.

A Magistrate to whose Court a case under s. 355 of the Indian Penal Code has been transferred at a stage when all the evidence for the prosecution had been taken, did not re-summon the witnesses for the prosecution but proceeded to act on their evidence as if it had been taken before himself :—*Held* that whether such procedure amounted to an irregularity or illegality or not, it was sufficiently prejudicial to the accused to warrant the conviction being quashed.

[R., 15 C.P.L.R. 66 (68); 12 C.W.N. 140 (144)=6 Cr. L.J. 434; D., 35 C. 457 (462)=7 C.L.J. 488=7 Cr. L.J. 220=12 C.W.N. 416.]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of Straight, J.

Mr. *Fateh Chand*, for the petitioners.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

STRAIGHT, J.—In this case charges were preferred before the Honorary Magisrates of Agra against the two petitioners for an offence under section 355 of the Indian Penal Code, that is to say, of committing an assault with the intent to dishonor a person, that person being one Sukhdeo Prasad, the complainant. The case was pending before the Honorary Magistrates, when an application was put in by the accused to have it transferred from that Bench to the Court of a First-class Magistrate, and accordingly an order of transfar was made to the Court of Muhammad Isa Khan, a First-class Magistrate of the Agra District. At the time of the transfer all the witnesses had been examined for the prosecution and a charge had been framed. After the transfer, the petitioners filed two petitions, praying that the Magistrate to whose Court the case had been transferred would re-summon the witnesses for the prosecution and have them examined before himself *de novo*. This the learned Government Pleader admits was not done, and he further concedes that, so far as the evidence-in-chief of those witnesses was concerned, the Magistrate acted upon their depositions as recorded before the Honorary Magistrates.

[347] I think this was a most objectionable course in a case of this description, and, whether it amounts to an irregularity or an illegality, which I do not think it necessary to decide, I think that the accused persons were prejudiced, and that the conviction under such circumstances should not stand. I accordingly set it aside. I am informed that the petitioners have had nearly three months' imprisonment already; and, assuming the facts as stated by the convicting Magistrate to be accurately stated for this purpose, I do not think it necessary to direct that any further proceedings should be taken.

The order as to security is quashed.

* Criminal Revision No. 724 of 1891.

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FEB. 2.

APPELLATE CIVIL.

14 A. 347 = 12 A.W.N. (1892) 20.

14 A. 347 = 12 A.W.N. (1892) 20.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GAURI SHANKAR (*Defendant*) *v.* BABBAN LAL AND ANOTHER (*Plaintiffs*).* [2nd February, 1892.]

Act XIX of 1873 (*N W.P. Rent Act*), s. 221—*Civil Procedure Code*, s. 521—*Arbitration—Award delivered after expiration of time allowed by Court.*

The principle of the ruling of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwat Kuar* (1) is applicable also to arbitrations under s. 221 of Act No. XIX of 1873.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. C. Dillon*, for the appellant.

Munshi *Jwala Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This was a suit for rent in the Revenue Court. It was referred to arbitration under s. 221 of Act No. XIX of 1873, and in the order of reference the time for delivery of the award was specified. The award was not delivered until after that time. Although our attention has not been drawn to any express provision of Act No. XIX of 1873, similar to that contained in the last paragraph of s. 521 of Act No. XIV of 1882, [348] we think that the principle of the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) applies. We should say that there was here no extension of time, and that it was really the acts of the parties which caused the award not to be made within the time allowed. However, as s. 221 of Act No. XIX of 1873 enacts that the time for the delivery of the award *shall* be specified in the order of reference, we must give effect to it and hold that the award was bad. The proceedings on the award must be treated as null and void. We set aside those proceedings and refer this case back to the first Court, which will dispose of the suit according to law. Costs will abide the result.

Cause remanded.

* Second Appeal No. 889 of 1889 from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 13th April 1889, confirming a decree of Maulvi Muhummad Ismail Khan, Deputy Collector of Mirzapur, dated the 29th January, 1889.

(1) 18 I.A. 55 = 13 A. 300.

14 A. 348=12 A.W.N. (1892) 25.

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APPELLATE CIVIL.

14 A. 348= 12 A.W.N. (1892) 25.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

KHARAG PRASAD BHAGAT AND ANOTHER (*Plaintiffs*) *v.* DURDHARI RAI AND OTHERS (*Defendants*).* [12th February, 1892.]

Jurisdiction—Dismissal of suit by Munsif on preliminary point—Remand by Subordinate Judge on appeal—Fresh appeal before second Subordinate Judge, who disagrees with the finding of the former Subordinate Judge.

Where there are two Subordinate Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate presiding officers. *Suraj Din* v. *Chattar* (1) and *Ram Kirpal* v. *Rup Kuari* (2) referred to.

[R., 32 M. 318 (320)=2 Ind. Cas. 525 (526)=5 M.L.T. 75 ; 7 M.L.T. 93 (94).]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Spankie* and Munshi *Jwala Prasad*, for the appellants.

Mr. *Amiruddin*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This suit was instituted in the Court of the Munsif of Ballia, who dismissed the suit on the ground that the suit should have been brought in the Revenue Court, and [349] that consequently he had no jurisdiction. There was an appeal which was heard by one of the two Subordinate Judges of Ghazipur. He decided that the suit was a Civil Court suit, and remanded the case under s. 562 of the Code of Civil Procedure to the Court of that Munsif to be disposed of on the merits. The Munsif tried the case and passed a decree from which there was an appeal. The appeal happened to go to the other Subordinate Judge of Ghazipur, who, holding that the suit was a Revenue Court suit and could not have been brought in the Civil Court, allowed the appeal and dismissed the suit. The plaintiffs have brought this second appeal. It is contended on their behalf that the second Subordinate Judge of Ghazipur had no power to question the legal propriety of the order of the other Subordinate Judge. It is really one Court, but there are two Subordinate Judges. On the other hand, it is contended that the decision of the last Subordinate Judge was right. We are clearly of opinion that Pandit Bansidhar, the second Subordinate Judge, had no power to overrule the decision of Mr. Lalta Prasad, the first Subordinate Judge, and that he was bound by it. That point was decided in this Court as far back as 1881 in the case of *Suraj Dīn* v. *Chattar* (1) which was a similar case. The principle which was enunciated by their Lordships of the Privy Council in *Ram Kirpal* v. *Rup Kuari* (2) would apply here. The Full Bench case of *Deokishen* v. *Bansi* (3) does not apply. The order which we must pass in this case is an order setting aside the decree of Pandit Bansidhar and remanding the case under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge of Ghazipur to be disposed of according to law.

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* Second Appeal, No. 1148 of 1889 from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 28th August 1889, confirming a decree of Maulvi Abdul Ghafur, Munsif of Ballia, dated the 16th January 1889.

(1) 3 A. 755. (2) 6 A. 269. (3) 8 A. 172.

1892 FEB. 12. — APPELLATE CIVIL. — 14 A. 348=12 A.W.N. (1892) 25.

Mr. *Amiruddin's* clients, the defendants, will not be damnified, because, should the Subordinate Judge find against them on the merits, they can raise, in an appeal from his decree, the question of jurisdiction and of the correctness of the order of remand of Mr. Lalta Prasad. That they can do so under s. 591 is amply shown by a judgment of this Court in the case of *Rameshur Singh* v. *Sheodin Singh* (1), and by the High Court at Bombay in the case of *Savitri* [350] v. *Ramji* (2). We set aside the decree of the Subordinate Judge, and remand the case under s. 562 of the Code of Civil Procedure, and direct it to be restored to the file of pending appeals in the Court of the Subordinate Judge. Costs will be costs in the cause.

Cause remanded.

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14 A. 350=12 A.W N. (1892) 40.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BANDHU BHAGAT (*Decree-holder*) *v.* SHAH MUHAMMAD TAQI (*Judgment-debtor*).* [15th February, 1892.]

Civil Procedure Code, s 577—*Unverified* sulahnamah—*Execution of decree—Mortgage, redemption of—Decree not specifying result of non-payment of mortgage—Debt within the time prescribed thereby for payment—Limitation—Act XV of* 1877 (*Indian Limitation Act*), *sch.* ii, *art.* 179.

Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *sulahnamah* being sent down to the lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured :—*Held* that the High Court was not justified in passing a decree under s. 577 of the Code of Civil Procedure in accordance with the terms of the unverified *sulahnamah*.

Where a decree for redemption of mortgage stated that the amount due under the mortgage should be paid within four months, but omitted to state what the result would be if the mortgage debt was not so paid :—*Held* that it was competent to the decree-holder to execute such a decree at any time within the period of limitation prescribed by art. 179 of the second schedule of Act XV of 1877.

[Diss., 14 A. 529; 16 A. 65; R., 18 Ind. Cas. 48=53 P.W.R. 1913; 44 P.L.R. 1913; D., 7 A.L.J. 778=6 Ind. Cas. 857 (858).]

[N. B.—Another point re these same execution proceedings came before the High Court at Allahabad—see 8 A. W. N. (1888) 119.—Ed.]

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Mr. *Abdul Raoof*, for the appellant.

The respondent was unrepresented.

JUDGMENT.

MAHMOOD, J.—In this case there is a peliminary matter which must be stated before I proceed with the judgment upon the merits of the appeal.

The case being a pending case upon the files of this Court, an application bearing date the 10th of March 1890, and purporting to [351] have been signed by the respondent, Shah Muhammad Taqi, was presented to

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* Second Appeal, No. 1241 of 1889, from a decree of J.J, McLean, Esq., District Judge of Azamgarh, dated the 24th June 1889, confirming a decree of Rai Kulwant Prasad, Subordinnate Judge of Azamgarh, dated the 17th July 1888.

(1) 12 A. 510. (2) 14 B. 232.

1892 FEB. 15. — APPELLATE CIVIL. — 14 A. 350 = 12 A.W.N. (1892) 40.

my brother Tyrrell on the 11th of March 1890, and his order upon the application bearing that date was :—"Send to the Court below for verification." The application seems to have been so sent down, but it appears from the letter of the District Judge of Azamgarh, dated the 3rd of May 1890, "that several adjournments were granted at the request of their vakils for the appearance of the parties, but none of them has attended, and their vakils now say that they have heard nothing of them of late."

Upon this state of things the report of the District Judge came up before my brother Straight, who, by his order of the 9th of May 1890, directed that the application called the *sulahnamah* be sent back and the case put up before the Court.

The case appears then to have been put up before my brother Tyrrell, who in his order of the 30th of April 1891, which is upon the original application of compromise, said :—" Send down again for verification."

This also has been done, and the learned District Judge has returned the *sulahnamah*, again unverified, and he adds that " the pleaders were directed to produce the parties on the 6th of June, 1891, but as the latter did not appear, the 13th of June was fixed. On that date they were again absent, and notices were consequently issued fixing the 11th of July 1891 for their appearance. One of these notices was served on the person of Bandhu Bhagat and the other was fixed on the door of Muhammad Taqi's house, but in spite of such service none of the parties has appeared, nor is there any likelihood of their appearance."

Mr. *Abdul Raoof*, who appears for the judgment-debtor appellant, has contended that the proceedings taken by the lower Court are sufficient to enable me to accept the unverified *sulahnamah* of the 10th of March 1890, and that in consequence of these circumstances I am bound to act under s. 577 of the Code of Civil Procedure and to make a decree in the terms of the *sulahnamah*.

[352] I am of opinion that the powers conferred by that section upon Courts of appeal are powers which require that parties should be in accord with each other at the time when the decree is pronounced by the appellate Court. The use of the word "may," which is significant in the section, is also important, because it indicates discretion in a Court and does not force the Court to pass a decree in any manner which goes beyond the scope of its discretionary power.

There is, therefore, nothing to bind me sitting here as a Judge in a second appeal (though I concede that by dint of s. 582, s. 577 is, *mutatis mutandis* also applicable to second appeals) that in a case such as this I should act upon the document which is before me, dated the 10th of March 1890, and bearing the order of my brother Tyrrell, dated the 11th of March 1890, and another order, dated the 30th of April 1891.

The reason why I think that in this case I should not act upon this document is simple. As I have already stated, repeated attempts have been made by orders of this Court to obtain from the parties the verification of the *sulahnamah* or deed of compromise, and it followed that these attempts have failed, and because they have failed there is no necessity for me to act under s. 577 of the Code of Civil Procedure, because the failure has been due to the negligence of the parties to attend to verify the compromise at which they arrived. I regard the document therefore as useless for the purpose of disposing of the case.

Then comes the hearing, which after the expression of my opinion I gave to Mr. *Abdul Raoof* for the appellant; the respondent, for whom

1892 FEB. 15. — APPEL-LATE CIVIL. — 14 A. 350 = 12 A.W.N. (1892) 40.

the name of Mr. *Jokhu Lal* appears, being absent altogether. The appeal has been heard therefore *ex parte* upon the merits.

Now upon the merits the facts of the case are simple. The respondent, Shah Muhammad Taqi, decree-holder, obtained against the appellant, Bandhu Bhagat, on the 5th of February 1887, a decree for redemption of certain properties which are admitted by Mr. *Abdul Raoof* to have been usufructuarily mortgaged to the appellant. In that decree there was a period fixed for redemption, and [353] it was four months, that is to say, a period which would end on the 5th of June 1887.

In the decree so made, whilst fixing the period of four months, there was no condition such as that which is contemplated by the last paragraph of s. 92 of the Transfer of Property Act, to the effect that if such payment is not made on or before the day fixed by the Court, the plaintiff should be absolutely debarred of all rights to redeem the property.

The decree thus framed was evidently a decree which, if it was finally framed and gave *even* a wrong order as to debarring redemption if payment of the mortgage money was not made within the time limited by it, would be binding upon me sitting here as a Judge dealing with execution of the decree. But the decree did not say so, and the decree therefore must stand as it stands without any such exception or interpretation as that contemplated by the last paragraph of s. 92 of the Transfer of Property Act (IV of 1882).

It is probably in consequence of the decree not having been properly framed that this litigation began. It began in an application made on the 29th of May 1888 by the decree-holder, respondent, for redemption, and on the 1st of June 1888 the money required for redemption is admitted by Mr. *Abdul Raoof* to have been deposited in Court.

The question then is simple. Whether a condition as to deposit was or was not valid in law for the purpose of preventing redemption which had been decreed in favour of the respondent on the 5th of February 1887?

I am of opinion that in the absence of any limits contained in the decree, a Court executing the decree is not justified nor bound to go beyond its terms. Here the decree fixed four months, but did not fix what the result would be if within that period the money was not deposited. And since it did not do so, it follows that the ordinary law regulating the limit for execution of decrees would apply, that is to say, the rule contained in art. 179 of sch. ii of the Limitation Act (XV of 1877).

[354] It was upon this principle that Mr. Justice Oldfield and myself in *Karamat Ali* v. *Inayat Husain* (1) held that the right of redemption cannot be considered as having been barred, and upon this ground we allowed execution, because the money had been deposited within the period allowed by the rule of limitation applicable to the decree, namely, the period awarded by the Limitation Act. Similar is the effect of the *ratio* upon which the judgment of my brother Straight and myself proceeded in *Hulas Rai* v. *Pirthi Singh* (2).

Before leaving this point alone I desire to express as clearly and briefly as I can the reason why the limitations established by a decree are not to be placed upon the same footing as limitations as to time or otherwise imposed by the legislature for purpose of the audibility of causes, *ad litis ordinationem*. The reason is simple. One is the act of a Judge, the other is the act of the legislature, and it cannot be that any Judge by fixing one hour, or one day, or one month, or one hear

(1) 4 A.W.N. (1884) 329. (2) 9 A. 500.

for obedience to his order would render it impossible for the party aggrieved to have his remedy by the ordinary procedure within the time allowed by the Legislature. This view is the principle of what I said in the Full Bench case of *Kodai Singh* v. *Jaisri Singh* (1).

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For these reasons I think that upon the findings of the lower Appellate Court this appeal is not sustainable. I therefore dismiss the appeal, but without costs, as the respondent is not represented.

Appeal dismissed.

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14 A. 354 = 12 A.W.N. (1892) 32.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* MAKHDUM.* [22nd February, 1892.]

Criminal Procedure Code, ss. 195, 476, 487—*Act XLV of* 1860, s. 193—*False evidence—Jurisdiction—Sessions Judge.*

A Sessions Judge who has directed the trial of a person for the offence of giving false evidence committed in the course of a judicial proceeding of a criminal nature before him cannot try the case himself. *Empress* v. *Ganga Din* (2) distinguished.

[R., U.B.R. (1897—1901), Vol. 1, 127 (130).]

[355] THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *W.S. Howell* and Babu *Becha Ram Bhattacharji*, for the appellant.

The Government Pleader (Munshi *Ram Prasad*) for the Crown.

JUDGMENT.

STRAIGHT, J.—For the purpose of determining the question of law that arises before me in this appeal, it is only necessary that I should state the following brief facts. Upon the trial before the Sessions Judge of Jhansi of one Wilayat Hussain for the offence of giving false evidence contrary to the provisions of s. 193 of the Indian Penal Code, the appellant was examined as a witness and deposed to certain facts. The learned Sessions Judge being of opinion that in his depositions he had been guilty of giving false evidence under s. 476 of the Code of Criminal Procedure, adopted the procedure therein laid down, with the result that the appellant was committed to his Court to take his trial for an offence under s. 193 of the Indian Penal Code. The Sessions Judge has tried and convicted him and sentenced him to a term of 3 years' rigorous imprisonment. The initial objection taken to that decision is that by s. 487 of the Code of Criminal Procedure, the jurisdiction of the Sessions Judge was taken away, and that he had no power to enter upon the trial. A number of cases have been quoted in the course of the hearing of the appeal, among them *Sundriah* v. *The Queen* (3), *Regina* v. *Goji Kom Ranu* (4), *Empress of India* v. *Kashmiri Lal* (5), *Empress* v. *Gaspar D'Silva* (6), *Empress* v. *Gauri Shankar* (7), *Empress* v. *Chait Ram* (8), *Queen-Empress* v. *Sarat Chandra Rakhit* (9). This last case is a Full Bench decision.

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* Criminal Appeal No. 1017 of 1891.

(1) 13 A. 376. (2) 7 A.W.N. (1887) 139. (3) 3 M. 254. (4) 1 B. 311.
(5) 1 A. 625. (6) 6 B. 479. (7) 6 A. 42. (8) 6 A. 103.
(9) 16 C. 766.

1892 FEB. 22. — APPELLATE CRIMINAL. — 14 A. 354 = 12 A.W.N. (1892) 32.

I am of opinion that the contention for the appellant must prevail. The offence of giving false evidence is one of those mentioned in s. 195 of the Code of Criminal Procedure. That offence was committed before the Sessions Judge and came under his notice [356] in the course of a judicial proceeding, that is to say, upon the trial of Wilayat Husain.

As Sessions Judge he was the Judge of the Criminal Court, and it is not pretended that s. 477, s. 480, or s. 485 could have any application to the circumstances of this case. Accordingly I hold that there was a direct statutory prohibition to the Sessions Judge trying this case, and that in trying it he acted without jurisdiction, which condition of things no subsequent provision of the Criminal Procedure Code pretends to, or could, cure. I agree to this extent in the view expressed in the Full Bench ruling of the Calcutta Court that I have quoted, and it is not necessary for the purposes of this case to enter into other questions. I should have had no doubt as to the proper conclusion to arrive at upon the questions of law, but for the ruling of the learned Chief Justice reported in the *Empress* v. *Ganga Din* (1). It is deserving of notice in regard to that case that apparently the attention of the learned Judge was not directed to the terms of s. 487, but there is nothing, as far as I can gather, to show that in that particular case the trial which took place before the Sessions Judge in the first instance was in his character of Sessions Judge, and I am disposed to presume, until I am satisfied as to this, that the trial out of which the prosecution sprang was of a civil character. I allow this appeal, and setting aside the conviction and sentence, direct that the commitment be transferred to the Court of the Sessions Judge of Cawnpore for disposal according to law.

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14 A. 356 = 12 A.W.N. (1892) 42.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

HAR GOBIND AND OTHERS (*Defendants*) v. NONI BAHU (*Plaintiff*).*
[23rd February, 1892.]

Evidence—Document rejected as inadmissible but allowed to remain on the record—Civil Procedure Code, section 142 A.

Where a document tendered in evidence in a Court of first instance was rejected as inadmissible but was nevertheless allowed to remain on the record of the case. *Held* [357] that the mere fact of the document remaining on the record did not make it evidence in the Appellate Court, but it must be tendered as evidence in the Appellate Court and accepted thereby.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. *Amiruddin* and Maulvi *Mehdi Hasan*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—The suit in which this second appeal has been brought by the defendants was one to have a mortgage set aside.

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* Second Appeal No. 1194 of 1889 from a decree of G. L. Lang, Esq., Commissioner of Jhansi, dated the 20th August 1889, confirming a decree of Babu Baldeo Prasad, Deputy Collector of Jhansi, dated the 22nd June 1889.

(1) 7 A. W.N. (1887) 139.

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The one question for decision in this suit was as to whether any consideration had been paid. The defendants produced and tendered in evidence a document purporting to be a receipt for the consideration. That document was rejected by the first Court on the ground that it was not proved as against the plaintiff. The suit was brought on the 26th of April 1889, consequently after Act VII of 1888 had come into force. The document bears an endorsement showing why it was rejected. It remains on the record *notwithstanding* the provisions of cl. 2 of s. 142A of the Code of Civil Procedure. The suit was decreed by the first Court, all the material issues having been found in favour of the plaintiff. The defendants appealed, and that portion of the memorandum of appeal to the lower appellate Court which relates to the document in question is as follow:—"An unregistered receipt may be inadmissible in evidence, but is sufficient for the satisfaction of a Court of justice." That was a broad proposition, but whether well founded or not we need not consider, because the document in question was not tendered in evidence in the lower appellate Court. It has been contended here that it was duty of the lower appellate Court to deal with the document, inasmuch as it had not been returned to the defendants by the first Court. We do not accede to that argument; we assume that by some oversight on the part of some officer of the first Court, or by reason of the defendants or those who represented them not asking to have the document handed over to them it was allowed to remain on the record. The fact of its being on the record did not avoid the necessity which the [358] defendants were under to tender it in evidence to the lower appellate Court, if they wanted to rely on it. S. 142A, cl. (2), is explicit, and the document in question not having been admitted in evidence cannot be treated as forming part of the record, although in fact it is found amongst the papers on the record. We do not consider whether the document was admissible in evidence under the Registration Act or whether if it was inadmissible in evidence under the Registration Act, a Court of justice could look at it or not. It was not tendered in evidence in the lower appellate Court, and no question consequently arises upon it. The other matters raised in the appeal are concluded by the findings of fact in the lower appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

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14 A. 358 = 12 A.W.N. (1892) 36.

CIVIL REVISIONAL.

Before Mr. Justice Straight.

GAURI DATT (*Decree-holder, Petitioner*) v. SHANKAR LAL (*Judgment-debtor, Opposite Party.*)*

[29th February, 1892.]

Execution of decree—Insolvency—Two reliefs not concurrent—Civil Procedure Code, ss. 351, et seqq.

A decree-holder in respect of whose judgment-debtor an order declaring him insolvent and appointing a receiver has been passed under s. 351 of the Code of Civil Procedure, and whose decree has been placed on the list of the judgment-debtor's scheduled debts, cannot, *pari passu* with the proceedings in insolvency,

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* Civil Revision No. 60 of 1891. Miscellaneous Application for revision under s. 622 of the Code of Civil Procedure.

1892 FEB. 29. — CIVIL REVISIONAL. — 14 A. 358 = 12 A.W.N. (1892) 36.

go on executing his decree in the ordinary way against that judgment-debtor. *Badal Singh* v. *Birch* (1), and *Abdul Rahman* v. *Behari Puri* (2) distinguished. [F., 28 M. 122=15 M.L.J. 1 (F.B.).]

THE facts of this case sufficiently appear from the judgment of Straight, J.

Munshi *Ram Prasad* and Kunwar *Parmanand*, for the applicant.

Babu *Jogindro Nath Chaudhri*, for the opposite party.

JUDGMENT.

STRAIGHT, J.—This is an application for revision under s. 622 of the Code of Civil Procedure of an order of the Small Cause Court Judge of Allahabad, dated the 29th of August 1891. Gauri [359] Datt, the petitioner, held a decree for money, dated the 11th of February 1887, against Shankar Lal. In the early part of 1888, Shankar Lal got into difficulties, and upon the 14th of April 1888 an order was passed under s. 351 of the Code, declaring him an insolvent, and upon the same date a receiver was appointed. Subsequently to the order in insolvency certain parties, alleging themselves to be the creditors of Shankar Lal, came forward, and among them was Gauri Datt, the holder of this money decree, and a schedule of creditors was prepared, and in that schedule was included the name of Gauri Datt, and there it remains to the present moment. Now Gauri Datt, outside of the proceedings in insolvency, has gone with his decree to the Court of Small Causes, and despite the pendency of those insolvency proceedings, has sought execution of it in the ordinary way. The learned Small Cause Court Judge has held that that money decree of Gauri Datt has become part and parcel of the scheduled debts under s. 352 of the Code of Civil Procedure, and that any rights Gauri Datt has under that decree must be regulated by Chapter XX of that Code.

Mr. *Ram Prasad* has strenuously argued to the contrary, and in support of his contention he has referred to two cases, *Badal Singh* v. *Birch* (1) and *Abdul Rahman* v. *Behari Puri* (2). With regard to the first of these rulings I think it enough to say that it is distinguishable upon the ground, first, that no receiver was appointed, and, secondly, that the decree of the decree-holder was obtained, after the order in insolvency had been made. With regard to the second ruling, it seems to me clearly distinguishable, because, whether rightly or wrongly, the learned Judges who decided that case held that under the circumstances therein disclosed there was bar to a suit under s. 283 by the party who had obtained a decree against a person in respect of whom an order in insolvency had been made.

It seems to me that Mr. *Ram Prasad's* contention, if effect were given to it, would practically render the whole provisions of Chapter XX of the Code nugatory and useless. I presume that [360] they were framed with two objects: first, the relief of an embarrassed judgment-debtor from obligations that he was honestly unable to meet, and secondly, that creditors who came in and proved in the insolvency proceedings were to share and share alike out of the proceeds or assets derived from the property of the insolvent, and provision is made in ss. 357 and 358 as to what protection is to be afforded to the insolvent, and under what circumstances he is to be held discharged from further liability in respect of his scheduled debts. If Mr. *Ram Pershad's* contention is to be given effect

(1) 15 C. 762. (2) 10 A. 194.

to, this startling state of things would arise, that where an order of insolvency had been passed and the insolvent had a hundred creditors, fifty of whom were decree holders and fifty of them entitled to sums of money from him, not only might they avail themselves of the provision of s. 352, but the fifty decree-holders might, *pari passu*, go on executing their decrees in fifty different Courts, and that the other fifty parties entitled to money from the judgment-debtor might institute fifty suits in fifty different Courts. Unless I read s. 352 as excluding not only the capacity to institute execution proceedings but also to institute suits, in either case it would be open to a decree-holder or creditor to adopt the above course. Mr. *Ram Prasad* says, unless there is a prohibition in terms to a decree-holder's executing his decree he must be allowed to do so, even though he is a scheduled creditor. My reply is that the position he contends for is wholly inconsistent with the scope and effect of the provisions of Chapter XX. The learned Subordinate Judge is right in the view he took, and I refuse this application with costs.

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Application refused.

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14 A. 361 = 12 A.W.N. (1892) 30.

[361] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

POHKAR SINGH (*Plaintiff*) v. GOPAL SINGH AND OTHERS (*Defendants*).*
[3rd March, 1892.]

Letters Patent, s. 10—Civil Procedure Code, ss. 556, 558, and 558, cl. (27)—Dismissal of appeal for default—Appeal under s. 10 of the Letters Patent from order of dismissal.

No appeal under s. 10 of the Letters Patent will lie from an order under s. 556 of the Code of Civil Procedure dismissing an appeal for default, the appellant not having had recourse to the procedure provided by s. 558 of the said Code.

[F., 15 A.W.N. 140; U.B.R. (1897—1901), Vol. II, 206; R., 39 C. 341 (343) = 15 C.L.J. 334 (335) = 14 Ind. Cas. 823.]

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of Edge, C.J.

Munshi *Jwala Prasad*, for the appellant.

Munshi *Ram Prasad* and Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J.—This is a Letters Patent appeal. The second appeal out of which it arose came on to be heard before our brother Mahmood on the 20th of July 1891. It was dismissed for default under s. 556 of the Code of Civil Procedure. The appellant, instead of following the course provided for by s. 558 of that Code, presented this Letters Patent appeal. I am of opinion that when the Code of Civil Procedure provides a specific remedy the appellant must follow it, and not having done so in this case, I would dismiss his appeal with costs.

STRAIGHT, J.—In support of what has fallen from the Chief Justice, I would point out that Mr. *Jwala Prasad* sought to support his appeal upon an affidavit of merits and facts connected with the dismissal for default. The best person to deal with those merits and matters of fact

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* Appeal No. 34 of 1891, under s. 10 of the Letters Patent.

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was the Judge who dismissed for default, and I believe that it was the this reason that the section was framed in order that the Judge who dismissed for default might have an opportunity of readmitting or refusing to readmit the appeal, and in the latter case the appellant is entitled to the advantage of the appeal provided for by s. 588, cl. (27).

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14 A. 362=12 A.W.N. (1892) 36.

[362] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

BISHESHAR (*Plaintiff*) v. MUIRHEAD (*Defendant*).* [4th March, 1892.]

Zemindar and tenant—Lessor and lessee—Lessee taking lease direct from zamindar—Suit by occupancy tenant to eject zamindar's lessee—Equitable estoppel.

Where a person took a permanent lease of a cultivatory holding direct from the zamindar without making any inquiries as to who were the cultivators and on what tenure they held; and where, the permanent lessee having commenced to build, one of the cultivators, being an occupancy tenant, subsequently brought a suit in ejectment against him:—*held*, that the lessee should, by the knowledge that the land was a cultivatory holding, have been put on his guard and have made inquiries as to the exact condition of the title, and that as he had not done so the doctrine of equitable acquiescence could not be applied in his favour.

[F., L.B.R. (1893—1900) 512 (514); 1 L.B.R. 196 (198).]

THE facts of this case sufficiently appear from the judgment of Straight, J.

Munshi *Kashi Prasad*, for the appellant.

Mr. *W. M. Colvin*, for the respondent.

JUDGMENT.

STRAIGHT, J.—This suit was brought by Bisheshar Ahir for ejectment of the defendant from an area of land amounting to 15 biswas 7 dhurs situated in the zamindari of Bechupur of which one Prayag Singh is the zamindar. Prior to the month of June, 1887, the plaintiff was the occupancy tenant of Prayag Singh and in occupation and cultivation of the land in suit with other land constituting an occupancy tenure of 11 bighas 10 biswas and 9 dhurs. It is not denied that in the month of June, 1887, the defendant enclosed within a fence the land claimed by the plaintiff in the present suit along with other land; and that within the area so fenced in he has planted trees and has erected a building at the cost of a very considerable sum of money. The plaintiff says:—"In doing this you are a trespasser, who has interfered with and destroyed my enjoyment of my occupancy right." The defendant replies:—"I did so under the warrant and authority of a lease granted to me by Prayag on the 4th of June, 1887." Another ground taken up by the defendants which it would be convenient to dispose of at once was that Prayag should have been made a [363] party to the suit; and that as through his action in granting the lease to the defendant, under which the defendant acted, the plaintiff had been dispossessed, his proper procedure was under clause, (*n*), s. 95 of the Rent Act against the zamindar, and that no action having been taken within six months from the date of the dispossession, he was barred by

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* Second Appeal No. 337 of 1889, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 8th December, 1888, confirming a decree of Pandit Râj Nath, Munsif of Benares, dated the 25 June, 1888.

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time, and was not entitled to come into the Civil Courts to maintain the present suit. That view was adopted by the first Court, and the same view was taken by the learned Judge in appeal, and it is upon that ground that he has upheld the decision of the first Court dismissing the plaintiff's claim.

It is impossible that I can hold this view to be sound law. The plaintiff was undoubtedly an occupancy tenant of a certain piece of land. The defendant, a stranger, came upon that land and interfered with it in such a way as to destroy the plaintiff's occupancy rights. He was undoubtedly a trespasser, and against such a person, I have no doubt whatever that the plaintiff, wholly irrespective of any statutory right he might have had as against his landlord under the Rent Act, was entitled to seek relief from the Civil Court to restore possession to him as against this trespasser. I am therefore very clearly of opinion that the ground upon which the suit was dismissed by the lower Courts was wrong, and that their judgments cannot be sustained.

Then comes a very grave and serious question for consideration which arises upon the contention of the learned Counsel for the respondent, namely, that taking the facts as stated in the judgment of the lower Court and as found by the learned Judge, the doctrine of equitable acquiescence should be applied as against this plaintiff, and that it should be held that he by his conduct is estopped now from asserting his occupancy rights in the land to which this suit relates.

I cannot help saying that there has been a good deal of loose talk with regard to this doctrine of equitable acquiescence, and that there are to be found judgments which in a way that is not altogether satisfactory applied or refused to apply it. It is well that I should, so far as my own view is concerned, very clearly point out what I understand to be the principle that should govern us. [364] In enunciating this principle it must be borne in mind that we have a provision contained in our Evidence Act which at least indicates the lines upon which an estoppel of any kind should proceed. Undoubtedly if the owner of a piece of land stands by while another person professes to sell that land to a third party, and he does not interfere, but allows that other person to hold himself out to be the owner of the land and to make a transfer of it, he is not to be heard afterwards for the purpose of destroying that purchaser's title by asserting to the contrary, though he may upset that title if he can show either that the purchaser had notice of his title, constructive or actual, or that circumstances existed at the time of the purchase which, as a reasonable man should have put him upon his guard and suggested inquiry, which inquiry, if made, would have resulted in his ascertaining the title of the true owner. In that case, supposing he makes out such a case, the purchaser cannot hold on to his purchase and the true owner is entitled to his property. That principle is laid down in the cases of *Ramcoomar Koondoo* v. *Macqueen* (1), and *Uda Begam* v. *Imam-ud-din* (2), and is embodied in s. 41 of the Transfer of Property Act.

In dealing with a case like the present, where the zemindar was granting a perpetual lease at a ground rent of an area of land of 11 bighas 15 biswas, it was in my opinion incumbent upon the defendant, knowing the circumstances, as he must be presumed to have known them, that attach to the tenure of land in India, to make inquiries as to whether suberdinate to the zemindar's interests there were cultivatory interests in

(1) I. A. Supp. Vol. 40. (2) 1 A. 82.

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the land which would have to be compensated or provided for under the lease. As regards a considerable portion of this land it is clear from the circumstance of the present plaintiff's claim and of the claim of the plaintiff in the other suits that it is and has long been a cultivated area. This was a fact in itself such as to put the defendant upon his guard and to make it incumbent on him as an ordinarily prudent and cautious man to make inquiry. If he had made inquiry the unavoidable result must have been that he would have ascertained the interest as occupancy tenant of this plaintiff and the others. He did no such thing. He [365] was content to take from the zemindar, and the zemindar alone, this perpetual lease, and it is not suggested that he ever entered into or made any inquiry. In that aspect of the matter it does not appear to me that as defendant in this cause, he can be heard upon the question of acquiescence which was put forward by his learned Counsel. Having failed to make inquiries he must be presumed to have had notice or to have known of the existence of the right of the plaintiff in this suit and the plaintiffs in the other suits. He must be taken to have known that there were other persons who had interests in this land upon which he was building these erections and which he was inclosing. I think therefore that there was no equitable estoppel maintainable against the plaintiff.

It has been urged that the case has aspects of hardship as regards the defendant. No doubt it is a matter for regret that he should have spent so considerable a sum of money upon the erection of the buildings ; but he is in no worse position than any other man who, having failed to take the necessary precautions required of him, finds himself confronted by a person whose title he has overlooked. On the other hand, it may be said that these occupancy tenants have been placed in a serious difficulty by having their rights interfered with and their cultivation of the land, which they held on the strength of a tenant's right created and recognised by a statute, disturbed.

I think therefore that the plaintiff is entitled to succeed in his suit, and I decree the appeal, and, reversing the decree of the lower Courts, decree the plaintiff's claim to possession of this land, but direct the decree be not given effect to for a period of three months from the date of the decree, during which period of time the defendant must be afforded full leave and license to go upon the land and to remove the materials. Under all the circumstances, I think the proper order to make about costs is that each party is to bear its own costs.

KNOX, J.—I concur entirely in the order and also in the reasons for the same.

Appeal decreed.

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[366] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Hannen and Sir R. Couch.
[*On appeal from the High Court at Allahabad.*]

CHANDI DIN (*Plaintiff*) v. NARAINI KUAR (*Defendant*).
[5th and 25th March, 1892]

Civil Procedure Code, ss 566 *and* 567—*The framing a new issue by an Appellate Court —Evidence recorded in one suit admitted by consent at the hearing of another.*

In the Court of first instance the appellant, upon the title of a sister's son, was one of the plaintiffs who obtained a decree for an inheritance, the suit having been heard at the same time with another, in which relations of the deceased owner, aleging themselves to be of the same *gotra* with him, also obtained a decree as his heirs. Evidence in the latter suit was received in that of the appellant by consent of parties, both suits having been brought against the same defendant, whose title, as widow of a son alleged to have been adopted by the last owner, was set up in both but was not proved.

Appeals having been filed in both suits, in that brought by the sister's son a new issue was framed by the appellate Court, under section 566, Civil Procedure Code, as to whether he was entitled as nearest of kin, or was excluded by the other claimants, whose suit was, at the time, compromised.

Held, that, after what had taken place in regard to both suits the appellate Court could frame this issue, although it was new, and had not been raised by the defendant's written answer.

With reference to the evidence in the one suit having been imported as a whole into the other at the first hearing, and the admission of evidence upon the trial of the new issue; it was held, that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son, on return made under section 567.

[N.B.—See in this connection 9 A. 467 whereon this appeal has arisen.]

APPEAL from a decree (7th of December, 1886) of the High Court, reversing, after remand, a decree (20th of June, 1881) of the District Judge of Bareilly.

This appeal was preferred in one of two suits brought by two sets of plaintiffs against the same defendant and transferred from the Court of the Subordinate Judge to that of the District Judge, by whom they were heard together. In one of these suits, *Chandi Din and others* v. *Naraini Kuar*, evidence recorded in the other, *Piyare Lal and others* v. *Naraini Kuar*, was admitted by consent.

[367] The principal questions in this appeal were, as to the appellate Court having framed a new issue and referred it under section 566 to the original Court, and as to the admission in the one suit of evidence heard in the other.

The facts giving rise to the suit are stated in the report of the appeal in the High Court, *Naraini Kuar* v. *Chandi Din and others* (1).

Both suits were for possession by right of inheritance of ancestral estate consisting of villages, gardens, houses and other properties valued at Rs. 5,84,490 which had belonged to Chaudhri Naubat Ram, a Kanaujia Brahman of Bareilly, who died in 1867, and to whom the plaintiff-appellant, Chandi Din, was related as sister's son. The plaintiffs in the other suit were Piyare Lal, who died pending the appeal in the High

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(1) 9 A. 467.

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Court, Shib Lal and Bhairon Prasad, descended from an ancestor common to them and to Naubat Ram. In both suits the defence has set up that the defendant, Naraini Kuar, being the widow of the late Raghunandan Ram, who had been the adopted son of Naubat Ram, was, therefore, entitled to the succession; and in Piyare Lal's suit, Naraini pleaded that the plaintiffs were strangers, and not related to the family. Not only did the suits differ in respect of the titles set up, but originally there were other co-plaintiffs with Chandi Din, not claiming under his title. These were Musammat Dayan, who claimed as step-mother of Naubat Ram, and Mashuk, a purchaser of part of the shares claimed by each of the other two plaintiffs. The representatives of this purchaser were parties to this appeal. Dayan withdrew her claim when the suit was first before the District Judge, and the purchaser also abandoned that part of the property to which title had been alleged through her. There being thus, more especially at first, an absence of identity in the plaintiff's interests, both sets, while the suits were pending in the Court of the Subordinate Judge, on the 4th of July, 1879, applied that they might be added as defendants, each set in the suit in which they were not plaintiffs. The order was made in that Court, purporting to be under section 32, Civil Procedure Code, that they should be added as defendants. This order, however, **[368]** was reversed (16th of February, 1880) by the High Court (*Pearson* and *Straight, JJ.*), and the judgment is here given, as it may be considered relevant to this report, and is of importance in the branch of procedure to which it relates. *Straight, J.*, said :—

"Apart from all questions of inconvenience or embarrassment to the principal defendant in the conduct of her defence should she fail to establish the adoption on which the whole fabric of her case rests, I do not see how, as between the plaintiffs and the joined defendants, no matter in which case, any decision that can be passed will estop either of them from subsequent assertion of their rights against one another in a separate suit. It does not appear to me that the plaintiffs in either case could have joined the other plaintiffs in their original plaint as defendants, for they sought no relief against them, and the relief they did seek against Musammat Naraini Kuar was not, in the sense of section 28, in respect 'of the same matter.' The joinder of the two sets of plaintiffs as defendants, in accordance with the order of the Subordinate Judge, can only be reasonable if they are to be legally bound by the decree in one suit, not only as to the principal defendant, but as between themselves; and it is only in this sense that their presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.' But the question involved in each suit is not what are the rights of two sets of plaintiffs *inter se*; the issue to be decided between the defendant Musammat Naraini Kuar, and each set of plaintiffs is perfectly plain and intelligible, and, as she is in possession, the burden of proof will be on those who assail her title. Necessarily all the plaintiffs are interested in the determination of the 'adoption" set up by the principal defendant; but, as I have already remarked, I do not see how a finding upon this point in either suit can bind the joined defendants to the plaintiffs or the plaintiffs to the joined defendants in respect of their mutual claims between one and another to the property; or in the event of the principal defendant establishing the adoption in one case, can obviate a second trial. No plea of *res judicata* could be sustained. **[369]** Upon the argument before us, Mr. Hill for the appellant called our attention to three judgments of Sir Barnes Peacock, reported in 7 W.R.

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p. 202; 8 W.R., p. 16; W.R., p. 368, which are valuable and instructive. For though these were given upon cases arising under section 73 of Act VIII of 1859, the reasoning and principles of interpretation enunciated may appropriately be followed in construing section 32 of Act X of 1877. Under section 73 of Act VIII of 1859, the Court had power to join 'all parties who may be likely to be affected by the result,'—an expression that might be taken to mean a great deal more than was ever intended by the legislative authorities, and which Sir Barnes Peacock, in the judgments already adverted to, was careful to qualify and reduce within intelligible limits. But now reading, as I think one should, sections 28, 29, and 32 of Act X together, the terms 'questions involved in the suit' must be taken to mean questions directly arising out of, and incident to, the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party, in the litigation on whose side he is to be ranged. I do not lay this down as an invariable rule by which applications under section 32 of Act X should be determined, for cases may arise similar to one reported at p. 315 of Vol. 7 W. R., and another which may be found in 3 B.L.R., p. 23; but in the multitude of instances, it will be a useful test to apply in deciding whether the presence of parties is necessary to enable the 'Court effectually and completely to adjudicate and settle the questions involved in the suit.' I entirely agree with the remarks of Pontifex, J., in *Mahmood Badsha* v. *Nicol, Fleming and others* (1); and applying them to the present cases, it appears to me that the joinder of the two sets of plaintiffs as defendants was not necessary to enable the Court effectually and completely to settle the question arising between the plaintiffs and Musammat Naraini Kuar in the respective suits." The order of the 4th of July, 1879, was on these grounds reversed. Both suits accordingly [370] proceeded without being consolidated, but both were transferred to the Court of the District Judge and heard together.

The District Judge having decreed (20th of June, 1881) the claims of the plaintiffs in both suits for possession of their shares in the property with costs of all parties out of the estate, the defendant, Naraini Kuar, filed separate appeals in each suit. In the appeal of *Naraini Kuar* v. *Piyare Lal and others*, the parties arrived at a compromise, of which the terms were drawn up in a decree. In the appeal of *Naraini Kuar* v. *Chandi Din and others* the Court (8th of July, 1885) ordered that the suit should be referred to the District Judge, under s. 566, Civil Procedure, for a finding "whether Chandi Din, plaintiff, was, according to Hindu law, as nearest heir, entitled to the property left by Naubat Ram." The District Judge found (15th of April 1886) that Chandi Din was not the heir of Chaudhri Naubat Ram, but that two persons, *viz.*, Shib Lal and Bhairon Prasad, now and at the commencement of the suit, both living, stood nearer in point of heirship to Naubat Ram than did Chandi Din. Return was made accordingly. Objections disputing the correctness of this return were disallowed, and the High Court (7th of December, 1886), affirming the conclusion of the District Judge upon the issue, dismissed Chandi Din's suit. The judgment is reported at p. 469 of I.L.R. 9 All.

Mr. *J. D. Mayne*, and Mr. *G.E A. Ross*, for the appellant: Under the circumtances the order of the 8th of July 1885, framing a new issue, was not rightly made. It enabled the defendant, Naraini Kuar, to put forward a new defence in the Court of appeal, which had not been set up

(1) 4 C. 355.

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in the first Court. This new defence was inconsistent with that on which she relied in the other suit, tried with this, in which she was defendant. At the trial of the new issue much of the evidence consisted of that adduced in the compromised suit. Naraini in that suit had originally pleaded that the plaintiffs, Piyare Lal, Shib Lal and others, were strangers and not of Naubat Ram's family. She was, therefore, debarred from taking the inconsistent ground that they belonged to his [371] family in a degree nearer than that of the plaintiff Chandi Din. Objections had been taken on behalf of the latter to the admission of evidence, which, however, had been admitted with the result that the pedigree put forward for the defence was found proved. This finding was tantamount to one that Shib Lal and Bhairon Prasad of the family of Piyare Lal, who had died during these proceedings, were seventh in descent from one Hiraman, the ancestor common to them and to Chaudhri Naubat Ram, to whom, in fact, as might have been found but for the irregular admission of evidence, Chandi Din was the nearest heir.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

In this case their Lordships understand that no question is raised for the purposes of this appeal as to the correctness of the findings of the High Court either in law or in fact, but the objection is one preliminary to those findings, and consists of a suggestion that the High Court have committed improprieties in point of procedure by which the appellant has been prejudiced. The first impropriety alleged is the remand to the District Judge in order to try the issue whether the plaintiff Chandi Din is the nearest heir under the Hindu law to the estate left by Naubat Ram. It is contended that inasmuch as the defendant Naraini Kuar had not raised that issue in her written statement, and as the issue had not been tried by the District Judge, she was debarred from raising it. Their Lordships think that there is no ground for that contention. When the suit was first instituted against Naraini she claimed under an alleged adoption of the deceased husband by Naubat Ram, and she disputed the title of the two rival sets of alleged heirs who brought suits against her. The title of Piyare Lal and others was established against her by decree; and although that decree was not affirmed by the High Court, but was the subject of compromise between her and others, she then had a perfect right to say :—" That title which I disputed or ignored before has been established against me by a decree, and I now claim to set it up in order to defeat the [372] claim made by persons who allege that they are heirs of Naubat Ram." She had a right to have that question tried, and the High Court directed it to be tried.

The next objection is that a quantity of evidence has been improperly admitted; and in order to see exactly how that stands, their Lordships will take notice of the state of the litigation.

Two suits were brought against Naraini Kuar in the year 1879, one by Chandi Din, the present appellant, who claimed to be the heir of Naubat Ram, and the other by Piyare Lal and others, who also claimed to be heirs of Naubat Ram. The District Judge attempted to consolidate those suits so as to settle the question *uno flatu* between the various litigant parties, but, no doubt for good technical reasons, that well-meant attempt

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was defeated, and the two suits had each to go on independently of the other. But in point of fact there were issues in those suits which were identical with one another, and they went on *pari passu*, and were tried simultaneously before the District Judge.

There was one question—a material one—which was not common to the two suits, and that was the question whether Piyare Lal and his faction, as they are called—his co-plaintiffs—were of kin to Naubat Ram. That question did not arise in Chandi Din's suit, but it was certainly a most reasonable course that the evidence taken in one suit should be admitted in the other; and the parties came to an agreement on the 12th of January 1881 that the evidence adduced in the case of Piyare Lal should be accepted also in the case of Chandi Din. There was no limit then put as to the kind of evidence that was to be adduced. The agreement extends to the whole evidence, and the whole evidence in Piyare Lal's suit was imported into that of Chandi Din. When the remand took place, a further agreement was come to between the parties on the 19th of January 1886, by which it was agreed that the evidence recorded by the Subordinate Judge in a subsequent suit that was brought by the co-plaintiffs of Piyare Lal should be admitted for the determination of the issues in the present case; and subsequently to that, *viz*, on the 15th of February 1786, an application was made that the [373] original papers contained in the record of the case of *Choudhri Shib Lal and others* v. *Chandi Din*, and those in the case of *Choudhri Shib Lal and Piyare Lal and others* v. *Naraini Kuar*, decided on the 20th of June 1881, should be perused, and on that day an order was made that the list of documents produced in Piyare Lal's suit should be put up with the record. All that list appears to have been treated as evidence upon the trial of the issue ordered by the remand.

It is objected that the agreement of 1881 should be limited by confining it to that evidence which related to the issues common to the two suits; and it is alleged that the District Judge erred in admitting for the trial of the issue on remand the whole of the evidence which was admitted under the order of 1881. But their Lordships find that there was ample opportunity for considering the effect of the evidence admitted by the order of the 15th of February 1886. The evidence appears to have been taken into consideration on the 19th, 20th, and 22nd of February 1886. The 10th of March was fixed for the hearing, and in fact the case was heard from the 1st to the 3rd of April 1886. There seems to have been some discussion as to the admission of particular documents; it does not matter exactly what the discussion was, but it shows that the attention of the parties was called to the state of the evidence; and there does not appear to have been any objection made then to the admission of this evidence in bulk. The District Judge, in his judgment, refers to the agreement to take the evidence in the second suit of Piyare Lal's party, and then he states this:—" Of the evidence adduced on behalf of the appellant Rani Naraini Kuar, a great portion consists of that adduced by Piyare Lal and others in their former suit against her;" but he does not go on to say that any objection was taken. It is apparent that no objection was taken; but an objection wad founded upon that evidence to the effect, as has been already referred to, that Naraini Kuar was by her conduct in Piyare Lal's suit estopped from raising the issue which the District Judge had to try between her and Chandi Din.

[374] Now it appears to their Lordships that if there was any objection to the admission of this evidence it should have been made at that

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time. Either there should have been an objection that the agreement of 1881 did not apply to it, and that it should be rejected *in toto* until proved independently, or some application should have been made providing that Chandi Din should be placed in as favourable a position as if the evidence had been originally adduced against him by Naraini Kuar, instead of being adduced by Piyare Lal. But nothing of the kind took place.

On appeal to the High Court some objection was made, which it is not very easy to construe, to the effect that the District Judge had misapprehended the consent as to reading the evidence on the record of the cases pending in the Subordinate Judge's Court; but even then no objection was raised that the District Judge was wrong in admitting the evidence adduced in the case *of Piyare Lal* v. *Naraini Kuar.* Therefore it is very difficult for the appellant to make anything of that written objection upon the appeal. Before the High Court it appears that certain specific objections were made to a large number of documents. In the first place, an objection was made to the whole, as not coming from proper custody. But that is not an objection that they were not properly admitted, excepting on the one ground that they did not come from the proper custody.

There are a number of specific objections on other grounds, but no trace of an objection that the District Judge was wrong in admitting the evidence in bulk as given in the suit of Piyare Lal.

Their Lordships are clear that the parties really intended that the evidence should be admitted; and probably it was the most reasonable course to take. There is no reason to suppose that if any objection had been taken by Chandi Din the whole of this evidence could not have been proved against him; and the parties took a shorter and a cheaper course by admitting it in bulk, as it was given in the suit of Piyare Lal.

[375] In the result their Lordships will humbly advise Her Majesty that the judgment appealed against ought to stand, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers.*
Solicitors for the respondent: Messrs. *T. L. Wilson and Co.*

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14 A. 375 = 12 A.W.N. (1892) 48.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

DEOKI PRASAD AND OTHERS (*Plaintiffs*) *v.* INAIT-ULLAH (*Defendant*).*
[5th March, 1892.]

Muhammadan Law—Waqf—Waqf-namah containing provision for descendants of grantor.

The fact that the grantor of a *waqf* has in the deed constituting the same made some provision for the maintenance of his kindred and descendants will not render the *wafq* invalid. *Sheik Mahomed Ahsan-ul'a Chowdhry* v. *Amarchand Kundu* (1) and *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (2) referred to.

[R., 8 O.C. 379.]

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* Second Appeal No. 838 of 1888 from a decree of Lala Lalta Prasad, Subordinate Judge of Ghazipur, dated the 21st March 1888, reversing a decree of Lala Bageshri Dial, Munsif of Rasra, dated the 17th November, 1887.

(1) 17 I.A. 28. (2) 13 W.R. 235.

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APPELLATE CIVIL.

14 A. 375 = 12 A.W.N. (1892) 48.

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *Amiruddin*, for the appellants.

The Hon'ble Mr. *Spankie* for the respondent.

JUDGMENT.

EDGE, C. J.—The plaintiffs, appellants here, on the 19th of March 1885, obtained a money-decree against Kudrat Ali. On the 27th of July 1885, Kudrat Ali executed a deed which is alleged to be a *waqf-namah*, and thereby transferred a portion of his property to his son Inait-ullah. The appellants here proceeded to execute their decree against the portion of the property which had been assigned by the deed of the 27th of July 1885. Inait-ullah filed objections claiming that the property was *waqf*. His objections were allowed, and thereupon the plaintiffs brought this suit against Inait-ullah and his father Kudrat Ali. The first Court decreed the suit. The lower appellate Court allowed the appeal of Inait-[376]ullah and dismissed the suit with costs. From the decree of the lower appellate Court this second appeal has been brought. Kudrat Ali did not defend the suit. He is not a respondent here. The sole respondent here is his son Inaït-ullah. Mr. *Amiruddin*, for the appellants, contended, firstly, that the assignment of the 27th of July 1885 was a fraudulent transfer within the meaning of s. 53 of the Transfer of Property Act. It is not necessary to decide whether or not s. 2, clause *(d)* of the Transfer of Property Act excludes s. 53 of that Act, I say it is not necessary to decide this, because it has been found by the lower appellate Court that Kudrat Ali was possessed of other property quite sufficient to pay off the decree. Consequently, the case cannot come within s. 53 of the Transfer of Property Act. The other point taken by Mr. *Amiruddin* is that the document of the 27th of July 1885 is not a valid *waqf-namah* according to Muhammadan law. His contention is that it is void under Muhammadan law, as it provides for the descendants and kindred of the grantor, as well as for certain religious purposes, and he relies on the decision of their Lordships of the Privy Council in the case of *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1). In my opinion, the document which was considered there was a very different document from the document which we have to consider here. In this case the object of the *wagf-namah* was, firstly, to provide for the support of the descendants and kindred of the grantor who might be in great want and need of support, and the surplus of the income of the property was to go to purposes which were undoubtedly religious purposes. In my opinion that was a good *waqf-namah* and I would dismiss the appeal with costs.

MAHMOOD, J.—The learned Chief Justice has already dealt with the case so completely that I only wish to add a few words. One observation which I have to make is that the deed of *waqf-namah* now before us was a valid *waqf-namah*, according to Muhammadan law, and that the views expressed by the learned Chief Justice in this case are in accord with those expressed by Kemp, J., [377] in the case of *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (2). The next observation I have to make is that these views were accepted by their Lordships of the Privy Council in this very case of *Shiek Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), and that that case, far from supporting the appeal, seems to me to be opposed to it. For these reasons, I agree with all that has fallen from the learned Chief Justice, and also in the decree which he has made.

Appeal dismissed.

(1) 17 I. A. 28.

(2) 13 W. R. 235.

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APPELLATE CIVIL.

14 A. 377 = 12 A.W.N. (1892) 33.

14 A. 377 = 12 A.W.N. (1892) 33.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

DULI SINGH (*Plaintiff*) *v.* SUNDAR SINGH (*Defendant*).*
[5th March, 1892.]

Hindu law—Hindu widow—Gift.

The widow of a separated Hindu being in possession, as such widow, of property left by her husband, executed a deed of gift of such property in favour of her daughter's son, her daughter being also a party to the deed. Subsequently to the execution of this deed of gift the executant's daughter gave birth to another son :—*held*, that the deed in question could not affect more than the life interests of the executant and her daughter, and could not operate to prevent the succession (as to a moiety of the property) opening up in favour of the subsequently-born son on the death of the survivor of the two ladies. *Ramphol Rai* v. *Tula Kuari* (1) referred to.

[R., 35 C. 1086 (1090) = 8 C.L.J. 120 (122) = 12 C.W.N. 914.]

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *D. Banerji* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Roshan Lal* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

STRAIGHT, J.—One Bhimjit was the admitted owner of the property to which the suit relates, and he occupied the position of a separated Hindu in possession of separate estate. He was married to one Hira Kuar, who, upon his death in 1850, survived him. By Hira Kuar he had one daughter, Musammat Rukmin, who was married to a man of the name of Fateh Singh. By Fateh Singh she had two sons, Kharak Singh, who is a *pro forma* defendant in the present litigation, and Duli Singh, who is the plaintiff. Hira [378] Kuar died in the year 1877. Rukmin and Fateh Singh both died in the year 1882. Hira Kuar during her lifetime made a deed of gift of the property now in suit with other properties in favor of her grandson Kharak Singh. This was in the year 1872, and possession was given and mutation of names recorded, a reservation being made in the deed of gift in favour of the donor to the effect that an allowance of Rs. 100 *per annum* was to be paid to her by the donee. At the time when the deed of gift was assented to by Musammat Rukmin, Kharak Singh was the immediate reversioner. It is also a material fact that at the time of the deed of gift Duli Singh, the present plaintiff, had not come into existence. At some time prior to his death Fateh Singh, professing to act as the guardian of his minor son, Kharak Singh, made a charge in favour of the defendant Sundar Singh in respect of the property in suit, together with another share in it which we are not concerned with in the present litigation. Subsequently, the defendant Sundar Singh obtained a decree in respect of his charge and put it into execution against half the property as representing the interest of Kharak Singh, and he brought it to sale, and there is an end of that. Now, he has attached the other half of the property as the property of his judgment-debtor and

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* First Appeal, No. 36 of 1891, from an order of Babu Ganga Saran, Subordinate Judge of Agra, dated the 11th October 1890.

(1) 6 A. 116.

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he sought to bring it to sale. Duli Singh, the plaintiff, objected to the sale; his objection was disallowed, and consequently he has had to bring the present suit to have his right in this particular property declared. It is therefore obvious that the whole title of the defendant-respondent rests upon the question of what by the transaction of 1872, Kharak Singh, his judgment-debtor, had acquired. The case for the plaintiff is that as the grandson of Bhimjit, his right to succession in the property of Bhimjit did not arise of open up until the death of his mother in 1882, and that no assent given by his mother to the transaction of the gift of 1872 could affect his right or destroy his title to succeed to his share in the estate on the death of his mother. The first Court decreed the plaintiff's claim, holding in effect that the estate of the widow and the estate of the reversioner, Musammat Rukmin, who assented to her making the gift, being of a limited nature, they between them could not do more than affect their own limited [379] interests to the extent of anticipating the succession of Kharak Singh before the time he would otherwise have been entitled to it. I have considered this view of the matter, which has been supplemented by the able argument of Mr. *Banerji* in support of appeal, and it certainly appears to me to be in harmony with the view expressed by the Full Bench of this Court in *Ramphal Rai* v. *Tula Kuari* (1). Mr. *Sundar Lal* has contended that the estate of a Hindu widow in possession is not of such a limited character as is contended for, and that for certain recognized purposes sanctioned by the Hindu law she may make a perfectly good and valid absolute alienation of her deceased husband's estate. I do not propose here to repeat what I said in the Full Bench ruling as to the nature of a Hindu widow's estate, nor in this case does any question arise of an alienation made by her of the kind ordinarily contemplated. I am not now going to decide what would be the position of a stranger third party in whose favour an alienation had been made. I am dealing solely and purely with the case in which two persons having a limited interest in property in the nature more or less of a life interest, one taking by succession after the other, have joined together to allow the party entitled when both of them are dead to succeed to the estate to obtain immediate possession. I think, under circumstances such as these, that the only proper view to adopt and the only view consistent with the Hindu law is, that they have relinquished their several rights to life possession of the property. Then, under such circumstances, can it be said that their action was of such a character as to defeat the title of the plaintiff in the present suit which accrued to him at the date of his mother Musammat Rukmin's demise? So far as Musammat Rukmin was concerned, she could not be heard as against her son, Kharak Singh, to deny his right to possession as against her. But that right would only subsist so long as she remained alive, and with her death the succession, in my opinion, opened up and Duli Singh plaintiff's right as grandson of Bhimjit came into existence, and in my opinion, had not been destroyed or in any way affected [380] by the deed of gift of 1872. I see nothing in this view which is inconsistent with the remarks made by their Lordships of the Privy Council in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2), nor, so far as I am aware, is this rule other than consistent with the doctrines of the Hindu law. I accordingly think that the issues which the learned Judge remanded were immaterial, and that it was unimportant to consider whether Duli Singh was alive at the date of his grandmother, Hira

(1) 6 A. 116. (2) 13 M.I.A. 219.

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Kuar's death or not. It seems to me sufficient for the purpose of ascertaining his right that he was alive at the date of his mother's death in 1882, when the succession opened up which had been suspended during the lifetime, first of the widow and then of Musammat Rukmin. Under these circumstances I allow the appeal and reverse the order of the learned Judge, remanding the case under s. 562 of the Code of Civil Procedure. I direct the learned Judge to restore the appeal to his file of pending appeals and to determine the other issues, if any, arising before him, taking such action under s. 566 of the Code as may appear to him necessary upon the basis of my preceding remarks that Duli Singh is entitled to maintain the action. The costs hitherto incurred will be costs in the cause.

TYRRELL, J.—I entirely concur in the view of law as laid down by my brother Straight and with the order that he has made in this appeal, and I am the more ready to adopt this view because it will be in harmony with the decree of this Court in another case, not between the same parties it is true, but by which Kharak Singh's interest in his grandfather's estate was judicially limited to a moiety thereof, upon the ground that his brother, Duli Singh, was presumably entitled to the other half of the estate.

Cause remanded.

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14 A. 381 (F.B.) = 12 A.W.N. (1892) 143.

[381] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

LEKHRAJ SINGH (*Plaintiff*) *v.* RAI SINGH AND ANOTHER (*Defendants*).* [9th March, 1892.]

Act XII of 1881 (*N.W.P. Rent Act*), ss 9, 93, *cl.* (*a*), 112 *A.* 161—*Landholder and tenant—Occupancy tenant—Suit by landholder against successor of occupancy tenant for arrears of rent which accrued during the lifetime of his predecessor—Jurisdiction—Civil and Revenue Courts.*

An occupancy tenant in possession, who has accepted the occupancy holding, is liable to be sued for arrears of rent not barred by limitation which accrued in the lifetime of the person from whom the right of occupancy has devolved upon him.

The suit above referred to is exclusively cognizable by a Court of Revenue.

So *held* by the Full Bench, Mahmood, J., *dissentiente*.

The following cases were referred to:—By Edge, C.J., *Jyeperkash* v. *Shewpurshad* (1), *Mata Deen Doobey* v. *Chundee Deen Doobey* (2), *Mata Deen* v. *Chundee Deen* (3), *Wazir Muhammad* v. *Amanat Khan* (4), *Bhikhan Kuar* v. *Ratan Kuar* (5), *Ahmad-ud-din Khan* v. *Majlis Rai* (6), By Knox, J., *Ashootosh Chuckerbutty* v. *Baneemadhub Mookerjee* (7), *Benod Behary Mookhopadhya* v. *Beer Narain Roy* (8), and *Hossein Ali Beg* v. *Ashruff Ali Beg* (9), By Mahmood, J., *Gopal Pandey* v. *Parsotam Das* (10), *Mahadeo*

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* Miscellaneous No. 12 of 1891.

(1) N.W.P. S.D.A.R. 1864, vol. I, p. 230.
(2) N.W.P.H.C.R. 1874, p. 118. (3) N.W.P.H.C.R. 1870, p. 54.
(4) 3 A.W.N. (1883) 172. (5) 1 A. 512. (6) 5 A. 438.
(7) Revenue, Civil and Criminal Reporter, vol. I, p. 26.
(8) Revenue, Civil and Criminal Reporter, vol. I, p. 46.
(9) N.W.P.S.D.A.R. 1865, p. 221. (10) 5 A. 121.

Singh v. *Bachu Singh* (1), *Waris Ali* v. *Muhammad Ismail* (2) and *Ahmad-ud-din Khan* v. *Majis Rai* (3).

[F., 13 A.W.N. 102; 16 C.P.L.R. 55; 8 O. C. 257 (260); R., 19 A. 352; 15 C.P.L.R. 89 (91); D., 8 O.C. 203.]

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FULL BENCH.

14 A. 381 (F.B.) = 12 A.W.N. (1892) 143.

THIS was a reference under s. 205 of the North-Western Provinces Rent Act (Act No. XII of 1881) made by the Assistant Collector of Aligarh. The suit out of which the reference arose was a suit to recover a certain sum as rent and interest brought under the following circumstances, as stated in the order of reference :—"The plaintiff, Kunwar Lekhraj Singh, is landholder in mauza Bisaro. The defendants are occupancy tenants. Their father was occupancy tenant before them. During his lifetime they did not live with him as a joint family, but separately, and did not share in the tenancy. Their father died at the end of 1888 [382] or the beginning of 1889. The present suit is for rent which fell due in October, 1887, and April 1888, that is to say during the lifetime of the defendants' father." The Assistant Collector, being of opinion that he had no jurisdiction to try the suit, referred the question to the High Court in the following form :—"Has a revenue Court jurisdiction in a suit for arrears of rent which fell due during the lifetime of a deceased representative of the defendants whom they have succeeded as tenants by inheritance and not by survivorship?" On the reference coming before a Bench consisting of Edge, C. J., Straight and Tyrrell, JJ., it was ordered to be laid before the Full Bench of five Judges.

Babu *Jogindro Nath Chaudhri*, for the plaintiff.

Munshi *Ram Prasad*, for the defendants.

Mr. *T. Conlan* and Mr. *C. O. Dillon*, on behalf of Government.

JUDGMENT.

MAHMOOD, J.—In this case I have the misfortune of having to begin the judgment, because I regret that I am not agreed with the majority of the Court in the answer which should be given to this reference.

The case arises from facts which are succinctly stated by Mr. Sabonadiere, Assistant Collector, who has referred this case under s. 205 (*a*) of the Rent Act (Act No. XII of 1881) for a reply to be given by this Court in regard to certain views which he entertained as to the jurisdiction which he possesses. Yesterday the point was considered whether the reference would lie to the District Judge instead of to this Court, but we were unanimous that, under s. 205 of the Rent Act, the Assistant Collector had the authority to refer the case to us through the Collector, as he has done.

Now, I have no doubt that the reference is one with which we can deal under the enactment, namely, the Rent Act above referred to.

The point, however, is one not free from difficulty, and I am anxious as the dissentient Judge to explain exactly why I cannot agree with the views which the majority of the Court are inclined [383] to hold in regard to the matter, which though pecuniarily small undoubtedly raises important questions for not only the decision of technicalities as to jurisdiction, but also to the rights of parties when questions of this character arise between landlord and tenant.

Mr. Sabonadiere states that the question which he has referred arises from the following facts :—

(1) 11 A. 224. (2) 8 A. 552. (3) 5 A. 438.

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"Kunwar Lekhraj Singh his landholder in mauza Bisaro. The defendants are occupancy tenants. Their father was occupancy tenant before them. During his lifetime they did not live with him as a joint family, but separately, and did not share in the tenancy. Their father died at the end of 1888 or beginning of 1889. The present suit is for rent which fell due in October 1887 and April 1888, that is to say, during the lifetime of the defendants' father.

Now over this matter one thing is certain, namely, that the claim which is brought in the suit out of which this reference has arisen was a claim, as appears from the record, for recovery of Rs. 236-2-0 in respect of the year 1295 Fasli for 83 bighas, and it is a claim for recovery not of rent due by the present defendants but of rent due by their father Amar Singh, who as a matter of fact died before paying up his debts, that is to say, before paying up, *inter alia* the debt due to the landlord, namely, the present plaintiff in the cause. Now much difficulty in regard to a question of this character arises not from any complications of fact, because they are simple, but from the difficulties which arise out of the somewhat inadequate drafting of the Rent Act (Act No. XII of 1881), and those difficulties I am anxious to explain.

The plaintiff of course as the landlord is anxious to show that because Amar Singh held an occupancy tenure of some sort, not an occupancy tenure such as is contemplated by exproprietary tenancy or by the transferable occupancy, but as land held under the statutory right awarded by the very statute which I am now considering, by s. 8 of the Rent Act, it is a tenancy which amounts to and is subject to all the right and liabilities which belong to proprietors in land *pro tanto*, that is to say, the right having in the first instance been con-[384]ferred by the statute, it becomes subject to the ordinary rules of equity, justice and good conscience within the meaning of the phrase as it has already been understood in India. It must be dealt with as the property of the tenant upon whom the right is conferred, and therefore whosoever succeeds to such a right must necessarily be regarded as taking the right subject to all the liabilities which belonged to the original tenancy. For this proposition Mr. *Conlan* who, as *amicus curiæ*, has appeared on behalf of Government has naturally relied upon s. 9 of the same enactment which lays down, among other things, that such holdings shall in the first place be non-transferable, and then it goes on to lay down that though they are non-transferable they should be dealt with according to the rules laid down in the last paragraph as if they were land.

Now as to the last paragraph of s. 9, I wish to say that I am most anxious to consider what it means. In the first place, whatever may be the rule of law as to original tenures, as to their being in the occupancy of a tenant by dint either of contract, express or implied, written or oral, the law, as it confers the right of occupancy upon an occupancy tenant in this part of the country, as in Bengal, confers a right which has got nothing to do with contract. It is the creation of a statute, a creation which, irrespective of the wishes of the landlord, and indeed, as we know from the history of the legislation, entirely against his wishes, confers the right to occupy and hold the land, because of twelve years' cultivation pure and simple.

Now this being so, I have to consider further what is the nature of the right which the law has created, and in having to consider this it will be simply taking up the time of the Court if I read out all the judgments which I considered in my dissentient judgment in the case of *Gopal*

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Pandey v. *Parsotam Das* (1) where I had to deal with the whole history and policy upon which the right is created.

The judgment unhappily, however, was a dissentient judgment, and since it has been made the subject of consideration in this case [385] I will read out passages from that judgment so as to incorporate them in this judgment. At page 128 of the report I said :—

" Whatever the rights of tenants may originally have been in these Provinces, Act X of 1859 was the first legislative enactment which recognized or conferred the rights of occupancy upon cultivators who had occupied their holding for twelve years and upwards. Section 6 of that Act virtually declared the right to be heritable, but left the question of transferability of the tenure unprovided for. Numerous rulings, more or less conflicting, are to be found in the reports. It was held by a Full Bench of the Calcutta High Court that the right was not transferable; that it was a right to be enjoyed by the person who held or cultivated and paid the rent, and had done so for a period of twelve years; that the right was only to be in the person who had occupied for twelve years, and was not intended to give any right of property which could be transferred. *Narendra Narayan Roy Chowdhry* v. *Ishan Chundra Sen* (2).

" The same view had been previously taken by Phear, J., in the case of *Bibee Sohodwa* (3). That learned Judge in examining the nature of the right of occupancy compared it to the relation which obtains between the right of ownership of land in England and the servitude or easement which is termed *profit a prendre*. He further observed that the ryot's was the dominant and the zemindar's the servient right; that whatever the ryot had, the zemindar had all the rest, which was necessary to complete ownership of the land; that the latter must, therefore, have such a right as would enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invaded by those who are not entitled to it.

" Whilst such was the nature of the right to which occupancy tenants were held to be entitled merely by force of the statute, it had been held, both by this Court and by the High Court of Calcutta, that local custom would entitle the occupancy tenant to transfer his holding, in other words, the question of transferability [386] was to be determined with reference to the original nature of the tenure, irrespective of the statutory provisions which were not understood to deprive tenants of such customary or other rights as they possessed before the passing of Act X of 1859. The *status* of occupancy tenants was therefore variable and indefinite, and being thus involved in uncertainty was liable to create the mischief which arises from imposing upon the Courts, charged with deciding such suits, the duty of ascertaining local custom in every case in which the tenant chose to plead it—customs which in India are far from being fixed or easily ascertainable.

" Such was the state of things found by the Legislature in 1873, when the Rent Act of that year was passed. The preamble to that Act shows that its objects were of a wider scope than those with which Act X of 1859 was enacted. The object of the Act of 1873 was not only to consolidate but to *amend* the law relating to the recovery of rent in these Provinces. It is therefore with reference to the provisions of that Act, which are more specific and clear, that the nature of the right of occupancy

(1) 5 A. 121. (2) 13 B.L.R. 274. (3) 12 B.L.R. 82.

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should be determined, and it is to be observed that the question of transferability is no longer left unprovided for by the Legislature.

"The manner in which the right of occupancy comes into existence is described in s. 8 of the Act. The right is acquired by the tenant merely in virtue of occupying or cultivating land continually for twelve years; in computing the period, the occupation or cultivation by the 'father or other person from whom the tenant inherits,' is also taken into calculation, and the whole rule is subject to certain provisions, which need not be considered for the purposes of the present cases. The right which thus comes into existence confers definite benefits on the tenant. He ceases to be a tenant-at-will; the rent payable by him cannot be enhanced by the mere wish of the landlord (s. 12) without special grounds (s. 13); he can apply for abatement of rent on showing adequate grounds (s. 15); the entire question of the amount of rent no longer remains a matter of discretion with the landlord, but is regulated by definite rules (ss. 16 and 17), though the landlord and tenant can by mutual **[387]** agreement fix such amount (s. 22) for such term as may be agreed upon. Further, the tenant can claim a lease from the landlord at the rate paid by him (s. 26); he cannot be ejected except on the ground of the non-payment of arrears of rent and other definite grounds specified in the Act. In short, while the landlord still continues to be the owner of the land, the tenant acquires a right to occupy and cultivate the soil wholly irrespective of the assent or permission of the londlord, so long as the provisions of the Act or conformed to.

"Now these statutory provisions which on the face of them, appear to relate only to the province of procedure or adjective law on the subject of recovery of rent, have, in reality, the effect of creating a substantive right in favour of the tenants. It has been said that the nature of that right is only a personal one, because, as is contended, it belongs to the tenant personally and dies with him. This contention is no doubt in a measure supported by the view expressed by Couch, C. J., in the Full Bench ruling in the case of *Narendra Narayan Roy Chowdhry* (1). But that ruling was passed under Act X of 1859 and Bengal Act VIII of 1869, the provisions of which were vastly different to those of Act XVIII of 1873. I confess I can take no such view of the right of occupancy under the provisions of the last-mentioned Act. The idea of a personal right has been variously difined by jurists, to whom it is known by the term *jus in personam*, but in all those definitions the essential principle is recognized that such right avails exclusively against persons specifically determinate. In the case of an occupancy tenant the right created in his favour by the statute is not a right which binds the landlord alone; in other words, it is not a right which has for its correlative the obligation of only the landlord of the soil. On the contrary, it is a right in land, a right which avails against all persons universally. It is therefore not a *jus in personam*, and it is clear that it cannot be called a *jus ad rem*, for that class of right is only a species of personal right and implies the right of compelling a determinate person or persons to do any **[388]** specific act, the commission of which would confer a real right known in the language of jurisprudence as *jus in rem* or a permanent right in and over a thing which forms the subject of the right. In the case of an occupancy tenant, the right which the Legislature has conferred upon him under Act No. XVIII of 1873 is such as, subject to the limitations

(1) 13 B.L R. 274.

provided by the statute, prevails against all the world. The subject of the right is the land held by the tenant, and, whatever changes the ownership of that land may undergo, the occupancy right subsists in and goes with the land. The right no doubt falls far short of absolute ownership or *dominion* defined by Austin to be a 'right over a determinate thing indefinite in point of *user*, unrestricted in point of *disposition* and unlimited in point of *duration*.' But 'one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership—called by the Romans *nuda proprietas*—remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself—in other words, which may be granted to one person over an object of which another continues to be the owner—are known as *jura in re aliena*' (Holland on Jur. p. 144.) Thus *Jura in re aliena* are such of the rights *in rem* availing against the world at large as are acquired over and in the absolute ownership or *dominion* of another person in whom the ownership still continues. Among such rights was a right known to Roman Jurisprudence as *emphyteusis* which has been defined to be 'the right of a person who was not the owner of a piece of land to use it as his own in perpetuity, subject to forfeiture on non-payment of a fixed rent and on certain other contingencies.' It appears to me that the right of an occupancy-tenant in these Provinces resembles the *emphyteusis* of the Roman Law. It is a right carved out of the proprietary estate of the zemindar by the operation of the statute, as indeed it might have been by grants from the landlord himself. That such was the nature of the right of occupancy intended to be conferred by the Legislature upon tenants of twelve years' standing seems to me to be clearly shown, not only by the general provisions of the Rent Act but by the express language of a clause in s. 9. [389] That clause lays down that, 'when any person entitled to such last-mentioned right dies, the right shall devolve as if it were land. Moreover, as shown by s. 8, the tenant acquires the right of occupancy not only by virtue of his own cultivation, but also by virtue of the continuous cultivation or occupation of the land by the person from whom he inherits. Under s. 9 the right is capable of devolution by inheritance and also of transfer by act of parties, but both these capabilities are subject to the limitations provided by that section. It provides that the right of occupancy shall not 'be transferable by grant, will or otherwise, except as between persons who have become by inheritance cosharers in such a right.' These limitations, however, do not alter the nature of the right so as to take it from one class of rights recognised by jurisprudence into another class. Therefore, according to my view, the holding of an occupancy tenant must, for the purposes of the present question, be regarded as land, or any other real and substantive interest in immoveable property. If any light can be thrown upon this question by the provisions of the laws other than the Rent Act itself, I should say that the rules of procedure in regard to the territorial jurisdiction and limitation applicable to a suit by an occupancy tenant for recovery of possession of his holding from a trespasser proceed upon the principle that the tenant's right is immoveable property and must be treated as such for purposes of procedure."

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I have quoted these long passages from my long judgment for no reason other than that of showing the principle upon which my judgment proceeds, namely, the appreciation of what the Legislature intended by the right called occupancy tenure. The judgment unhappily was

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a dissentient judgment, as this one is, but I still adhere to the views I then expressed in connection with, not the recognition, but the creation of the right of occupancy. It is a matter of the history of legislation to which I as a Judge can refer, namely, that it was the policy of Government at the time expressed by its legislative enactment of 1859, soon after the troubles of 1857, that persons who were in possession of the land must not be easily ousted, that difficulties must be placed in [390] the power of landlords and zemindars for procuring the ouster, and therefore, not with the consent, not with the desire, but indeed against the wishes of the zemindars, namely, landlords, the Act No. X of 1859 was passed conferring the right, whether created by custom or by dint of twelve years' possession. The right thus created was a right intended to devolve like land. It was not intended to vest like land. The object of the Legislature was simply to keep a certain class of population which cultivates certain parts of the land on the soil. It is not for me to say whether the policy was right or wrong, but it is clear from the history of legislation that this was the object of the Legislature. Therefore two consequences followed; one was the conferring of the right, and the other was to disable a party who held such right from being able to transfer it, though he might wish to do so as much as he could. The agricultural population of India is a population which has not enough advancement of mind to understand its own interests, and it is obvious to me, reading through the whole history of the legislation, that it was intended that no man by his want of prudence, being an agriculturist, should cease to be the tenant of the land by transferring it. This is clear from s. 9 of Act No. XII of 1881.

Now this being the nature of the right, the exact question before me becomes simple, and it is this: is the misbehaviour or imprudence or extravagance of an occupancy tenant to be any reason for the ouster of his son or any other person upon whom the tenure would devolve within the meaning of s. 9 of the Rent Act? So far as I am concerned, I have absolutely no doubt that such was not the intention of the Legislature. When an occupancy tenant who cannot be turned out by the landlord at his will, and in the way of turning him out difficulties and use of formalities required by the enactment are placed, chooses to misbehave and to die before paying up the rent due from him, his sins do not fall upon his son or his heirs, because, although the tenancy is an occupancy tenure and devolves like land, yet an occupancy tenure in this country was created to prevent such contingencies. It was so created [391] because, unhappily, the agricultural population of India has not yet advanced enough to understand its own interests, otherwise there is no reason either of legislative or other consideration which would take away from a man the power of conveying his own rights such as those in an occupancy tenure. We know that in England a lease-holder can convey land, and the assignee takes subject to all the conditions of the lease, subject to all the impediments and legal liabilities which the lease was subject to.

But such is not the case in regard to occupancy tenures, and any questions which arise in regard to covenants running with the land, as they are called, do not apply to this right because it does not devolve like any other land. The right is personal to the man, namely, the present defendant. He derives it by reason of certain qualifications which are required by the law, namely, by reason of their being father and son, but the fact that this qualification is required by the statutory rights does not create any privity of land between himself and his father *qua* a tenant.

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The tenancy is free to devolve upon him by dint of the statute, because if the statute meant to render him liable, the word used would have been *inherit* and not *devolve* as it is in s. 9 of the Rent Act.

But this is not, in my opinion, the intention of the Legislature, and I hold that upon the death of an occupancy tenant those who succeed him in the tenure have no privity with the deceased tenant, but that they derive a right independently for themselves by reason of being qualified for the statutory right which s. 9 of the Rent Act contemplates. It follows therefore that no covenants made by the predecessor in the occupancy tenure and no obligations incurred by him can fall upon his successor.

In laying down this rule some difficulty may arise over transferable occupancy tenures such as those contemplated by s. 7 of the enactment. I have no difficulty, so far as I am concerned, in explaining the incidents that may arise in regard to that class of tenures and extending the same principles as those upon which I [392] am dealing with this case, but the question under that section does not arise here.

Now, how does the matter stand? The matter is that Amar Singh, an occupancy tenant, died, leaving, I do not know whether he left other property, a debt due by him to the plaintiff, landlord. The debt was a subsisting one for which remedies are apparently provided by the Rent Act (No. XII of 1881) by the summary procedure of the Act so long as he lived. Those remedies were never employed against him. His crops which were liable primarily for the payment of rent were never distrained. No remedy such as the enactment confers was ever sought for by the landlord, zemindar. The man died and the question is whether upon his death his sons could be brought into the Rent Court for being dealt with as if they were Amar Singh themselves.

I have no doubt they cannot. The enactment itself specifically deals with remedies, and where it creates rights it is most anxious to define them. There is not one word in the enactment to show that suits such as those contemplated by s. 93 or s. 95 of the Rent Act are to be instituted against the heirs or representatives or other persons other than the original tenants. Reliance has been laid upon the last paragraph of s. 112-A of the Rent Act, which says that "when a defendant dies and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant."

I am, however, relieved from the difficulty of considering this matter, because in this case admittedly the suit was commenced after the death of the tenant, the tenant being never a party to the suit, and the quarrel, the subject of the reference, relates to a dispute between a man who at one time was subject to the jurisdiction of the Rent Act and his landlord. Notwithstanding the section, a son or other successor to an occupancy tenant may possibly raise pleas in an action of this character as the legal representative, upon the ground that the cause of action does not survive.

[393] Be it as it may, the immediate question before me is whether the Civil Court has jurisdiction in regard to the dispute as represented by the pleadings of the parties and as it is before me. Now, in the case of *Mahadeo Singh* v. *Bachu Singh* (1) I took some trouble to explain how the provisions of a general enactment are to be considered as imperative till it is shown that by special enactment the power of jurisdiction

(1) 11 A. 224.

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is taken away. The general enactment is the present Code of Civil Procedure (Act No. XIV of 1882), and it can, as such, of course be abrogated by any special enactment, but in s. 11 it says that the Civil Courts "shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force."

Now there is a maxim of law which says that special enactments may abrogate the general enactments. The abrogation here which Mr. *Conlan* relies upon lies in s. 93 of the Rent Act (No. XII of 1881) and in the point now before me relates to clause (*a*) of the section, because the first part of it is clear enough as to the ouster of jurisdiction.

The difficulty then is, is the present suit a suit for arrears of rent? It was contended, and, I may say, with much emphasis, by Mr. *Conlan* that the word "*rent*" being used there is generic, that therefore it must be taken to mean not only rent due actually by the occupancy tenant now in possession, but also by his ancestor, so that a suit of this nature is a suit of this character within the meaning of this section which must be dealt with, because the occupancy tenure being under s. 9 a tenure which devolves like land, a great-grandfather dies, a grandfather dies, a father dies and the son is in possession, then under the enactment, as the necessary legal result of Mr. *Conlan's* argument, the Rent Court has power to deal with liabilities as to arrears of rent, to deal with questions which may involve the administration of various estates which I have considered for bringing out the point of law.

There is one more point in the matter, and it is this. If the word "*rent*" did mean as Mr. *Conlan* argued it meant, I should **[394]** have consented to his contention. But it cannot be that, because the word "*rent*" is not to be understood in the English sense of rent nor is it the same as "rent charge," which again is a most complicated term of the English law, but it must be understood as rent within the meaning of the Rent Act. To understand what "*rent*" means and what may be the meaning within the meaning of the statute, we must consider the several remedies provided by law for recovery of rent. In regard to this matter I may *perforce* refer to the ruling in *Waris Ali* v. *Muhammad Ismail* (1), where I had the misfortune of differing with Mr. Justice Oldfield in regard to the meaning of the word "*rent.*" There it was actually contended and actually held by my learned colleague that mimickry was rent within the meaning of the enactment, and that because it was rent, therefore, all the rules applicable to the recovery of rent were applicable to that case. I have in this case also the misfortune of differing from my learned brethren.

This being the difficulty which arises over the question as to the definition of rent, we may refer to the provisions of clause (2) of s. 3 of this somewhat loosely drafted enactment. There rent is defined in the following words:—

"Rent 'means whatever is to be paid, delivered or rendered by a tenant on account of his holding, use or occupation of land."

Now this being so, I have been unable to conceive upon what ground it can be held that the word "*rent*" as used in clause (*a*) of s. 93 of the Rent Act can be understood in any sense other than that in the definition. Now what is rent is rent due by the tenant and not by his heirs, on account of his holding, not on account of his heirs' holding, use or occupation of land. Similarly the suit contemplated by s. 93 (*a*) is a suit which

(1) 8 A. 552.

can be against the tenant himself and not against his heirs, and indeed this is the principle of the *ratio* upon which the Full Bench of this Court proceeded in *Ahmad-ud-din Khan* v. *Majlis Rai* (1), over a cognate question.

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Now I havesaid enough to show that for the purpose of maintaining an action under s. 93 (*a*) of the Rent Act (No. XII of 1881) [395] it is not a suit for rent, because for purposes of the enactment the defendants were not the occupancy tenants, of the land during the period for which the rent is claimed. Amar Singh's death may or may not render his estate liable for payment of what was due from him by reason of the occupancy tenure, but it is a question which is not excluded from the cognizance of the Civil Courts of Judicature, because it is a question which may involve the administration of the estate, and is a question which the Rent Act does not contemplate should be committed to the summary trial of the Rent Court.

This being so, I respectfully think that the cause and dispute as represented in this case was a cause which did not fall within the purview of clause (*a*) of s. 93 of the Rent Act, and there was no abrogation of the general jurisdiction of the Civil Court, and that therefore the cause lay where it should have lain under the general law and procedure in a Court which can deal with the administration of estates and which can deal with questions of equities arising in the case.

My answer to the question therefore is that Mr. Sabonadiere was right in the opinion that he had no jurisdiction as a revenue officer to entertain the suit, and that Mr. La Touche, the Collector who differed from him, was wrong in holding that it was a suit capable of being entertained by the Rent Court. This is my answer to the reference.

EDGE, C. J.—This is a reference under s. 205 of Act No. XII of 1881 made by Mr. Sabonadiere as the presiding officer of the Court of Revenue in which the suit to which the reference relates was pending. The reference was forwarded to the Court through the medium of the Collector. The question which we have to determine here is, can a suit for arrears of rent be brought by the landlord against the person upon whom the right of occupancy has devolved, the arrears having accrued during the lifetime of the prior occupancy tenant? The answer to the question in my opinion depends upon the construction of s. 93, clause (*a*) of Act [396] No. XII of 1881. The section, so far as it bears upon the question before us, is as follows:—

"Except in the way of appeal, as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise; (*a*) suits for arrears of rent, or, where rent is payable in kind, for the money equivalent of rent, on account of land or an account of any rights of pasturage, forest rights, fisheries or the like."

Now it is to be observed that according to the plain reading of the section no suit of the nature of a suit for arrears of rent on account of land can be brought in any Court other than the Court of Revenue. There is absolutely no limitation placed upon the wording of section other than the limitation which is to be found in s. 1 of the Act, which limitation does not apply in this case. In my judgment the answer to the

(1) 5 A. 438.

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question merely depends on the question of facts, was or was not the suit which was before Mr. Sabonadiere a suit for arrears of rent on account of land? It certainly, according to the plain understanding of the English language, with which there is nothing inconsistent in Act No. XII of 1881, was a suit for arrears of rent on account of land, that is, a suit in which the plaintiff sought a decree for arrears of rent which he alleged to be due to him on account of land. There is nothing in the section, so far as it relates to suits for arrears of rent to indicate that the section applies only where the person suing was the person who was the landholder or landlord at the time when the rent became due, nor is there anything in the section to indicate that the person to be sued in a suit for arrears of rent must necessarily be the person who occupied the position of tenant at the time when the rent, the arrears of which are sued for, became due. According to the plain English of the section it applies to all suits in which it is sought to recover arrears of rent on account of land, that is to say, to all suits of rent in [397] respect of holdings to which Act No. XII of 1881 applies. I would be content, so far as I am concerned, to rest my judgment in this case on the plain reading of the section. But several cases have been relied upon in the course of the argument as bearing upon the question, and I think it necessary to point out here how far, if at all, they affect the question immediately before us. I think it is also advisable to point out, that there is in my judgment nothing in Act No. XII of 1881 which is inconsistent with the plain construction of clause (*a*) of s. 93.

The person who sues here is a landlord to whom the rent sued for became due. The person who is being sued is the present occupancy tenant of a holding held under the plaintiff, and is being sued in respect of arrears of rent which accrued in the life-time of his father, the then occupancy tenant, who died before the institution of the suit. Referring to s. 9 of Act No. XII of 1881, we find that a right of occupancy other than the right of a tenant at fixed rates devolves as if it were land. In what I shall say in this judgment it must be understood that when I refer to a right of occupancy I refer to such a right of occupancy as devolves under s. 9 as if it were land. Now what is such right of occupancy? It is a right to occupy land subject, amongst other conditions, to the condition of paying the rent which may be payable for the time being in respect of the land. The right of occupancy cannot be regarded as a right to occupy the land independent of the condition for the payment of rent, and when a right of occupancy devolves under s. 9, it appears to me that it devolves in its integrity, that is to say, carrying with it, amongst others, the condition as to payment of rent. The person upon whom the right of occupancy devolves is not bound to accept the tenancy, but, if he does accept it, he, in my opinion, must accept it subject to its burdens, and one of those burdens is the legal liability to pay the rent which is in arrear and a suit for which is not barred by limitation.

If such person elects not to accept the right of occupancy his liability would be limited to that of a legal representative to [398] whom assets had come. I think it would be correct to say that the condition to pay rent due and in arrear, which was part of the contract of occupancy followed the land and affected the person upon whom the right of occupancy devolved and who accepted the position of an occupancy tenant in succession. It is obvious to my mind that the Rent Act contemplates that a landlord shall have a remedy by way of ejectment in case of non-payment of rent by his tenant where the tenant is an occupancy

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tenant. But in order to exercise the right of ejectment, which in such a case could only be done under Act No. XII of 1881, it would be necessary for the landlord to first obtain a decree for the rent in arrear. The decree which would enable the landlord to apply for ejectment is a decree for rent in arrear passed by a Court of Revenue and not by a Civil Court. Consequently, if the landlord in the present case was compelled to bring his suit in the Civil Court and has not got his right of suit in the Court of Revenue for the rent which became due in the life-time of the deceased occupancy tenant, and which is still in arrear, he might lose those arrears by reason of there being no assets and yet never could obtain under the present condition of the law, a decree for the rent so in arrear, upon which he could apply to the Court of Revenue to eject the occupancy tenant in possession upon whom the right of occupancy has devolved under s. 9 of the Act. In such a case, and if the law is as it has been contended it is, the landlord might be left without any remedy. He could neither obtain payment of the rent due by the deceased occupancy-tenant and in arrear at his death, nor obtain possession of the land which was held on the condition that the rent payable for it should be paid. To my mind those considerations suggest that it was clearly the intention of the Legislature, as indeed they expressed it, that all suits for arrears of rent should be entertainable by the Courts of Revenue, and by the Courts of Revenue only, no matter who might be the parties to those suits. It was suggested in the course of the argument that if a suit for arrears of rent against the legal representative of a deceased occupancy tenant was entertainable in a Court of Revenue it might be necessary for that Court to enter into an inquiry [399] as to the assets and as to other matters which a Civil Court would be the more suitable tribunal to deal with. But s. 112-A contemplates the carrying on of a suit on the death of the tenant and the carrying on of the suit by making his legal representative a party to the suit as defendant. Further, s. 161 of Act No. XII of 1881 obviously means that where a decree under the Act has been obtained and the judgment-debtor has died before execution, his heir or other representative may be made a party for the purpose of enabling the judgment-creditor to execute his decree, so that in either of these two cases it is possible that a Court of Revenue might have to consider the very matters which, it is suggested, can only properly be considered and dealt with in a Civil Court. Shortly, in my opinion, according to the Act, the occupancy tenant in possession who has accepted the occupancy holding is liable to be sued for arrears of rent not barred by limitation which accrued in the lifetime of the person from whom the right of occupancy has devolved upon him. I shall now shortly refer to some of the principal cases which were cited before us in the argument. The first case to which I shall refer is *Jyeperkash* v. *Shewpurshad* (1). In that case as the law then stood it was held that an assignee of rent could only sue to rocover the rent which had been assigned to him by bringing his suit in the Court of Revenue, and that the Civil Court could not entertain such a suit. That is in accordance with the principle which, in my judgment, underlies Act No. XII of 1881, namely, that all suits of the nature of suits for arrears of rent must be brought in the Court of Revenue and in the Court of Revenue only. In the case of *Mata Deen Doobey* v. *Chundee Deen Doobey* (2) the plaintiffs, who were recorded proprietors of a share, sued after their father died, under Act No. XIV of 1863, to recover

(1) N.W.P.S.D.A. R. 1864, Vol. I, p. 230. (2) N.W.P.H.C. R. 1874, p. 118.

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profits which had accrued before their father's death. Sir Robert Stuart, C. J., and Spankie, J., differed; Stuart, C. J., holding that the suit was maintainable in the Civil Court only, Spankie, J., holding that the suit was maintainable in the Court of Revenue only. In the case of *Mata Deen* v. *Chundee* [400] *Deen* (1), it was decided that a lambardar was not chargeable in the Court of Revenue in respect of profits which had become due and payable at a time prior to his appointment, although he succeeded his father in the office. The case apparently turned on the wording of a clause in Act No. XIV of 1863 which related to suits by or against lambardars. In the case of *Wazir Muhammad* v. *Amanat Khan* (2) it was held that the heirs of a deceased lambardar could not sue to recover in respect of revenue paid by the lambardar. The decision turned on the wording of clause (*g*) of s. 93 of Act No. XII of 1881, which apparently relates solely to suits by a lambardar himself and not by his heirs. It was in my opinion a perfectly right decision having regard to the clause which applied in the case. The next case to which we were referred was the case reported in the note to the case of *Bhikhan Khan* v. *Ratan Kuar* (3). It was a suit by a co-sharer, not apparently against the lambardar, but against a person who had intermeddled by dealing with the profits of the mahal. The case in my judgment depended on some of the clauses of the Rent Act then in force, and has, so far as I can see, no bearing upon the construction to be put on s. 93, clause (*a*), Act No. XII of 1881. I next come to a case which was much pressed upon us, namely, *Ahmad-ud-din Khan* v. *Majlis Rai* (4) in which it was decided that a suit by the heirs of deceased co-sharer against the heirs of a deceased lambardar for money claimed as profits due to the deceased co-sharer by the deceased lambardar was a suit which was cognizable by the Civil Court and not by the Court of Revenue. Now that decision turned upon clause (*h*), s. 93 of Act No. XVIII of 1873, in which the word introduced into Act No. XII of 1881, namely, "recorded" was not to be found. I may say that I am of opinion that the co-sharer mentioned in clause (*h*) of s. 93 of Act No. XVIII of 1873 meant recorded co-sharer.

I entirely agree with the decision that a suit by a person who was the heir of a recorded co-sharer, but was himself not a recorded [401] co-sharer, did not lie in the Courts of Revenue for profits. That case, as most of the others, turned upon the special wording of clauses which do not apply to the suit in the present case. There were one or two other authorities referred to in the course of the argument to which I do not think it necessary to refer in my judgment, as they have no direct bearing on the question before us, and as I think that the answer to the reference is really to be ascertained by the plain construction of clause (*a*), s. 93, Act No. XII of 1881. I would accordingly answer the question by saying that the suit in question is one not cognizable by the Civil Courts and is cognizable by the Courts of Revenue only.

TYRRELL, J.—I entirely concur with the learned Chief Justice.

KNOX, J.—The question put to us for answer is whether the Revenue Courts have jurisdiction in suits for arrears of rent which may have fallen due during the lifetime of a deceased tenant and which may be claimed by the landlord from the persons who have succeeded as tenants by inheritance, and not by survivorship The question does not in terms refer to the fact that it is a question which has arisen out of a suit brought

(1) N.W.P.H.C.R. 1870, p. 54.
(2) 3 A.W.N. (1883) 172.
(3) 1 A. 512.
(4) 5 A. 438.

by a landlord against a tenant with right of occupancy, or rather the successor to such tenant, but it is evident from the reference, and it is with regard to such case alone that I make the answer, and my answer would be that the Revenue Courts alone have jurisdiction. It is beyond all doubt that s. 93 of Act No. XII of 1881 confers upon Courts of Revenue the jurisdiction to take cognizance of any dispute or matter which may arise between the landlord and tenant having a right of occupancy when such a matter relates to arrears of rent, and I do not think that I am forcing the language of the Act at all when I understand from it that the Act confers jurisdiction over all disputes relating to matters of rent between persons who at the time when the suit is brought are holding towards each other the position of landlord and tenant. It follows from this that the jurisdiction of the Civil Courts is *prima facie* and in terms excluded from taking cognizance of such suit. Now this being so, is there anything as contained in s. 93 or elsewhere in the Act to take such a suit as this which has [402] been made the subject of this question out of the revenue jurisdiction? I can find no such provision.

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It has, however, been contended that the successor by inheritance to a deceased tenant, whose tenure was of the class referred to in and contemplated by s. 8 of Act No. XII of 1881, is not the tenant of the landlord so far as arrears which accrued due from his predecessor in interest are concerned, and it is then contended that the Revenue Courts are deprived of jurisdiction. It seems to me that to concede such a construction of the language contained in s. 93 is in effect to place a limit upon language which is in terms very wide and a limit which was not contemplated or intended by the Legislature. The claim of a landlord for arrears of rent brought in this form can only, and must always, be a suit for arrears of rent against whomsoever it may be brought. The person sued as defendant may indeed plead in answer that he is not the tenant of the plaintiff and has never attorned to him, and if it be so found the jurisdiction of Revenue Courts fails. But if the pleadings disclose that the defendants had succeeded to the position of the tenant by the time the suit has been brought and had accepted the liability of the tenant to the plaintiff as landlord, the question must still remain whether the defendants had accepted the liability to arrears of rent which accrued due before his tenure commenced. But on such pleadings in my opinion the suit will still be a suit for arrears of rent, and being such a suit no Court other than a Court of Revenue can take congnizance of it. It will be in fact for the Revenue Court, and the Revenue Court alone, to determine whether the defendant before us is or is not liable for the sum claimed as arrears of rent.

I am fortified in this view by the history of the past legislation on the question of landlord and tenant. So far as I can discover, from the earliest times in which the question has been made the matter of legislation by the English Government, all matters in dispute touching arrears of rent between landlords and tenants were removed from the ordinary jurisdiction of Civil Courts and made the subject of special enactment. There was indeed one [403] attempt made, and only one, so far as I can find, to place suits of this kind on the same footing as ordinary civil suits. It was in Regulation XVII of 1793, and the only preference given to suits of this nature was that they were invariably to be heard and determined prior to any suits of other kinds which might be then pending before the Courts. It was, however, found that this expedient was of no practical value where the object was to provide speedy remedy. Regulation XLV of 1795 in its

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preamble states that there had been found in the Regulations as they then existed defects tending to screen oppression and dishonesty on the one hand, and to discourage moderation and good faith on the other, and it was essential to the prosperity of the country and the punctual collection of the public revenue that landholders and farmers of land should have the means of speedy remedy for recovery of rent, special powers were sanctioned by law which enabled landholders to recover rent without the delay and expense necessarily attending a law process for the recovery of every arrear. This expedient, however, failed also, and Regulation VIII of 1831 was placed upon the statute book which expressly provided that summary claims connected with arrears of rent should be preferred in the first instance to Collectors of Land Revenue. After several intermediate Regulations bearing upon the subject and with the same end in view, Act No X of 1859 was enacted. Act No. X. of 1859 was not an Act curtailing the powers of Collectors, but as its preamble shows, it was specifically enacted to extend the jurisdiction to Collectors in connection with the demands of rent and other questions connected with the same, and thus we come to an end of what was known as the summary jurisdiction and summary rights. Act No. X of 1859 and the Acts which follow it are Acts providing elaborate and special machinery for the trial of rent suits amongst other matters. Act No. X of 1859, so far as the provisions contained in it for recovery of arrears of rent are concerned, and they will be found in s. 23 of the Act, will be found to differ in no material way from Act No. XVIII of 1873, which is described as an Act for the consolidation and amendment of the law relating to recovery of rent. Act No. XII of 1881, which is the enactment at present in force, is described **[404]** as an Act to amend the law relating to recovery of rent. But I find nothing in any of these Acts which encourages the view that the ample and express jurisdiction which was conferred upon Collectors of Land Revenue by Act No. X of 1859 has been in any way curtailed or restricted. The object of all the legislation was over and over again described in the Regulation as being the promotion of peaceful and equitable relations between the superior and inferior classes of agricultural population and the supply of prompt remedies for the differences which would otherwise impede the punctual realization of the land revenue. Moreover it seems to me that the view I have taken is consistent with the view which was taken, both in these Provinces and in Lower Bengal, when Act No. X of 1859 was for many years in force. Both the Calcutta High Court and this Court appear to have entertained no doubt as to the jurisdiction of the Revenue Courts to determine suits relating to arrears of rent, even in cases where the plaintiff might not be the then landlord, but an assignee of or holding some similar position from the landlord. Thus I find that in 1865 the Calcutta High Court in the case of *Ashootosh Chuckerbutty* v. *Baneemadhub Mookerjee* (1) held that the Revenue Court had jurisdiction, even when the defendants pleaded that the claim was not one for rent but for money due upon contract, and therefore beyond the cognizance of the Revenue Court. The case was one in which the defendant had covenanted in his *kabuliat* to become liable for certain outstanding rents due before he had taken the lease. Then there is the case of *Benod Behary Mookhopadhya* v. *Beer Narain Roy* in the same volume, page 46, in which that Court held that the Revenue Court had jurisdiction where a rent decree had been

(1) Revenue, Civil and Crimnal Reporter, Vol. I, p. 26.

purchased from the landlord, and the purchaser of the decree found it necessary to continue the litigation in the Rent Court. There is a case in which the Sadr Diwani Adalat of these Provinces in 1865, namely, in the case of *Hossain Ali Beg* v. *Ashruff Ali Beg* (1), held that a sharer in possession of his share at the time of his suit may claim in the Revenue Court the profits [405] of his share for a previous period during which he was not in possession. There are other cases to the same effect, but I only quote these by way of analogy. For these reasons I agree in the answer given by the learned Chief Justice.

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STRAIGHT, J.—I only wish to say this, that though my mind is not wholly without doubt, I am not so satisfied as to the correctness of the contrary view as to justify me in differing from the majority.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

ALI ABBAS AND ANOTHER (*Plaintiffs*) v. KALKA PRASAD (*Defendant*).*
[16th March, 1892.]

Regulation No. XVII of 1806, ss. 7 and 8—Mortgage by conditional sale—Foreclosure—Pre emption, suit for—Limitation—Act XV of 1877 (Indian Limitation Act), sch. ii, art. 120.

Where a mortgage by conditional sale had been duly foreclosed in accordance with the procedure laid down in ss. 7 and 8 of Regulation XVII of 1806 and at the expiration of the year of grace a portion of the mortgage money remained unpaid:—*held* in a suit for pre-emption of the mortgaged property that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the plaintiff's right of pre-emption accrued and limitation began to run against him from the expiration of such year of grace. *Forbes* v. *Ameeroonissa Begum* (2), distinguished: *Raisuddin Chowdhry* v. *Khodu Newaz Chowdry* (3); *Jaikaran Rai* v. *Ganga Dhari Rai* (4); *Moonshee Syud Ameer Ali Bhabo Soonduree Debia* (5); *Mohunt Ajoodhya Pooree* v. *Sohun Lal* (6); *Joorackhun Singh* v. *Hookum Singh* (7); *Buddree Doss* v. *Durga Pershad* (8); *Mussamat Tara Kunwar* v. *Mangri Meea* (9); *Hazari Ram* v. *Shankar Dial* (10); *Tawakkul Rai* v. *Lachman Rai* (11); and *Ajaib Nath* v. *Mathura Prasad* (12); referred to. *Prag Chaubey* v. *Bhajan Chaudhri* (13); and *Rasik Lal* v. *Gajraj Singh* (14); and *Udit Singh* v. *Padarath Singh* (15) overruled.

[Appr., 24 A. 17 (P.C.) = 28 I.A. 248 = 5 C.W.N. 388 = 3 Bom. L.R. 707 = 8 Sar. P.C. J. 133; 3 O.C. 184 (187); 113 P.R. 1901 = 120 P.L.R. 1901; R., 10 O.C 374; 26 P. R. 1902 = 26 P.L.R. 1902; 103 P.R. 1893; Expl., 20 A. 315 (318) (F.B.). D., 20 A. 358.]

THIS was a reference made to the Full Bench by Tyrrell and Knox, JJ. The facts of the case sufficiently appear from the order of reference, which is as follows:—

[406] TYRRELL and KNOX, JJ.—This appeal has arisen out of a pre-emption suit brought by the appellant against the respondents. There are two appellants, the father and a minor son. At the time the suit was

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* Reference in Second Appeal, No. 749 of 1889.

(1) N. W. P. S. D. A. R. 1865, p. 221.
(2) 10 M.I.A. 340.
(3) 12 C. L.R. 479.
(4) 3 A. 175.
(5) 6 W. R C. R. 116.
(6) 7 W. R. C. R. 428.
(7) 3 Agra 358.
(8) N. W. P. H. C. R. 1870, p. 284.
(9) 6 B. L. R. App. 114.
(10) 3 A. 770.
(11) 6 A. 344.
(12) 11 A. 164.
(13) 4 A. 291.
(14) 4 A. 414.
(15) 8 A. 54.

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brought. Syed Ali Abbas, the father, was a recorded co-sharer in the mahal to which the contested property belongs. The second appellant, his minor son, Ghulam Haidar, who is joined with him in the suit, is said to have obtained the property now in controversy by gift from the other plaintiff *pendente lite.* The defendant, respondent, is the conditional vendee from a co-sharer of the plaintiff under a deed of conditional sale executed in favour of his (the defendant's) father, Khushhali, on the 12th of August, 1872. Under the terms of that deed the respondent, or rather his father, was put in possession of the land the subject of the conditional sale. On the 4th of August, 1873, this vendee applied under Regulation XVII of 1806, s. 8, for a notice of foreclosure against his conditional vendor. On the 27th of August, 1874, the year of grace contemplated by the above section expired, but the conditional vendee took no steps to obtain an order of foreclosure in the terms of the last paragraph of s. 8 of the Regulation until the 17th of February, 1885, upon which date he moved the District Judge of Allahabad to give him an order in the terms of s. 8 of Regulation XVII of 1806. On the 9th of March, the District Judge of Allahabad, having found that notice had been duly issued under the Regulation to the vendor, and that the year of grace had expired on the 27th of August, 1874, without any payment by the vendor to the vendee, gave to the conditional vendee the foreclosure order he sought for. The conditional vendee, for reasons which are not disclosed, although he had possession of the property, brought a suit, apparently to mature and establish his title against his vendor, on the 26th of March, 1885, that is to say, a few weeks after he had obtained the fereclosure order, and on the 16th of May, 1885, he obtained a decree. The appellant here claiming to pre-empt the property which was the subject-matter of the conditional sale, instituted the present suit on the 9th of September, 1886. It is conceded on both sides that the limitation of art. 120 of sch. ii of Act No. XV of 1877 is applicable to this case.

[407] The question therefore arises whether or not this suit has been brought within six years of the date when the right to bring the suit accrued. The suit is based on a provision in the *wajib-ul-arz* to the effect that "co-sharers have a right to pre-empt in cases of sale by a co-sharer. When did the sale in question take place? Should it be deemed to have taken place on the 27th of August, 1874, when the year of grace expired, or on the 9th of March, 1885, when the District Judge gave a foreclosure order under s. 8 of Regulation XVII of 1806, or on the 16th of May, 1885, when the vendee's title was perfected by a final decree made in the suit in that behalf between himself and his vendor?

Both the Courts below have defeated the pre-emptor upon the ground of limitation, holding that time ran against him from the 27th of August, 1874. Mr. *Sundar Lal* on behalf of the appellant contends here that no complete, absolute or full title was vested in the conditional vendee in respect of the property in suit prior to the 16th of May, 1885, when he obtained a decree in the controversial suit for declaration of his right as absolute vendee from the Civil Court. In support of his contention Mr. *Sundar Lal* relied upon the ruling of this Court in *Prag Choubey* v. *Bhajan Chawdhri* (1), where it was held by the late Mr. Justice Oldfield that the *terminus a quo* for a suit of the character of the suit now before us is to be found in the date of the decree which declared the completeness and maturity

(1) 4 A. 291.

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of the title of the conditional vendee, and not from the date of the expiry of twelve months from the date of the notice issued by the District Court in its ministerial capacity under the Regulation, or from the date of the foreclosure order made by the District Judge. Mr. *Sundar Lal* also relied upon the ruling in *Udit Singh* v. *Padarat Singh* (1), and we understand that he was in a position to refer to some few other authorities in the same direction. But as we intimated to him that we mean to refer the question in issue to a Full Bench, he preferred to reserve them for the present.

[408] In support of the respondent's case Mr. *Ram Prasad* cited the following authorities :—*Tawakkul Rai* v. *Lachman Rai* (2) ; *Ashik Ali* v. *Mothura Kandu* (3) ; *Hazari Ram* v. *Shankar Dial* (4) ; *Buddree Doss* v. *Durga Pershad* (5) ; *Jeorakhun Singh* v. *Hookum Singh* (6) ; *Digambur Misser* v. *Ram Lal Roy* (7) ; *Moonshee Syud Ameer Ali* v. *Bhabo Soonduree Debia* (8) ; *Mohunt Ajoodhya Pooree* v. *Sohun Lal* (9) ; *Musammat Tara Kunwar* v. *Mangri Meea* (10).

Mr. *Ram Prasad* tells us explicitly that he relies upon the date of the 27th of August, 1874, as the *terminus a quo* for this suit, and he contends that a suit for pre-emption brought more than six years after that date is barred by limitation. He does not rely upon the foreclosure order, and rightly in our opinion : for it is pretty obvious that although proceedings under s. 8 of Regulation XVII of 1806 had been set on foot in 1873, yet when the application was made in March, 1885, and the foreclosure order was given in the same month by the District Judge, under s. 8 of the said Regulation, the order was made without jurisdiction ; for the Reglution in question had been repealed in its entirety by Act No. IV of 1882, and under the Full Bench ruling of this Court in *Ganga Sahai* v. *Kishin Sahai* (11) it was incompetent to the District Judge to use the procedure of the repealed Regulation. The only course open to the conditional vendee in those proceedings was to have adopted the procedure of the Transfer of Property Act in order to obtain the relief he wanted ; and we may observe that the suit which he brought in the year 1885 was not a suit which he could have brought under the Transfer of Property Act, nor was the decree given to him a decree which could properly be made in a suit brought under the Transfer of Property Act.

However that may be, the only question now before us is whether the limitation of art. 120 is to be calculated from the 27th of August, 1874, when the year of grace expired, or from the date of the decree of the 16th of May, 1885. There can be no doubt **[409]** that there has been considerable conflict of opinion upon this point between different Benches of this Court. It is well to mention here, so as to clear the ground, that there is no question in the present case of want of notice on the pre-emptor's part of the fact of the conditional sale of 1872, or of the fact that a notice for foreclosure had been applied for and obtained, or of the fact that the year of grace was about to expire. This is shown by the proceeding No. 19 upon the record of this suit, dated the 19th of August, 1874, in which the pre-emptor intervened in the foreclosure proceeding and made certain objections which were disposed of by the District Judge. We think

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(1) 8 A. 54. (2) 6 A. 344. (3) 5 A. 187.
(4) 3 A. 770. (5) N.W.P.H.C.R. 1870, p. 284. (6) 3 Agra 358.
(7) 14 C. 761. (8) 6 W. R. C.R. 116, (9) 7 W.R.C.R. 428.
(10) 6 B.L.R. App. 114 (11) 6 A. 262.

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that it is desirable that a Full Bench should determine the question whether in respect of a pre-emption suit brought after the passing of Act No. IV of 1882, in respect of a co-sharer's transfer by way of conditional sale to a stranger of his rights in a mahal in 1872, and in respect of which foreclosure proceedings had been initiated under Regulation XVII of 1806 the *terminus a quo* under s. 120 is to be found in the date of the expiry of the year of grace in such proceedings, or in a decree in a suit brought between the conditional vendee and the conditional vendor to establish the former's absolute title to the subject-matter of the conditional sale.

We refer this question accordingly.

On the case coming before the Full Bench the following judgments were pronounced.

The Hon'ble Mr. *Spankie* and Pandit *Sundar Lal*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

JUDGMENTS.

EDGE, C.J.—The suit out of which this appeal and reference have arisen is one for pre-emption. On the 12th of August, 1872, the then owner mortgaged his share by way of a mortgage by conditional sale. On the 27th of August, 1873, a notice or *parwana* in accordance with s. 7 of Regulation XVII of 1806 was duly served. On the 27th of August, 1874, the mortgage-moneys not having been satisfied, s. 8 of that Regulation applied. Nothing further appears to have been done till the 17th of February, 1885, **[410]** when an application was made to the District Judge to draw up an order completing the foreclosure proceedings commenced in 1873. On the 9th of March, 1885, the District Judge made what purported to be the order asked for. On the 26th of March, 1885, the son of the vendee brought a suit to establish his title as vendee under the foreclosure proceedings and the conditional sale of 1872. That suit was contested by the mortgagor, but on the 16th of May, 1885, the vendee obtained a decree declaring his title. On the 9th of September, 1886, the suit for pre-emption now before us was brought. The question referred to us is whether, admitting art. 120 of sch. ii of the Indian Limitation Act to be applicable, the right of the pre-empting plaintiff to sue accrued on the expiration of the year of grace which expired on the 27th of August, 1874, or when the vendee obtained his decree clearing his title on the 16th of May, 1885. It has been contended by Mr. *Spankie* for the plaintiffs-appellants that no right of suit for pre-emption accrued before the 16th of May, 1885, the contention being that according to the judgment of their Lordships of the Privy Council in *Forbes* v. *Ameeroonissa Begum* (1), there was in contemplation of law under the Regulation no complete sale until the conditional vendee had brought his suit for a declaration of his absolute title and until he has obtained a decree in his favour in that suit. Mr. *Spankie* in support of that contention has relied on the case of *Rais-ud-din Chowdhry* v. *Khodu Newaz Chowdhry* (2) in which, apparently, that Court held that without a suit for possession, or a suit for declaration of absolute title, a conditional vendee did not under the Regulation become an absolute vendee. The learned Judges in that case refer generally to the fact that such was the result of the decisions in that Court. I am unable to agree either with their conclusion, or with the proposition that the invariable decisions of the Court supported that view. Mr. *Spankie* also referred to *Jaikaran Rai* v. *Ganga Dhari Rai* (3), *Prag*

(1) 10 M.I.A. 340 at pp. 350-1. (2) 12 C.L.R. 479. (3) 3 A. 175.

Chaubey v. *Bhajan Chaudhri* (1) and to *Rasik Lal* v. *Gajraj Singh* (2), which apparently [411] supported his contention. He also criticised certain other judgments of this Court. On the other hand, Mr. *Ram Prasad*, for the respondent vendee, or rather heir of the vendee, relied on *Moonshee Syud Ameer Ali* v. *Bhabo Soonduree Debia* (3), *Mohunt Ajoodhya Pooree* v. *Sohun Lal* (4), *Jeorakhun Singh* v. *Hookum Singh* (5), *Musammat Tara Kunwar* v. *Mangri Meea* (6), *Hazari Ram* v. *Shankar Dial* (7) and *Tawakkul Rai* v. *Lachman Rai* (8). It appears to me that the principle of the decisions of those cases shows that on the expiration of the year of grace, provided that anything remains to be paid under the mortgage and the proceedings under the Regulation were regular, all of which facts appear to have been found here, the title of the conditional vendee becomes that of an absolute vendee and the sale becomes an absolute sale on that date. In one of those cases, *viz.*, *Jeorakhun Singh* v. *Hookum Singh* (5) the decision of their Lordships of the Privy Council in *Forbes* v. *Ameeroonissa* (9) is very fully considered, and it appears to me that the right interpretation was placed upon it. With regard to that case in the Privy Council it is to be observed that the decree which their Lordships gave to the conditional vendee was a decree that the appellant before them, who was conditional vendee, "was entitled to the possession of the mortgaged premises as absolute owner by virtue of the conditional sale, which had been duly made absolute, but was not entitled to a decree for any *mesne* profits." Apparently the reason why he was deprived of a decree for *mesne* profits was his own conduct. Our brother Mahmood and Mr. Justice Duthoit in *Tawakkul Rai* v. *Lachman Rai* (8) agreed with the view of the Judges in the case in the Agra High Court Reports, 1868, p. 358. I notice that in s. 7 of Regulation XVII of 1806, reference is made to the mortgage being fully foreclosed in the manner provided for in s. 8, and I also notice in the concluding portion of s. 8 that the *parwana* therein provided for is to notify to the mortgagor, amongst other things, that in certain events "the mortgage will be fully foreclosed, and the conditional sale will become conclusive.' The suit for a [412] declaration of title may be necessary where the vendee wishes to clear his title by obtaining a decree of the Civil Court declaring his title to be that of an absolute vendee. Such a suit could not be maintained if he were not *de facto* and *de jure* the absolute vendee at the date when the suit was brought, therefore it appears to me that it cannot be said that his title as absolute vendee first came into existence when he obtained a decree in his declaratory suit. In my opinion, limitation in this case began to run from the 27th of August, 1874, when the year of grace expired under the circumstances of this case, and that is the answer which I would give.

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STRAIGHT, J.—I am of the same opinion. I only wish further to add that having heard the fuller argument of this case and of the point referred, I am of opinion that the two rulings to which I was a party, one reported in I.L.R., 4 All. 414, and the other in I.L.R., 8 All. 54, were erroneous decisions and must no longer be regarded as binding.

TYRRELL, J.—My answer to the reference is that the right to sue in the present case accrued on and after the exiry of the year of grace on the 27th of August, 1874.

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(1) 4 A. 291. (2) 4 A. 414. (3) 6 W.R.C.R. 116.
(4) 7 W.R.C.R. 428. (5) Agra 358. (6) 6 B.L.R. App. 114.
(7) 3 A. 770. (8) 6 A. 344. (9) 10 M.I.A. 340.

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MAHMOOD, J.—Consistently with my judgments in the cases of *Tawakkul Rai* v. *Lachman Rai* (1) and *Ajaib Nath* v. *Mathura Prasad* (2) I am of the same opinion as the learned Chief Justice and my brothers Straight and Tyrrell.

KNOX, J.—I am of the same opinion as the learned Chief Justice and my brother Tyrrell, and would answer this reference in the same manner.

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14 A. 413 = 12 A.W.N. (1892) 79.

[413] REVISIONAL CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Knox.

MIHR ALI SHAH (*Petitioner*) *v.* MUHAMMAD HUSEN AND OTHERS (*Opposite parties*).* [25th March, 1892.]

Revision—Powers of High Court—Jurisdiction—Act IX of 1887 (*Small Cause Courts Act*) *sch.* ii, *cl.* (18).

Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision.

A suit by a Muhammadan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by clause (18) of schedule ii of the Provincial Small Cause Courts Act IX of 1887, and therefore not cognizable by a Court of Small Causes.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Pandit *Sundar Lal*, and Maulvi *Ghulam Mujtaba*, for the applicants.

Mr. *D. Banerji*, for the opposite parties.

JUDGMENT.

MAHMOOD, J.—This is an application under s. 622 of the Code of Civil Procedure invoking the aid of this Court as a Court of Revision to disturb the decrees of the Munsif of Agra and the Subordinate Judge of that district as the Appellate Court which disposed of the case in appeal.

The solitary ground upon which such interference is invoked is, that the Court of the Subordinate Judge and the Munsif at Agra had no jurisdiction to try this suit, which was exclusively cognizable by the Court of Small Causes at Agra. In arguing this matter much ability has been displayed on behalf of the appellant by Pandit *Sundar Lal* and Mr. *Ghulam Mujtaba*, and in resisting it we have to deal with the argument of Mr. *Dwarkanath Banerji*, who appears for the opposite party.

The facts out of which this dispute has arisen are very simple. It is admitted that to the tomb and shrine of Shah Vilayat Shah is [414] attached certain property of which the profits have to be devoted to the *durgah*, and that such property is not only devoted to the expenses contingent upon the ritual of the Muhammadans in respect of such matters, but is also distributed among his descendants, among whom the

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* Application No. 28 of 1891 for revision, under s. 622 of the Civil Procedure Code, of a decree of Babu Ganga Saran, Subordinate Judge of Agra, dated the 3rd April, 1891, varying a decree of Maulvi Muhammad Shafi, Munsif of Agra, dated the 28th November, 1890.

(1) 6 A. 344. (2) 11 A. 164.

parties to this litigation are admitted to be. It is also admitted that in respect of such properties the plaintiff has no right of personal ownership, but that the right by which he collects the income of the property is in the capacity of *sajjada-nashin*, or, to use the phrase employed by the lower Courts, as *mutawalli*, and, to use the English simple phrase, he would be called the trustee of the property.

It seems that the parties to this litigation are not on friendly terms, because this very suit shows that the share claimed by the plaintiffs, respondents, being the share to which they were entitled under the object of the *waqf*, though found to be due to them, has not been paid by the defendant *sajjada-nashin*. There is not one question pressed upon us showing that the concurrent findings of both the lower Courts are wrong upon the merits as to the amount due to the plaintiffs whom Mr. *Banerji* represents.

But it is argued that although the plaintiffs might have had such a right of claiming the money that they did claim in this suit, yet the suit was of a character not entertainable in an ordinary Court of Civil Judicature because of s. 16 of the Provincial Small Cause Courts Act (Act No. IX of 1887), and it is then argued that because the suit was not a suit of an ordinary civil character, therefore we should now set aside the decrees of both the Courts below, leaving it open to the plaintiffs, respondents, to bring any action in the Small Cause Court at Agra.

Now I have no doubt that the provisions of s. 16 of the Provincial Small Cause Courts Act (Act No. IX of 1887) require that suits cognizable by the Small Cause Courts should be entertainable by those Courts and those Courts alone, but I am also satisfied that the provisions of s. 11 of the Code of Civil Procedure (Act No. XIV of 1882) require that, unless it is shown that a cause does not fall within the ordinary jurisdiction of a Civil Court, the cause being, **[415]** as it is here admitted and conceded, a cause of a civil nature, the Court is not to decline jurisdiction, so that, if I understand these two clauses aright, the following question arises :—

Is there anything in the Provincial Small Cause Courts Act (Act No. IX of 1887) to have ousted the jurisdiction of the Munsif of Agra as a Court of first instance or of the Subordinate Judge of Agra as a Court of appeal by reason of there being a separate Small Cause Court?

In arguing this point to show that such was the case, Pandit *Sundar Lal* and Mr. *Ghulam Mujtaba*, on behalf of the petitioner, have relied upon two of my own judgments in *Jai Devi* v. *Mathura Das* (1) and in *Masum Ali* v. *Mohsin Ali* (2). The argument in regard to these rulings on behalf of the petitioner has been that the principle applies to this case also, and that, therefore, the ruling of the Bombay High Court in *Bebi Ladli Begam* v. *Bibi Raje Rabia* (3) requires us to set aside the decrees of the Courts below with the effect that matters would stand exactly as they did before the litigation ever was started, irrespective of what happened in the Courts below.

Now, in the first place, there is much in the judgment of Markby, J., in the case of *Drobo Moyee Dabee* v. *Bipin Mundul* (4) which may have to be considered as to whether or not at this stage a plea such as that raised in this application is to be entertained; because it must be remembered

(1) 8 A.W.N. (1888) 193.
(2) 10 A.W.N. (1890) 201.
(3) 13 B. 650.
(4) 10 W.R. C.R. 6.

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that the Act upon which that ruling proceeded was the one which preceded the present enactment and was *in pari materia*.

It is, however, not upon this ground that I wish to dispose of this case. The petitioner never raised the question of jurisdiction, either in the Court of first instance or in the lower appellate Court, and the mere fact of contending that there was a want of jurisdiction at a stage such as this, under s. 622 of the Code of Civil Procedure, is not sufficient to decide whether that Court had or had not jurisdiction. Therefore, there was no material and no findings **[416]** in the concurrent judgments of the lower Courts to enable the petitioner to sustain his plea that there was any want of jurisdiction in this case. The powers exerciseable by this Court as a Court of revision have been the subject of consideration by me in numerous cases where I have held that, unless facts ousting jurisdiction are patent from the pleadings of the parties and the findings of the Court, this Court, as a Court of revision, should desist from interfering. Adopting the same views and applying them to this case, I do not think that there is any reason to interfere.

I wish, however, to mention as to clause (18) of the second Schedule of the Provincial Small Courts Act (Act No. IX of 1887) excluding suits relating to a trust, that I regard this suit as presented by the pleadings of the parties in this cause to be a suit of that character, and that upon a former occasion also the same view was adopted by Stuart, C.J., and Turner, J., in Miscellaneous No. 33B of 1877. The case is, therefore, not shown to be a fit case for cognizance by the Small Cause Court, and therefore the Courts below had jurisdiction, and I would decline to interfere. I therefore reject this application with costs in all the Courts.

KNOX, J.—The pleadings in this case, in my opinion, show that it is one of those cases which by clause (18), sch. ii, attached to the Provincial Small Cause Courts Act (IX of 1887) was in distinct terms excluded from the cognizance of the Small Cause Court. The parties before us in a previous case, to which my brother Mahmood has alluded, contended over property of the same nature, and in that case it was determined by this Court that the case was not one for rent, but one relating to a trust, and therefore under the Act then in force (Act No. XI of 1865) a suit which Courts of Small Causes could not hear and determine. Bearing these facts in mind and for similar reasons to those already given, I am of opinion that this case is one in which there is no cause for us to interfere, and I would concur in dismissing the application with costs in all Courts.

Application rejected.

14 A. 417=12 A.W.N. (1892) 51.

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APPELLATE CIVIL.

14 A. 417= 12 A.W.N. (1892) 51.

[417] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

MAHABIR PRASAD AND OTHERS (*Plaintiffs*) v. PARMA (*Defendant*).*
[31st March, 1892.]

Civil Procedure Code, ss. 13, 278, 331—*Execution of decree—Res judicata.*

The plaintiff, having obtained a decree for possession of certain land, applied for execution by delivery of possession. Whereupon a third party filed an objection, in the Court of the Munsif, that he held a prior decree for possession of the same land, and therefore the plaintiff's decree was incapable of execution. This objection was allowed, and the plaintiff then sued for establishment of his right to possession of the land jointly with the objector, making the former judgment-debtor and the objector defendants to the suit. The Subordinate Judge in first appeal held that the Munsif had acted under s. 331 of the Code of Civil Procedure, and, applying s. 13 of the same Code, dismissed the plaintiff's suit. The plaintiff then appealed.—*Held* that circumstances did not exist to give the Munsif jurisdiction to act under s. 331, and that his order must be taken to have been made, as it purported to have been made, under s. 278. *Buhal Singh Chowdhry* v. *Behari Lal* (1) referred to.

The scope and application of s. 331 of the Code of Civil Procedure commented upon.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This second appeal has arisen out of a suit in which the plaintiffs, who are appellants here, claimed a decree for the establishment of a joint right of the plaintiffs and the respondent here in certain land and for joint possession, and certain other matters. The facts, so far as they appear and are material to the consideration of this appeal, are as follows :—The plaintiffs had obtained a decree against one of the defendants to this suit (defendant No. 2) for possession of the land. After they had obtained that decree the defendant No. 1, respondent here, filed an objection in the Munsif's Court to the delivery of possession in execution, alleging that he held a prior decree for possession of [418] this land against defendant No.2, and that he, and not the plaintiffs, was entitled to possession, and alleging further that he, defendant No. 1, held possession. The Munsif proceeded to deal with that objection, treating it as an objection under s. 278 of the Code of Civil Procedure. The fact that the Munsif considered that he was acting under s. 278 of the Code is apparent from the statement in his *rubkar* that the objection was made under s. 278. The Munsif allowed the objection with costs; thereupon the plaintiffs brought this suit. The first Court decreed the suit. The defendant No. 1 appealed and the lower appellate Court dismissed the suit, holding

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* Second Appeal No. 9 of 1890, from a decree of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Gorakhpur, dated the 25th September, 1889, reversing a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 21st January, 1888.

(1) 1 B.L.R. A.C. 206.

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that as against defendant No. 1 the suit was barred by s. 13 of the Code of Civil Procedure and that as against defendant No. 2 the suit did not lie owing to s. 244 of the Code. We have nothing to do with the suit so far as it related to defendant No. 2. The Subordinate Judge's grounds for applying s. 13 of the Code of Civil Procedure were the objection and the order thereon which had been passed by the Munsif and the assumption by the Subordinate Judge that the proceedings on the objection were proceedings under s. 331 of the Code. It is difficult to understand how the Subordinate Judge came to that conclusion. On the face of the *rubkar* of the Munsif, as we have said, it was obvious that the Munsif dealt with the objection as if s. 278 were the section which applied. He did not adopt any of the procedure of s. 331 of the Code. There was no claim which he had numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant. The facts did not exist which would have given him jurisdiction to proceed under s. 331. S. 331 begins thus:—"If the resistance or obstruction has been occasioned." In order to see what the resistance or obstruction referred to in s. 331 is, we must refer to the previous sections. Now s. 328 is the first of the group of sections relating to resistance to the execution of decree. The intermediate sections, ss. 329 and 330, do not apply to this case, as the resistance was neither on the part of the judgment-debtor nor of any person at his instigation. Consequently the resistance or obstruction mentioned in s. 331 must be the resistance or obstruction contemplated by s. 328. Now the resistance or obstruction contemplated by that [419] section is the resistance to, or obstruction of, the officer charged with the execution of a warrant for the possession of property, and it is a resistance or an obtruction in the execution of a decree for the possession of property. Now, so far as appears, the officer charged with the execution of the warrant was not resisted or obstructed at all. Such obstruction as there was, was caused by the defendant No. 1 filing his objection in the Munsif's Court. Again, there was no claim to be numbered and registered as a suit within the meaning of s. 331. The word "claim" there has been rather unfortunately used, because at first sight one would think that "claim" and "claimant" had reference to each other; but the claimant in s. 331 is the person who makes or causes the resistance or obstruction, and it never could have been intended that an objection filed by him should be numbered and registered as a suit in which the decree-holder was to be made plaintiff; in other words, it never could have been intended that the decree-holder should be made plaintiff to support a claim put in by the person objecting to his proceedings in execution. The claim mentioned in s. 331 must mean the complaint which is mentioned in s. 328. That complaint is the complaint of the decree-holder, and not of the person causing the resistance or obstruction. There were, in fact, no elements in this case to give the Munsif jurisdiction to proceed or pass any order under s. 331. If, contrary to what we believe, the Subordinate Judge is right in thinking that the Munsif did proceed under s. 331, then all that need be said is that his proceedings were without jurisdiction and his order is nugatory. If, on the other hand, he proceeded, as he professed to proceed, under s. 278, he was proceeding under a section which relates to the attachment of property for the purposes of execution, and which does not relate, so far as we can see, to the execution of a decree for possession of immoveable property. In any case, the Munsif's order, if passed under s. 278, would not operate as a bar to this suit. The view which we take of s. 331 is similar to that taken as to the corresponding section of a former Code,

by Jackson, J., in *Buhal Sing Chowdhry* v. *Behari Lal* (1). The Subordinate Judge has not tried this appeal on its merits; he has decided it on a [420] preliminary point, and wrongly. We set aside his decree and remand the appeal under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge to be reinstated on his file and disposed of according to law. Costs here and hitherto will abide the result.

Cause remanded.

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14 A. 420 (P.C.) = 19 I. A. 196 = 6 Sar. P.C.J. 187.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Hannen, Sir R. Couch and Lord Shand.

[*On Appeal from the High Court at Allahabad.*]

AMARNATH SAH AND OTHERS (*Plaintiffs*) v. ACHAN KUAR AND OTHERS (*Defendants*). [11th March and 14th May, 1892.]

Hindu law—Hindu widow—Burden of proving necessity where a Hindu widow attempts to alienate property held by her for her widow's estate.

In order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led, on reasonable ground, to believe that there was.

In a suit upon a mortgage of such property executed under the authority of a widow borrowing money, the point whether the loan was necessary was expressed in the issues in the form of a question how far the defendants' objections, grounded on the absence of necessity, were tenable. This was obviously an incorrect mode of trying the suit, because it assumed that it was for the defendants to show absence of necessity, and did not accord with the obligation upon a mortgagee, claiming under a widow, to prove a valid mortgage. It was sufficient to defeat the suit that, upon the whole case, there had been no proof of the lendor's having fulfilled the legal obligation to inquire and satisfy himself that the widow, from whom he was taking a charge upon her husband's inheritance, had a proper justification for so charging it. *Hunooman Persaud* v. *Munraj Koonweree* (2) referred to.

[F., 21 A. 71 = 25 I.A. 183 (P.C.) = 2 C.W.N. 729 = 7 Sar. 417; 137 P.R. 1892; Rel., 6 C.L.J. 490 (514); R., 17 A. 125; 24 A. 548; 27 A. 97 = 1 A.L.J. 435 (F.B.) = A.W.N. (1904) 174; 26 B. 206 (213) = 3 Bom. L.R. 738 (756); 10 C.L.J. 313 (315) = 13 C.W.N. 1143 (P.C.) = 6 A.L.J. 817 = 11 Bom. L.R. 1220 = 6 M.L.T. 277 = 19 M.L.J. 682 = 31 A. 583; 12 C.L.J. 115 = 3 Ind. Cas. 330 (333); 17 C.L.J. 499 (536) = 17 C.W.N. 701 (727) = 19 Ind. Cas. 273 (285); 1 O.C. 30 (36).]

APPEAL from a decree (11th August 1888) reversing a decree (27th May 1885) of the Subordinate Judge of Bareilly.

The suit out of which this appeal arose had among its objects the fixing a charge on thirteen villages, which had belonged to Khairati Lal, deceased in 1866, who traded in Bareilly, under the firm of Rattan Singh, Khairati Lal, and whose family continued his business after his death. His widow, Hulas Kuar, on the 4th of [421] April 1866 gave her general mukhtarnama to her son-in-law, Lalji (fourth of the present defendants, but who did not appear to defend), authorizing him to manage the firm's

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(1) 1 B.L.R.A.C. 206.

(2) 6 M.I.A. 393.

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business. Lalji was the husband of her daughter Achan Kuar, the first defendant, and their two sons, Enayet and Shamsher, were the second and third defendants. Hulas died in 1878, and both Lalji and Shamsher, died before this appeal was filed.

The plaintiffs, now appellants, were the heirs of Moti Ram Sah, formerly a shraf in Bareilly; and they brought the present suit on a bond and mortgage, dated the 23rd of March 1873, claiming the balance, after crediting payment of Rs. 7,000, upon a loan, originally Rs. 32,000, with interest amounting to Rs. 39,249, taken by Lalji, as mukhtar of Hulas, claiming also a charge on villages mortgaged. Achan, Enayet and Shamsher, by their written statements, set up the defence that Hulas had no power to bind them by borrowing, and no power to mortgage the property inherited from her husband except for necessary purposes and that no such purposes existed in this transaction. Achan denied that Lalji had power to bind her interest in her father's estate, or to consent on behalf of his sons to the mortgage.

The issues related to the questions raised by the defences, and, among others, to the alleged "absence of necessity" to take the loan.

It appeared that after the death of Hulas, her daughter Achan, with her two sons, Enayet Singh and Shamsher Singh, obtained entry of their names in the Revenue records in place of the deceased. Also that, on the 5th of March 1877, a power in favour of Lalji was executed by Hulas, Achan and Enayet Singh, declaring that whatever proceeding had been, or might be, taken by the Mukhtar (Lalji) on their behalf, should be recognised by them as done by themselves.

In the result, the Subordinate Judge made a decree in favour of the plaintiffs for Rs. 38,010, and directed that, if this sum should not be paid, the mortgaged villages should be sold.

[422] Achan, Enayet Singh and Shamsher appealed to the High Court. By an order (16th February 1888), the plaintiffs, then respondents, were permitted to produce further evidence, and they filed accounts and other documents. They also examined a witness, Hira Lal, who stated the circumstances under which the loan of Rs. 32,000 was taken by Hulas.

The judgment of the Divisional Court (SIR J. EDGE, C.J., and TYRRELL, J.) dealt with the question of the necessity of the loan, and decided that the purposes for which, in fact, the Rs. 32,000 were borrowed from the firm of Moti Ram Sah were not purposes that could be pronounced "necessary," according to Hindu Law. With regard to how far Achan was bound by the acknowledgment of authority contained in the document of the 5th of March 1877, the Judges decided that there was nothing to show that, at the date of the bond of 1873, Lalji had authority from his wife to bind her in that transaction as to her expectant life interest; and that it could only be by treating the words in the subsequent power, executed in 1877, as a ratification of Lalji's act, that it could be said that he was so authorized. But as to that document, they considered the terms to be vague, and not calculated to show that at the time of the execution Achan had her attention called to, or was aware of, all the circumstances attending the bond of 1873, or knew what her own position was. It was not binding upon her. As to Enayet Singh, they were not satisfied with the evidence on the record that he was of age in 1877. Looking at the whole case, they were of opinion that the plaintiffs had failed to make out a case against any of the three defendants, and in that view they reversed the decree of the Subordinate Judge, and dismissed the suit with costs.

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On this appeal—

Mr. *R. V. Doyne*, and Mr. *G. E. A. Ross*, for the appellants, argued that the High Court should not have held that the purposes for which the loan was taken were not necessary. During the lifetime of Khairati Lal, the firm, of which he was head, carried on dealings with Moti Ram Sah, which were continued after his death, with the knowledge of Hulas. In fact, her husband left debts [423] contracted in his lawful business. These, his widow, in paying, would be acting as a faithful widow. She was bound to pay these debts, and could not pay them by other means than by borrowing. For these, and other purposes, connected with the maintenance and credit of the family, which was committed to keeping up the firm, she was justified in mortgaging. These matters were known to the lender of the money, and the occasion was regarded as a justifying and necessary one. The object of the document of 1877 was to satisfy the customers of the firm that Lalji could deal with the family estates for business purposes.

Reference was made to—

Hunooman Persaud v. *Munraj Koonweree* (1), *the Collector of Muslipatam* v. *Cavaly Vencata Narrainapah* (2) *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (3) *Kameswar Pershad* v. *Run Bahadoor Singh*.(4).

Mr. *J. D. Mayne*, for the respondents, argued that the judgment of the High Court was right. The mortgage of March 1873 only bound the widow's estate for her own life, and had ceased, upon her death, to operate. There had been no ratification.

Mr. *R. V. Doyne* replied.

Afterwards (14th May), their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

The plaintiffs, who are now appellants, brought a suit against the present respondents and two other defendants to enforce a mortgage bond executed to one Moti Ram, the ancestor of the plaintiffs, for the purpose of securing an advance of Rs. 32,000, with interest thereon.

The bond sued upon is dated the 23rd of March 1873, and it commences in this way:—

"I, Raja Lalji, for self, and as guardian of Kuar Enayet Singh and Kuar Shamsher Bahadur, muktar of Rani Hulas, Kuar wife, and manager of Rani Achan Kuar, daughter of Raja Khairati Lal, [424] caste Kayasth, resident of Lucknow, now residing at Bareilly, do declare that I have, under the power given to me by registered general power of attorney, dated the 4th of April 1866, executed by Rani Hulas Kuar under the power of the certificate of guardianship, dated the 18th of July 1866, and under the power which I have to make management in general, borrowed Rs. 32,000 of the Company's coin, half of which is Rs. 16,000, for the payment of the debt taken to meet the marriage expenses of Kuar Enayet Singh and the expenses of the case pending at Lucknow from before."

Raja Lalji then agrees to pay the money in five years, and hypothecates and pledges certain mauzas belonging to Rani Hulas Kuar.

Khairati Lal, who died in 1866, was the zemindar of the mauzas in question, and was also a dealer in money and in hundis. Hulas was his widow and heir. Achan was his only child, and she married

(1) 6 M.I.A. 393.
(2) 8 M.I.A. 500.
(3) 13 M.I.A. 209.
(4) 8 I.A. 8=6 C. 843.

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Raja Lalji. Enayet and Shamsher were the children of that marriage, both being minors at the date of the bond. Very shortly after Khairati's death, Hulas executed a mukhtarnama giving to Lalji very large powers of management and disposition over her property. She died on the 22nd of June 1878. Shamsher and Lalji were the two defendants below who are not now respondents. They are both dead.

The plaint, which was filed in February 1885, states that the four defendants borrowed the money, and that Hulas hypothecated the estate; and it prays such relief as is usual in the case of mortgage bonds. Lalji did not put in any written defence; indeed he cannot have had any defence. The other three defendants all set up the defence (among others) that Hulas had only a widow's estate, and was under no necessity to borrow money. The plaintiffs replied by a written statement in which they alleged that on the 5th of March 1877 another deed was executed by Hulas, Achan and Enayet to Lalji, by which they admitted and recognized the deed of the 23rd of March 1873. But the reply is quite silent, as was the plaint, upon the point whether the loan was necessary or not.

[425] When the issues were settled, this point was treated as belonging to the defence, and was raised in the form of a question, how far the objections resting on the absence of necessity were tenable. It is obvious that such a mode of raising the question is incorrect, because it appears to assume that it was for the defendants to show absence of necessity; whereas the rule is that a mortgagee claiming title under a Hindu widow as against her husband's heirs should prove the validity of his mortgage; and this case presents no ground of exception to the rule. Neither party adduced any evidence bearing on the point.

The Subordinate Judge gave the plaintiffs a decree for an amount something less than the amount claimed by them; and ordered that the hypothecation should be enforced. He was of opinion that the plea of non-necessity was not made out, apparently on the ground of the recital in the mortgage bond; and he also thought that the defendants Achan and Enayet had confirmed the bond.

The defendants other than Lalji appealed to the High Court. During the argument for the plaintiffs certain observations were made by their Counsel which induced the Court to make an order enabling them to produce further evidence. The order is not in the record, but probably it was framed so as to allow the plaintiffs to prove the necessity for the loan raised by Hulas. For that purpose the plaintiffs called as a witness one Hira Lal, who entered Khairati's service in the year 1864, and managed or assisted in managing the monetary business up to the year 1880. He was the only witness called. Lalji, who must have known the facts better than anybody else, died shortly before the hearing of the appeal.

After hearing the further evidence the High Court decided that there was no proof of any necessity for the loan, and that no act had been done by Achan or Enayet which had the effect of making them liable for it. They therefore dismissed the suit with costs. From this decree the plaintiffs appeal, and it has been strongly urged at the bar that they are entitled to succeed, both on the ground of the propriety and validity of the mortgage by Hulas, and [426] on the ground that Achan and Enayet have validated it if originally invalid.

As regards Enayet, he has never had any present interest in the estate. He is only heir-apparent now; and on the 5th of March 1877, the date of the deed relied on for the validation of the mortgage, he was not even so much as that; his mother, Achan, was then heir apparent

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It is not contended that he ever took upon himself any personal responsibility for the loan, and it is clear that he has never been in a position to confirm the mortgage.

As regards Achan, the expressions relied on in the deed are as follows: After stating that the former power of attorney was given to Lalji by Hulas alone, the three parties, Hulas, Achan and Enayet appoint Lalji their general attorney. They then proceed :—

"We covenant and record that whatever proceeding has been or may be taken by the said mukhtar on our behalf, *i.e.*, if he, having borrowed money, executes bonds or sells, pledges, mortgages or alienates in some other way the moveable and immoveable properties, or gives in lease the whole or a portion of the villages at any jama he thinks proper, or gets the documents executed by us registered, or causes mutation of names to be effected in respect of villages, etc., owing to temporary or permanent alienations, all such proceedings taken by the said mukhtar shall be accepted and recognized by us as done by ourselves, and not ignored by us in any way."

The whole of these expressions except the three words "has been or" point to that which is the proper object of a power of attorney, *viz.*, to give authority to the future acts of the attorney. Achan was a *pardanashin* lady; she had no interest in the estate other than one in expectancy; she was not dealing with a stranger, but with her own husband; she was not receiving any valuable consideration. It is true that she executed the deed after having it read over to her. But there is no evidence that she was told that amongst the somewhat profuse heap of words conferring ordinary powers on a general attorney, there lurked just three words having a far [427] different effect, the effect, namely, of subjecting her expectant estate to a burden which she was gratuitously undertaking. There is no evidence that at this time she knew anything about a prior mortgage. Indeed, it is not shown that she received any advice or information beyond having the deed read to her word for word. It would be against all principles if a lady so situated were held bound by such a transaction.

Reliance was placed by Mr. Doyne on two subsequent mortgages executed by Achan after the death of Hulas, in which Moti Ram's debt is mentioned. In one of them it is stated that Rs. 30,000 is borrowed for payment of the debt due to Moti Ram and others; and it is shown that shortly afterwards the sum of Rs. 7,000 was paid to Moti Ram. But it does not appear that those deeds were so much as read over to Achan, to say nothing of the want of explanation.

The foregoing views render it unnecessary for their Lordships to enter on the question when Enayet attained his majority, or on the question how far the transactions of Achan could be of avail for the plaintiffs who were not parties to them, both debated at the Bar. Their Lordships are clear that nothing was done to give Moti Ram's security greater validity than it originally possessed.

That reduces the questions in the suit to one, *viz.*, the validity of the mortgage by Hulas as against her successors. To prove its validity the plaintiffs must show either that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing his money Moti Ram gave credit on reasonable grounds to representations that the money was wanted for such necessity. It has been above shown

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that the plaintiffs neither averred nor attempted to prove necessity until their case was being argued in the High Court. They laid their claim under Hulas as if she were the absolute owner. On the appeal they were treated with great indulgence, being allowed in effect to amend their case. One effect of Hira Lal's evidence is to show the untrustworthiness of the statements in the mortgage bond on which the Subordinate Judge relied to show that Moti Ram's advance was applied to defray [428] marriage expenses of Enayet and the costs of the Lucknow suit. Out of the Rs. 32,000 advanced nearly Rs. 26,000 were applied in paying off hundis, Rs. 12,400 being due to Moti Ram himself. We are told nothing of the amount of Enayet's expenses; nothing of any reason why they should be paid by his grandmother, instead of his father; nothing of the nature of the Lucknow suit except that it was for ancestral property; nothing to show that in March 1873 any costs at all had been incurred by Hulas. So that the statements in the bond receive no effectual support and much contradiction from the new evidence.

But the plaintiffs rely on an entirely new cause of necessity, *viz.*, that Khairati's money business, which had been carried on by Hulas under the management of Lalji, was in a critical state, and that it was necessary to borrow money in order to ward off total insolvency. On this point their Lordships agree with the High Court in thinking the effect of Hira Lal's evidence to be that at Khairati's death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuation of this particular business before venturing to endorse the opinion of the High Court.

Their Lordships prefer to rest this part of the case on the entire failure of the plaintiffs to discharge the burden of proof which lies upon them. It has been above stated, in accordance with the often cited case of *Hunooman Persaud* v. *Munraj Koonweree* (1) that, in order to sustain an alienation by a Hindu widow [429] of the *corpus* of her husband's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led on reasonable grounds to believe that there was. But the plaintiffs have not proved either actual necessity, even though Moti Ram believed that there was such necessity, or that he ever made any inquiry on the subject. He may have rested content with the vague and misleading statements in the deed. He may have considered, as the plaintiffs have considered in this litigation, that the question of necessity did not concern him. He may have thought, as they apparently have thought, that he was taking title under an absolute owner. Anyhow the plaintiffs have not performed their legal obligation of proving that their ancestor performed his legal obligation, which was to inquire and satisfy himself that the widow from whom he was taking a charge upon her husband's

(1) 6 M.I.A. 393.

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inheritance had a proper justification for so charging it. That is sufficient to defeat the suit. Their Lordships will humbly advice Her Majesty to dismiss the appeal, and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Lattey and Hart.*
Solicitors for the respondents: Messrs. *Pyke and Parrott.*

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Mahmood and Mr. Justice Knox.

AGHA ALI KHAN AND ANOTHER (*Plaintiffs*) v. ALTAF HASAN KHAN AND ANOTHER (*Defendants*).* [9th May, 1892.]

Muhammadan Law—Shia sect—Waqf.

According to the law applicable to the *Shia* sect of Muhammadans a *waqf-bil-wasiyat*, or testamentary *waqf*, is not valid unless actual delivery of possession of the appropriated property is made by the *waqif* (or appropriator) himself to the *mutawalli* (or superintendent appointed by the *waqif*).

[430] According to the same law the death of the *waqif* before actual delivery of possession of the appropriated property by him to the *mutawalli* or the beneficiaries of the trust renders the *waqf* null and void *ab initio*.

Consequently where the *waqif* dies, as mentioned above, before actual delivery of possession of the appropriated property, the consent of his heirs to the testamentary *waqf* cannot validate such *waqif*.

Distinction between *waqf-bil-wasiyat* and *wasiyat-bil waqf* explained.

[Diss., 25 A. 236 (252) (P.C.) = 30 I.A. 94 = 7 C.W.N. 465 = 5 Bom. L.R. 410 = 8 Sar. 397; R., 24 A. 231; 24 A. 257 (271); 28 A. 633 = 3 A.L.J. 387 = A.W.N. (1906) 146; 2 A.L.J. 519 (526); 7 A.L.J. 1095 (1114); 8 A.L.J. 1154 (1156) = 12 Ind. Cas. 730 (731); 2 O.C. 115 (131).]

THIS was a reference to the Full Bench made at the instance of Mahmood and Young, JJ. The facts of the case out of which the reference arose are very fully stated in the order of reference made by Mahmood, J., which is a follows:—

ORDER OF RFERENCE.

MAHMOOD, J.—The parties to this litigation are *Shias*, and their relative positions appear from the following pedigree:—

Ali Bakhsh.
- Muhammad Ali.
  - Jafar Ali.
    - Naim-un-nisso (widow).
  - Kanizak Fatima = Mushtak Ali.
    - Agha Ali (plaintiff No. 1)
    - Amina Begam (defendant No. 3) = Altaf Hasan (defendant No. 1).
      - Sardar Hasan (defendant No. 2).
- Fazilat-un-nissa = Bu Ali.
  - Amjad Ali Khan (plaintiff No. 2).

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* First Appeal, No. 85 of 1888 (connected with F.A. No. 94 of 1888) from a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpur.

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Muhammad Ali, whose name appears in the pedigree, was a Muhammadan of the *Shia* sect, and owned considerable estate including the properties which form the subject-matter of this suit, *viz.*:—

(1) Mauza Rampur.
(2) „ Narkhas.
(3) „ Pipri Piterhar.
(4) „ Hafizpur.
(5) 2 pacca houses known as Anarwala, in Lucknow.

On the 3rd of November 1863, he executed a deed which purported to set apart the above-mentioned four villages and two houses, the properties in suit, as *waqf* to be administered by the *Mujtahid-ul-asr*, Muhammad Taqi, and his descendants, &c., for certain [431] religious and charitable objects specified in the deed. The deed purports to be a formal document and is a lengthy one, and it is a question in this case whether it is to be regarded as a will or as a *waqf-nama*, that is, a deed of endowment.

On the 14th of November 1863, Muhammed Ali executed another deed purporting to make a gift of a village, Chandpur, to make provision for Musammat Naim-un-nissa, widow of his deceased son Jafar Ali.

Similarly, on the 23rd of November 1863, he executed another deed in which, after reciting the provision he had made under the earlier two deeds, he purported to convey by gift the rest of his estate to his daughter Musammat Kanizak Fatima.

Again, on the 27th of November, 1863, he executed another document in which he in brief terms recapitulated and confirmed the provisions of the three earlier deeds.

Muhammad Ali died on the 11th of December, 1863, leaving Musammat Kanizak Fatima as his only heir under the *Shia* law of inheritance. It is also not disputed that at his death she obtained possession of the properties now in dispute, but on this point there is a question between the parties whether such possession was as absolute proprietor or as *mutawalli* of the *waqf*, which the deed of the 3rd of November, 1863, purported to create, and the deed of the 27th of November. 1863, to confirm. It is, however, admitted that in the Government Revenue Records mutation of names took place in her favour in respect of the four villages in suit, and her name was entered as proprietor instead of her deceased father Muhammad Ali.

Matters stood thus, when on the 7th of November, 1864, the *Mujtahid-ul-asr*, Muhammad Taqi, whom Muhammad Ali's deed of the 3rd of November, 1863, purported to appoint as *mutawalli* of the *waqf* property (namely, the four villages and two houses in dispute) instituted a suit for possession of the aforesaid property, basing his claim upon his right as *mutawalli* under Muhammad Ali's deed of the 3rd November, 1863. The suit was instituted against Musammat Kanizak Fatima, and she defended it by a writ-[432]ten statement dated the 24th of July, 1865, in which she stated *inter alia* that her father had never given effect to the *waqf* by delivery of possession to the proposed *mutawalli*; that it had therefore become *null* and *void*; that, notwithstanding this circumstance, the aforesaid Muhammad Taqi had been asked to accept the trust upon the conditions prescribed by the deceased Muhammad Ali, but had definitely refused to accept the terms of the trust, and was therefore no longer entitled to claim the possession of *waqf* property. This plea appears to have been allowed by the District Judge (Mr. B. Sapta) who decided the suit, dismissing it on the 20th of January, 1866.

Referring order, printed by the Court. 1892 MAY 9.

The suit of Muhammad Taqi having thus been defeated, Musammat Kanizak Fatima appears to have continued in undisturbed possession of her father's estate, including the villages and houses now in dispute. Then followed certain transactions which may be mentioned here.

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On the 14th of October, 1881, Musammat Kanizak Fatima executed a will of which the scope and objects are best represented in the opening sentence, which runs as follows:—

"Whereas God in His mercy has blessed this helpless being (the testatrix) with children and property, and among my children there are a son and a daughter, and life is uncertain, and there is a disagreement between these two heirs of mine, therefore it is incumbent on me to make whatever arrangements it may be advisable to make during my lifetime, so that after my death there may be no dispute between my heirs; therefore whatever arrangenments it is advisable to carry out, and those matters which it is necessary to state are set forth in paragraphs below, and I desire to express my intention and wishes, whatever these are, in this paper, and my heirs must not act contrary to them, and in the event of their acting contrary thereto, the presiding officer of the time will carry out and enforce my will."

The first paragraph of the will makes disposition of certain moveable properties and is unimportant for the purposes of this suit. [433] The second paragraph, however, requires consideration. It enumerates the properties of which the testatrix was then in possession, and it draws a distinction between the four villages and the two houses which had been made *waqf* by her father's will of the 3rd of November, 1863, and other properties of which she was in possession as absolute owner. This distinction appears in the first half of the paragraph, and in the latter half the testatrix deals with the rest of her property which is not included in this suit. The effect of this part of the will is to make a gift of a four-anna share in the various properties to her son-in-law Altaf Hasan Khan (defendant No. 1), and another four-anna share to her daughter Musammat Amina Begam (defendant No. 3), and it goes on to say that the gift in favour of these two persons had already been completed by separate deeds and delivery of possession. The last part of the paragraph expresses an intention on her part to make a gift of the remaining eight-anna share in the properties, and after enumerating them goes on to say:—"Whenever my son Agha Ali Khan wishes it, a deed of gift will also be executed and completed in his favour. This property, belonging to me, the testatrix, will not be considered as struck out (*kharij*) from my property until the execution of the deed of gift, and it will continue to be my property."

The statement of these facts, however, is only introductory to what will hereafter be stated as to the transactions between Musammat Kanizak Fatima and her son Agha Ali (plaintiff No. 1) having a bearing upon his right to maintain this suit. What is of great importance as relating immediately to the property now in suit (namely, the property declared as *waqf* by Muhammad Ali's deeds of the 3rd of November, 1863, and the 27th of November, 1863) is the fourth paragraph of Kanizak Fatima's will now under consideration. A considerable portion of the paragraph requires quotation, as indicating the manner in which the property now in suit was dealt with by the testatrix. It runs as follows:—

"In addition to the property belonging to me the testatrix, a detail of which is given above, there are *mauzas Rampur, Batrana, Narkhas, Pathri Patharhar* and *Hafizpur*, pargana [434] Rasulabad, zilla

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Cawnpur, and two houses known as Anarwala situated in *mohalla Banjaritola* one of the *mohallas* of Lucknow, a detail of which is given above. This property was left by the will of my father Sheikh Muhammad Ali, deceased, which was separated for charitable purposes, as *waqf*. In regard to these, neither I, the testatrix, have any proprietary powers of enjoyment and transfer, nor will my heirs have any. In accordance with the intention of my deceased father, as well as judgment of the Court, I, the testatrix, have been held to be the executrix, and superintendent (*walli*) of that property, and my duty is this, that I will continue to apply the profits of that property in such acts of charity as my deceased father's will provides, and I, the testatrix, up to the time of the execution of this document have been applying the profits of the villages which have been willed as aforesaid in actual acts of charity. I do not save anything from it. During my lifetime I will continue to act up to the intentions of the will as executrix and superintendent (*tauliat*) to the best of my ability, and after my death, Musammat Amina Begam *alias* Aghai Jan, my daughter, and Agha Ali Khan, my son, will be held to be the *mutawalli* (trustee to an endowment and executors of a moiety each in the event of both acting in harmony among themselves, and in the event of there being a disagreement, both my son and daughter will continue to carry out the intentions of the will separately in the proportion of a moiety each, and my representatives will always continue to act in accordance with the terms of the will of my deceased father as well as in accordance with the *rules of practice* written by me, the testatrix and bearing my seal, which I will execute separately, and whatever I the testatrix, will write out, the said heirs will be bound by it and it will be incumbent on them to continue to apply the profits of the property which has been willed for the purposes intended by the will in accordance with the above writing and to keep a correct account of the same as the officers and *mujtahdins* will have power to look into them. These powers as *tauliat* (trustee of an endowment) and executors which both my son and daughter have, will, after them, be transferred in the same way to their offspring from [435] generation to generation (*naslan bad naslan*) whether both have issue, or out of both of them whoever may have issue, and so long as there is a descendant of mine in existence, my heirs and the presiding officer of the time will not have power to appoint any person as executor. And be it known that as I have no confidence in my son's abilities and his proper management, and from motherly love and affection I consider my son and daughter to be equal, and to the best of my knowledge and belief the matters connected with the intentions of the will, will be carried out in a better manner on behalf of my daughter through her husband and children than by my son. Therefore I have appointed both these heirs *mutdwallis* and executors in equal shares. If the disagreement between these two heirs can in no way be removed, then the presiding officer of the time will have the intentions of the will carried out through *mujtahdins* (doctors of religion) and learned men. Out of these two heirs, one person only will, on no account, be the *mutawalli* and executor. And be it also known that my father did not bequeath more than ⅓rd by will, and I got the remainder of the property by right of inheritance, and a will under Muhammadan law (*shara*) can operate to the extent of ⅓rd only, hence the property that remained separate from the will and which devolved on me, the testatrix, by inheritance, the will of my deceased father does not affect it in any way, nor did I admit his will in regard to this property: hence my proprietary enjoyment of the property in question is in every way proper and valid.

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This will does not seem to have given satisfaction to Agha Ali (plaintiff No. 1) as his shown by what followed :—On the 1st of November, 1881, two deeds were executed by way of settlement of difference between the mother and son.

One of these two documents is an *ikrarnama* executed by Agha Ali Khan (plaintiff No. 1) of which the opening part may be quoted here, as it recites the objects and motives with which the deed was executed. It runs thus :—

"I, Agha Ali Khan, son of Hakim Mustak Ali Khan, deceased, resident of Banjaritola, one of the *mohallas* in the city of Lucknow, [436] do hereby declare that amity and unity would establish the family, while disunion and disagreement would ruin it; that the opinions expressed by the prudent ancestor are conducive to the benefit and welfare of the family ; that the dutiful children should be prevented from that; that therefore at the present time the respected far-sighted mother, in respect of the disposal of the property owned by her, desired that it be so arranged that on her demise there should not arise any quarrel or dispute between myself and my real sister Musammat Amina Begam, *alias* Aghai Jan, the only heirs to her (the mother) : that for us, the heirs, it would be beneficial to abide in every way by the will executed by her, containing the necessary particulars and proper directions; that moreover, with a view of avoiding future disputes she, out of the property owned by her, transferred a large portion of the property to the two heirs during her lifetime under registered deeds of gift; that the completion and maintenance of that arrangement made by the said mother had thus been agreed upon that both of us should remain bound by the directions given by her; that we shall accept all the directions given in the will and the deeds of gift; that without this the benefit and advantage contemplated by her to follow from such an arrangement in respect of each of her heirs, cannot accrue as she desired; that I, the executant, in every way came to find it expedient and conducive to my advantage that the establishment and completion of that arrangement should come to pass by means of writings respectively made by each of us, the heirs; that, with an eye to my advantage, I, the executant, of my own accord, while in a sound state of body and mind, without any force or coercion, swear by God and the Prophet that I have in sincerity and good faith bound myself to those terms that shall be detailed hereafter; that now and in future, I, the executant, or the representatives of me, the executant, shall have no power to deviate from the conditions laid down in this document; that should on behalf of me, the executant, or on behalf of my heirs and representatives, anything be set forth contrary to the terms and stipulation entered in this document, it shall be void and shall not be entertainable."

[437] This preliminary part is followed by the various clauses into which the *ikrarnama* is divided. The first clause, referring to Musammat Kanizak Fatima's will of the 14th of October, 1881, runs as follows :—

"That the contents of the registered will and the deeds of gift executed by my respected mother in favour of my sister Amina Begam, *alias* Aghai Jan, and in favour of my brother Sheikh Altaf Hasan Khan, are approved and accepted by me word for word, that neither have I now nor shall have in future any objection in regard to any matter."

The next three clauses are unimportant for the purposes of this litigation, but the fifth clause refers directly to the property now in suit. It runs thus :—

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"I shall continue to perform all acts and matters directed by the will in respect of the property endowed and willed by Sheikh Muhammad Ali Khan, deceased, after my mother's death, jointly with my sister, and under the management (*sarbarahkari*) of her husband, and on her death jointly with her issue; that I shall not through selfish motives interrupt or disturb the arrangement; that in no case whatever I shall have the power to object to the *mutawalliship* of my sister or to that of her issue on her death; that in no case I shall put forth my exclusive claim for discharging the duties appertaining to that *mutawalliship*, and if I do so, it shall not be entertainable in a Court of justice."

Another clause of the *ikrarnama* is the eighth, which refers to the intended *dastar-ul-amal*, which was subsequently incorporated in Musammat Kanizak Fatima's deed of the 22nd of October, 1884, which she executed as a supplement to her will of the 14th of October, 1881. The clause runs as follows:—

"That I agree that I shall always follow all the directions which may be found in the *dastur-ul-amal* in respect of the villages willed, the intention of writing of which is expressed in the will by the mother, jointly with my sister and under the management of her husband, and on her death, jointly with her issue."

[438] The other document executed on the same day as Agha Ali's *ikrarnama* of the 1st of November, 1881, is a deed of gift by Musammat Kanizak Fatima in favour of her son, the aforesaid Agha Ali Khan (plaintiff No. 1). The deed after referring to the disposition of property made by her in the will of the 14th of October, 1881, goes on to say:—

"I had reserved half of the villages owned by me and certain houses detailed below to be given in gift to my son, *Nurchasem*, Agha Ali Khan. Now as the said *Nurchascm*, having approved of the said will, has agreed that a deed of gift in respect of the eight-anna share should, as is stated in the aforesaid will, be executed in his favour completed with registration, I, having executed this document on an adequate stamp, do declare that I have of my own free will and accord and while in a sound state of body and mind made without any external pressure and coercion a gift to my son *Nurchasem* Agha Ali Khan, who is also my heir, through maternal affection, of an eight-anna share in *mauzas*."

Matters seem to have rested thus for nearly three years, during which period Musammat Kadizak Fatima appears to have remained in possession ol the property now in suit, that is, the *waqf* property, to which the fourth paragraph of her will of the 4th of October, 1881, related.

What followed is represented by two documents executed by Musammat Kanizak Fatima on the 22nd of October, 1884. One of these is a codicil to her will of the 14th of October, 1881, to which it refers in the opening sentence. The document has been described as *dastur-ul-amal* or rules of practice and guidance for the administration of the *waqf* property mentioned in the fourth paragraph of her will, dated the 14th of October, 1881, from which the above quotation has been made.

The other document executed by Musammat Kanizak Fatima on the same day (22nd of October, 1884), is a lease of the four *waqf* villages in favour of her daughter's son Sardar Husain (defendant No. 2) for a term of 25 years, on terms which are stated by [439] the plaintiffs to be unduly favourable to the lessee, and to contravene the terms of the *waqf* as described in Muhammad Ali's deed of the 3rd of November, 1863.

These two deeds were duly executed and registered, but they do not seem to have given satisfaction to Agha Ali Khan (plaintiff No. 1), and may be said to be the main reason for the institution of this suit. 1892 MAY 9.

This is indicated by what followed. FULL BENCH.

Agha Ali Khan instituted a suit against his mother Musammat Kanizak Fatima, his sister Musammat Amina Begam, and her husband Sheikh Altaf Hasan Khan, for cancelling his *ikrarnama* of the 1st of November, 1881, on the allegation that it had been obtained by fraud and undue influence, and was otherwise illegal. This litigation is referred to in the Subordinate Judge's judgment in this case, and forms the subject of second appeal No. 1144 of 1887, which is still pending in this Court awaiting the decision of this case. 14 A. 429 (F.B.) = 12 A.W.N. (1892) 187.

Musammat Kanizak Fatima died on the 17th of November, 1886, and on the 5th of March, 1887, the present suit was instituted by Agha Ali Khan (plaintiff No. 1) jointly with his cousin Amjad Ali Khan (plaintiff No. 2), whose name appears in the genealogical table set forth at the outset of this judgment. The defendants to the suit are Altaf Hasan Khan, Sardar Husain and Amina Begam.

The claim as set forth in the plaint proceeds upon the contention that Muhammad Ali's deed of the 3rd of November, 1863, created a valid *waqf* under the *Shia* law; that it took immediate effect in the lifetime of the executant, who continued to hold possession up to his death as *mutawalli* of the *waqf* property; that upon his death, on the 11th of December 1863, his daughter Musammat Kanizak Fatima took possession of the *waqf* property in the capacity of *mutawalli* or superintendent, and up to the time of her death, on the 17th of November, 1886, she continued to apply the profits of the property to the charitable purposes [440] mentioned in her father's will of the 3rd of November, 1863, and that her powers with respect to the *waqf* property must be regarded as subject to the restrictions and limits prescribed for the *mutawalli* in Muhammad Ali's will of the 3rd of November, 1863, and the general rules of the *Shia* law on the subject. It is further alleged in the plaint that Musammat Kanizak Fatima exceeded her powers in dealing with *waqf* property by her will of the 14th of October, 1881, and the codicil thereto, dated the 22nd of October, 1884, as well as by executing the lease of the *waqf* villages, dated the 22nd of October, 1884, and these documents are therefore null and void, being opposed to the terms of Muhammad Ali's will of the 3rd of November, 1863, and the provisions of the Muhammadan law. The plaintiffs further asserted that both under Muhammad Ali's will and the rules of the Muhammadan law they were entitled to the *mutawalliship* of the *waqf* property jointly or severally, and upon this ground they prayed for the following reliefs as stated in the plaint:—

(1) "That the plaintiffs may be appointed jointly, or severally, as the Court may think proper, superintendents of the endowed property, by cancelment of a lease and by actual ejectment of the defendants.

(2) That the will and the lease executed by Musammat Kanizak Fatima may be declared to be null and void.

(3) That such other relief as under the circumstances of the case may seem proper to the Court may be granted to the plaintiffs.

(4) That the costs of the suit may be awarded against all the defendants."

The suit was resisted by all the three defendants jointly by two written statements, one dated the 7th of May, 1887, and the other dated the 21st of May, 1887, the latter being apparently the amended written

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statement. The pleas in defence raised in these written statements are numerous enough to form the subject of no less than sixteen issues framed by the lower Court, but it is unnecessary to repeat them here, for all of them have not been pressed in [441] the argument addressed to us on behalf of the parties in this Court, and those which have been pressed will be dealt with later on.

For the present it is enough to say that the lower Court, after deciding the various issues raised by the pleadings of the parties indicated its decree in the last part of the judgment in the following words :—

"For the reasons recorded in disposing of the 12th and the 14th issues, the whole of the claim of Amjad Ali Khan is to be dismissed. The claim of Agha Ali Khan for cancelment of the document, executed by Kanizak Fatima is so far decreed as the said documents relate to the grant of the lease to Sardar Husain Khan, and so far as possession is given to him as lessee, and Altaf Hasan Khan is invested with the power of management and superintendence over the endowed property with an allowance of Rs. 300 per annum, out of the *waqf* property under the name of expenses of conveyance. But the claim for exclusive possession as superintendent by removal of Amina Begam is dismissed, and it is directed that the lessees' possession be removed,and Agha Ali Khan, plaintiff, and Amina Begam remain in possession as superintendents. Should it be shown in future that either of these persons has acted contrary to the conditions laid down by Sheikh Muhammad Ali, the Court shall pass suitable orders in respect of superintendentship. Having regard to peculiar features of this case, each party will pay half the costs with interest thereon at the rate of 8 annas per cent. per mensem. Amjad Ali Khan will get no costs. As the pleaders on both sides have greatly exerted themselves, and for several days argued the questions of law, they are entitled to a larger fee, Rs. 300 each, from their clients."

From this decree two appeals have been presented to this Court. One is this appeal filed by the two plaintiffs, Agha Ali Khan (plaintiff No. 1) and Amjad Ali Khan (plaintiff No. 2). The other is a cross-appeal from the same decree, and has been preferred jointly by all the three defendants, Altaf Hasan Khan (defendant No. 1), Sardar Husain (defendant No. 2), and Musammat Amina Begam (defendant No. 3). That appeal stands upon the register of this [442] Court as first appeal No. 94 of 1888, to which both the plaintiffs, *viz.*, Agha Ali Khan and Amjad Ali Khan, were made respondents. Notices however could not be served upon the second respondent Amjad Ali Khan, and when the appeal came on for hearing before my brother Young and myself, on the 6th of June, 1890, we were asked by Mr. *Conlan*, the learned Counsel for the appellant, to hear the appeal without notice being served on Amjad Ali Khan, who, the learned Counsel stated, was not a necessary party to the appeal, and the appellants did not therefore desire to prosecute the appeal against him. We accordingly decided to hear the appeal, as mentioned in our order of the 6th of June, 1890.

The two connected appeals have thus been heard together, and the arguments on behalf of the plaintiffs have been heard in this case (first appeal No. 85 of 1888), whilst the defendants' contention has been presented in the argument on their behalf in their appeal (first appeal No. 94 of 1888) referred to above. It may be stated here that in neither of these appeals did the respondents in their turn instruct Counsel, probably because they were represented in the cases as appellants, alternately in the two cases, and the argument in support of one appeal would amount

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to argument on behalf of the respondents in the other appeal. I have stated this matter as affecting the question of costs, which may be awarded in this litigation.

The arguments thus addressed to us on behalf of the parties to the suit in both appeals place the entire litigation before us for decision, that is to say, the entire decree of the lower Court is subjected to our adjudication in the two appeals.

The first four grounds of appeal on behalf of the defendants-appellants in first appeal No. 94 of 1888, repeat certain preliminary pleas which were taken in the lower Court and were disallowed by that Court in its finding upon the 13th, 14th and 15th issues. Of those pleas the only one on which Mr. *Conlan* for the defendants insisted in his argument relates to the effect of section 539 of the Civil Procedure Code (Act No. XIV of 1882) upon [443] the right of the plaintiffs to institute the suit without having obtained the sanction of the Local Government. Upon this point I am of opinion that the section referred to has no application to suits such as the present in which the plaintiffs claim a right vested in them personally by reason of their being related to Muhammad Ali, and under the terms of his will of the 3rd of November 1863. They are not suing on behalf of the public, but in their own individual right, which is independent of the interests of the public at large, and is therefore not in need of the consent either of the public or the Local Government. I have recently had occasion to consider this question and to the views which I then expressed I still adhere, and hold that this suit is not affected by anything contained in section 539 of the Civil Procedure Code.

The other preliminary pleas relating to misjoinder, limitation, and the effect of section 43 of the Civil Procedure Code as barring the suit have not been pressed here, and it is enough to say that I agree with the lower Court in the reasons for disallowing those pleas. Nor did Mr. *Conlan* in arguing the case for the defendant-appellants in first appeal No. 94 of 1888, press the fifth ground of appeal, which is to the effect that "because the document of the 3rd of November 1863 is not a will, but a *waqf-nama* or deed of endowment, and not being executed on a duly stamped paper is not admissible in evidence." The plea was the subject of the sixth issue in the lower Court, and was disallowed by the Subordinate Judge for reasons in which I concur. The deed itself is before us, and it opens with the following words:—

"I, Sheikh Muhammad Ali, son of Sheikh Ali Bakhsh, resident of Lucknow, while in the enjoyment of sound health and senses, write these lines *by way of a will*, the execution of the provisions whereof shall rest with my executor *after my death*—that the under-mentioned four villages, &c."

These words in themselves leave no doubt that the instrument was intended by the executant to be a testamentary disposition of the property to which it relates. It was registered as a will by Mr. Frederick Lincoln, the Sadar Registrar of Lucknow, on the 7th of [444] November 1863, and it has ever since been dealt with as a will by Musammat Kanizak Fatima, the only heir of the testator, Muhammad Ali. For instance, in paragraph 4 of her own will of the 14th of October 1881, she uniformly refers to her father's deed of the 3rd of November 1863, as "the will of my father, Sheikh Muhammad Ali, deceased," and the provisions of the deed itself show that it was intended to be a testamentary instrument. I have no doubt therefore that the Subordinate Judge was right in holding

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that the instrument did not require stamp, and that it was admissible in evidence.

Freed from these minor points the contention between the parties, so far as it has been urged here, raises the following substantial questions for determination:—

(1).—Is a *waqf-bil-wasiyat* or testamentary *waqf* valid under the Muhammadan law of *Shia* school in the absence of actual delivery by the *waqif* himself of possession of the appropriated property to the *mutawalli* or the person appointed as superintendent thereof by the deed whereby the *waqf* is created?

(2).—Does the death of a *waqif* (appropriator) before actual delivery of possession by him to the *mutawalli* or the beneficiaries of the trust invalidate the *waqf* so as to render it *null* and *void ab initio* under the *Shia* law?

(3).—If so, does the consent of the appropriator's heirs to testamentary *waqf* validate such *waqf* under that law?

(4).—Did the deeds of the 3rd of November 1863 and the 27th of November 1863, executed by Muhammad Ali create a valid *waqf* under the *Shia* law? and was actual effect given to them by Muhammad Ali himself during his lifetime, and after his death by his daughter and only heir, Musammat Kanizak Fatima?

(5).—Upon the death of Muhammad Ali on the 11th of December 1863, did Musammat Kanizak Fatima obtain possession of the property now in suit by right of inheritance as the sole heir of her father, or as successor to him as *mutawalli* of the *waqf* property?

[445] (6).—Does Musammat Kanizak Fatima's will of the 14th of October 1881 amount to a fresh *waqf* of the property in suit of which she appointed herself the *mutawalli* for life, and after hear death, her son and daughter, Agha Ali Khan and Musammat Amina Begam? and if so, was she entitled to alter the provisions of her father's will of the 3rd of November 1863?

(7).—What is the effect of the *ikrarnama* executed by Agha Ali Khan (plaintiff No. 1) upon his right to contest the validity of his mother's will of the 14th of October 1881, so far as the property now in suit is concerned?

(8).—Was the codicil of the 22nd of October 1884, executed by Musammat Kanizak Fatima as supplement to her will of the 15th of October 1881, valid, and within her legal powers?

(9).—Was the lease of the 22nd of October 1884, executed by Musammat Kanizak Fatima in favour of her grandson, Sardar Husain, in respect of the villages in suit valid?

(10).—Are the plaintiffs, or either of them, entitled to oust the defendant, Sardar Husain, from possession under the lease of the 22nd of October 1884, or to exclude Musammat Amina Begam from her position as *mutawalli* of the *waqf* property now in suit, under Musammat Kanizak Fatima's will of the 14th of October 1881?

(11).—Is there any such misfeasance or incompetency proved against Musammat Amina Begam as would entitle Agha Ali Khan (plaintiff No. 1) to exclude her from the joint *mutawalliship* of the *waqf* property now in dispute?

In my opinion the first of these questions is by far the most important as regulating the decision of this case. The second and third questions are closely connected with the first and require consideration before it becomes necessary to decide the remaining questions in the case as above formulated.

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Upon the first three questions authorities have been cited on either side, but the terms in which these authorities and the *Shia* law express the rule are so much in discord with the doctrines of **[446]** the *Sunni* school of the Muhammadan law that I think that the questions above referred to should be considered by a Full Bench of this Court. I may say that on behalf of one side of the question Pandit *Sundar Lal* has cited passages from Mr. Justice Ameer Ali's work on Muhammadan law, being the Tagore Law Lectures for the year 1884. On the other side of the question are passages to be found in the original Arabic works of high authority in the *Shia* law which do not seem to support the argument for the plaintiff so as to leave it undoubted whether or not a testamentary *waqf* is allowed under the *Shia* law. I will therefore refer the first three questions to the Full Bench with the recommendation that the case should be laid before the learned Chief Justice for orders on the opening of the Court.

On the reference being heard by the Full Bench the following judgments were delivered:—

Munshi *Ram Prasad*, Pandit *Sundar Lal*, and Babu *Durga Charan*, for the appellants.

Mr. *Karamat Husain*, for the respondents.

JUDGMENTS.

MAHMOOD, J.—The preliminary facts from which the questions of law now under consideration have arisen have been stated by me in my order of reference dated the 1st of October 1890 in which Mr. Justice Young concurred. I need not therefore repeat those facts, and I think it is enough to say that the points referred to the Full Bench are the following:—

(1) Is a *waqf-bil-wasiyat*, or testamentary *waqf* valid under the Muhammadan law of the *Shia* school in the absence of actual delivery by the *waqif* himself of possession of the appropriated property to the *mutawalli* or the person appointed as superintendent thereof by the deed whereby the *waqf* is created?

(2) Does the death of a *waqif* (appropriator) before actual delivery of possession by him to the *mutawalli* or the beneficiaries of the trust invalidate the *waqf* so as to render it *null* and *void ab initio* under the *Shia* law?

[447] (3) If so, does the consent of the apporpriator's heirs to testamentary *waqf* validate such *waqf* under that law?

In considering the first of these questions it will be convenient to ascertain in the first place the exact nature and constitution of *waqf* as understood, in the *Shia* law. The *Sharayi-ul-Islam* thus describes a *waqf*:—

"*Wakf* is a contract the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free. The only express word by which it can be constituted is '*Wukufto*' (I have appropriated), for with regard to '*Hurrumto*' (I have consecrated), and '*Suddukto*' (I have bestowed), they are not sufficient to constitute *wakf* without accompanying

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circumstances, as by themselves they are susceptible of another interpretation besides *wakf*." (Baillie's Imameea Law, p. 211.)*

The most important point to be noticed in this definition is the word *contract* which Mr. Baillie in his translation, and I, after having consulted the original Arabic, agree in thinking is a correct equivalent of the word *aqd* (عقد), which in the Latin phraseology of English law might be rendered by the word *pactum*. The importance of this explanation lies in the circumstance that the incidents of *waqf* under the *Shia* law are vastly different from those of the *Sunni* law on some of the most radical points, and since such distinction will enable me to make my meaning more clear I will quote a passage from the *Fatawa Alamgiri*, accepting the translation of Mr. Baillie which I have compared with the original:—

"According to the two disciples *wakf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind; and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited. In the Ayoon and [448] Yutuma it is stated that the *futwa* is in conformity with the opinion of the two disciples." (Baillie's Hanifeea Law, p. 558.)*

It will be observed that whilst under the *Shia* law *waqf* is a contract, under the *Sunni* law it is a unilateral disposition of property, and as such not subject to the rules of contract. This is shown from the following passage in the *Fatawa Alamgiri*, the substance of which has been correctly rendered by Mr. Baillie in the following words:—

"The pillars of *wakf* are special words declaratory of the appropriation, such as 'I have given this my land,' or 'bequeathed it as an appropriated and special *Sudukah* or charity.' Its cause or motive is a 'seeking for nearness.' And its legal effect, according to the two disciples, 'an abatement of the appropriator's right of property in the thing appropriated in favour of Almighty God,' and, according to Aboo Huneefa, 'a detaining of it in the ownership of the appropriator, but without the power of alienation,' and 'a bestowing of its produce in charity." (Baillie's Hanifeea Law, p. 559.)†

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* الوقف عقد ثمرته تحبيس الاصل و اطلاق المنفعة واللفظ الصريح فيه وقفت لاغير اما حرمت و تصدقت فلا يحمل علي الوقف الامع القرينة لاحتماله مع الانفراد غير الوقف — (شرائع الاسلام كتاب الوقف مطبوعه كلكته صفحه ۲۳۴) *

* وعند هما حبس العين على حكم ملك الله تعالى على وجه يعود منفعته إلى العباد فيلزم ولا يباع ولا يوهب ولا يورث كذا في الهداية و في العيون و اليتيمة ان الفتوى على قولهما — (عالمگيري جلد ثاني مطبوعه كلكته كتاب الوقف صفحه ۳۵۴)

† فاما ركنه فالالفاظ الخاصة الدالة عليه كذا في البحر الرائق و اما سببه فطلب الزلفى هكذا في العناية و اما حكمه فعند هما زوال العين عن ملكه إلى الله تعالى و عند ابى حنيفه رح حكمه صير ورة العين محبوسة على ملكه بحيث لايقبل النقل عن ملك إلى ملك والتصدق بالغلة المعدومة متى صح الوقف بان قال جعلت ارضى هذه صدقة موقوفة مؤبدة اوا وصيت به بعد موتي — (فتاوي عالمگيري جلد ثاني كتاب الوقف مطبوعه كلكته صفحه ۳۵۵ و ۳۵۶) *

It is a general rule of interpretation of the *Sunni* law that when there is a difference of opinion between Imam Abu Hanifa and his two disciples, Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority prevails and the passage from the *Fatawa Alamgiri* which I have first cited shows that in regard to the nature, **[449]** effect and constitution of *waqf*, the opinion of the two disciples is the one which has been adopted and prevails.

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Now, the distinction which thus exists between the *Sunni* and *Shia* law must not be lost sight of, as some of the texts and cases cited in the course of the argument proceeded upon the *Sunni* law and not upon the *Shia* law. Perhaps the most notable of these cases is *Wasiq Ali Khan* v. *The Government* (1) which, though a case relating to a *Shia waqf*, namely, the celebrated endowment under the will of Haji Muhammad Mohsin for the *Imambara* at Hoogly, was dealt with by the Sadr Diwani Adalat upon the principles of the *Sunni* school of Muhammadan law which was then prevalent as the Muhammadan law administered by the Courts of British India. The case was dicided so long ago as the 22nd of September 1836, and I seriously doubt whether in those days the *Shia* law was ever administered by the Courts of British India as the rule of decision, even when *Shias* were concerned. Mr. Baillie at the outset of the introduction to his Imameea Law describes the history of the manner in which the *Shia* law came to be recognized in India, and I think I may safely say that it was not till the ruling of their Lordships of the Privy Council in *Raja Deedar Hossein* v. *Ranee Zahoor-oon-Nissa* (2), decided in 1841, that the enforceability of the *Shia* law by the British Courts in India was placed upon a firm footing. In that case their Lordships in dealing with an enactment *in pari materia* with s. 37 of our present Civil Courts Act (Act No. XII of 1887) went on to say (*vide* p. 478) :—

"It is true that the *Soonee* law has generally prevailed, because the great majority of the Indian Muhammadans are *Soonees*, there being very few families of the *Sheeah* sect, except those of the reigning princes, which will account for the prevalence of the *Soonee* doctrines in the Courts, but there is no practice which excludes the application of the *Sheeah* law to the rights of persons professing the tenets of that sect. The natural and equitable construction of the Regulation therefore must prevail."

[450] It was indeed in view of this ruling of the Lords of the Privy Council that in *Abbas Ali* v. *Maya Ram* (3), which was a pre-emption case, Mr. Justice Straight agreed with me in applying the strict *Shia* law, though my opinion required dissenting from two previous Division Bench rulings of this Court referred to in my judgment.

I have been anxious to place this preliminary point upon a footing which is conducive to preventing my judgment from being misunderstood, because, whilst on the one hand, if the questions which are before the Full Bench were questions of the *Sunni* (*Hanafi*) law, they would probably involve neither doubt nor difficulty ; on the other hand, being questions governed by the *Shia* law, they are far from being simple questions, and in this judgment I will deal with them strictly according to the *Shia* doctrine as enunciated in the authoritative law works of that sect.

Now I have already said that the *Sharayi-ul-Islam* which is the most authoritative text-book of the *Shia* law, deals with *waqf* as a contract (*aqd*

(1) 6 S. D.A. Sel. Rep. 130.
(2) 2 M.I.A. 441, *vide* pp. 477-8.
(3) 12 A. 229.

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عقد), and I now proceed to show that the result of this doctrine as it has been accepted by authoritative commentators and writers on the *Shia* law has been to create complications of detail as to its constitution and incidents which require consideration in this case. The *Masalik-ul-Afham*, a celebrated and authoritative commentary on the *Sharayi-ul-Islam*, as also the *Jawahir-ul-Kalam*, another authoritative commentary on the same text-book, throughout deals with *waqf* as a contract *inter partes* as distinguished from unilateral dispositions of property.

Perhaps the best way to indicate this is to quote and refer to the *Jami-ul-Shattat*, in which three important points relevant to the present discussion are stated in the form of a question which runs as follows :—

"*Question* :—Is the formal expression (*sigha*) necessary in *appropriation?* Is it a contract requiring offer and acceptance, or a [451] mere declaration? and is the intention of a desire to draw near to God essential?"*

The points raised in the above question when analysed are three, and they may be stated in the interrogative form to be the following :—

(1) Is the use of formal technical expressions necessary for creation of *waqf ?*

(2) Is *waqf* a form of contract (*aqd*, عقد, *pactum*,) needing offer and acceptance, or a declaration (*iqa' auni* 'ایقاع' lateral disposition of property)?

(3) Is the intention of a desire to draw near to God essential?

All these three points have been discussed at length in the *Jami-ul-Shattat* in the chapter on *waqf* at pp. 332 and 333 of the Tehran edition; but since the work is in print and available to the public, it would be unnecessarily lengthening my judgment if I were to quote a whole page of a folio to show the meaning which I take from that work. I content myself by saying that upon each one of the three points above-mentioned the final answers given by the text are the following, and these I state *seriatim* :—

Upon the *first* point in the question thus enunciated the answer is thus worded :—

"Yes, the use of formal technical expressions is an essential condition, and without it *waqf* is not established."†

Upon the *second* point the answer is thus worded :—

"*Waqf* is a contract needing offer and acceptance."‡ But whilst thus generally expressing the necessity of the contractual [452] formalities of offer and acceptance, the text goes on to explain how in some cases exceptions are to be made, and in dealing with these exceptions the author, meeting the difficulty which arises out of the word *iqaa* ایقاع, which in English means 'declaration,' or rather 'unilateral disposition of property,' goes on to explain that—

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* در وقف صیغه شرط است یا نه و از باب عقودست که محتاجست بایجاب و قبول یا ایقاعست و قصد قربت شرطست یا نه — (جامع الشتات کتاب الوقف صفحه ۳۳۲) ۔

† بلی صیغه شرطست و بدون آن منعقد نمی شود ۔

‡ وقف عقدیست محتاج بایجاب و قبول ۔

"The meaning of *aqd*, عقد contract, here covers declarations (*iqa'a*, ایقاع unilateral disposition)." *

But in thus extending the ordinary technical legal meaning of the word *aqd*, عقد (which means contract needing offer and acceptance), the learned author is anxious to explain that the extended meaning applies only to certain classes of *waqf*, and, after dealing with the various opinions upon the subject, arrives at the conclusion that *acceptance* may be dispensed with in cases where such acceptance is impossible, such *waqf* being for public charities, such as a mosque or maintenance of *faqirs*, that is to say, the general pauper public.

This is the general substance of the answer given to the second point above enunciated according to the *Jami-ul-Shattat*.

As to the *third* point, namely, whether the intention of a desire to draw near to God is essential, the *Jami-ul-Shattat*, after stating differences of opinion goes on to say :—

"The accepted opinion is rendering it (*i.e.*, intention of a desire to draw near to God) a condition, by reason of the absence of validity and uncertainty of the *waqf* without such intention and desire."†

This then is the effect of the doctrine in the *Jami-ul-Shattat*. That same doctrine is better and more tersely explained in the *Durus*, a work of higher authority than the *Jami-ul-Shattat* in regard to the same matter. The necessity of the use of formal technical expressions for creating a *waqf* being accepted on all **[453]** hands, the author of the *Durus* deals with the other two points, and I will quote from him presently.

As to the necessity of the intention or desire to create a *waqf* he lays down a rule of common sense conformable to the rules of law and equity as understood not only in England but also in this country and in Muhammadan jurisprudence in general. After stating that the *waqif* or the appropriator should not be under any legal disability and thus competent to enter into a legal contract, the author goes on to state as the second condition of the validity of a *waqf* that—"It is necessary that there should exist an intention, and therefore it cannot be established by one who is unconscious or asleep or drunk."*

Then, in dealing with the question of *acceptance* of a *waqf* the authority is equally clear upon what has been described by me already as to the second point in the question raised in the *Jami-ul-Shattat*, namely whether *waqf* being a contract needs offer and acceptance as the essential conditions of its validity under the *Shia* law.

Upon this point the *Durus* is perfectly clear, all the more so as it is fully consistent with the *Shia* doctrine of regarding *waqf* as a contract (*aqd*, عقد) as contra-distinguished from the *Sunni* doctrine upon the same subject. The author of the *Durus*, recognising the necessity of keeping pace with the requirements of contracts and feeling the necessity of finding that in some cases of *waqf* whilst there is an offer there is no possibility

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* که مراد از عقد درین جا عام از ایقاع ست *

† و اظہر اشتراط است بدلیل اصل عدم صحت و عدم تحقق وقف بدون آن *

* و ثانیها النیة فلا یقع من الغافل والنائم والسکران — (دروس کتاب الوقف) *

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of acceptance, and at the same time desirous of maintaining the *waqf* under such circumstances, goes on to explain the doctrine in the following words as the fourth condition governing such alienations :—

"The fourth condition is acceptance, which is *correlative* to *offer* when it is possible for those in whose favour the *waqf* has been made. Acceptance is not rendered necessary in the case of mendicants nor [454] in the case of public charities because of the impossibility of securing acceptance."*

It must therefore be taken that the *Shia* law recognises *waqf* not as a unilateral disposition of property, as it is recognised in the *Sunni* law, but as a contract which, according to the requirements of juristic notions, irrespective of either of these two systems, must be a transaction *inter vivos*, and this *ex necessitate rei*.

I will refrain from expatiating upon this point of jurisprudence because, having once laid down, as I have already said, that a *waqf* under the *Shia* law is regarded as a contract (*aqd*, عقد) requiring, at least in its general form, offer and acceptance, the rules which follow from such a doctrine must be interpreted conformably with such a notion.

This leads me to the latter part of the first question as referred to the Full Bench, which, indeed, is the turning point of this case—namely, whether actual delivery by the *waqif* himself of the appropriated property to the *mutawalli*, or the person appointed as superintendent thereof, is essential to the validity of the *waqf* itself.

Upon this point, which, as I have already said, is the turning point of the case, much depends. The first point to ascertain is whether under the *Shia* law of the transfer of property known as *waqf* there is any distinction between transfers of property which require *tanjiz*, تنجيز, and those which do not require *tanjiz*, تنجيز, that is, immediate operation of the transaction *obsolute* and *unconditional.*

The *Sharayi-ul-Islam* in describing the rule as to *waqf* goes on to say :—

"Conditions that relate to the *wakf* itself, which are four in number :—First, it must be perpetual ; second, *absolute* and *unconditional* ; third, possession must be given of the *mowkoof*, or thing appropriated, and, fourth, it must be entirely taken out of the [455] *waqif* or appropriator himself. So that if the appropriation is restricted to a particular time or made dependent on some quality of future occurrence, it is void." (Baillie's Imameea Law, p. 218.)*

So far as the question of *tanjiz*, تنجيز (which I have already interpreted) is concerned the *Jawahir-ul-Kalam* is more explicit. It says :—

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* و رابعها القبول المقارن للايجاب اذا كان على من يمكن منه القبول ولا يشترط القبول فی الوقف على الفقراء لعدم امکان القبول ولا على الجهات العامة كالمساجد — (دروس کتاب الوقف) *

* القسم الرابع فی شرائط الوقف وهي اربعة الدوام و التنجيز والا قباض و اخراجه عن نفسه فلو قرنه بمدة بطل و كذا لو علقه بصفة متوقعة — (شرائع الاسلام صفحه ۲۳۶)

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"Similarly you have heard more than once that *tanjiz*, or to make a contract to take effect immediately, is necessary in every cause of legal results, save those which have been excepted (by the authority of law), and that appropriation is void if suspended on an uncertain or even certain future event. There is no difficulty or difference of opinion (on the necessity of *tanjiz*)." (*Jawahir-ul-Kalam Book of Appropriation*, Tehran edition.)*

From this text it is clear that *waqf* being dealt with by the author as a contract, he lays down that *tanjiz* تنجيز is an essential condition of the validity of a *waqf*. The matter is even more fully explained in another work of high authority in the *Shia* law, namely, the *Jami-ul-Maqasid*, which runs as follows in regard to *waqf*:—

"Its conditions are *tanjiz* تنجيز, perpetuity, delivery of possession, and its exclusion from the ownership of the *waqif*, appropriator, himself and an intention of nearness (to God). In regard to *waqf*, other matters are also conditioned; one of them is *tanjiz*, تنجيز, and therefore if he has suspended it upon any condition or quality like his saying 'when Zaid arrives I have certainly [456] appropriated my house,' or 'when the beginning of the month arrives, I have made a *waqf* of my slave, it is invalid by reason of the absence of absolute certainty of it, in the same manner as in the case of sale and gift rendering them contingent invalidates them."*

To these texts I may add another, which shows how strictly the *Shia* law regards *waqf* as a contract and renders *tanjiz*, تنجيز, an essential condition for its validity. The *Sharah Lamah Damishkia*, a work of high authority, has the following:—

"Besides above-mentioned matters, *tanjiz* تنجيز, is one of its (*waqf's*) conditions. Therefore, if he has suspended it upon any contingency or quality it is void, except in cases when the contingency already exists and the *waqif* (appropriator) is aware of its existence, such as his saying 'I have made this *waqf* if to-day is Friday, such as is the rule in regard to other contracts."†

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† وكذا قد سمعت غير مرة اعتبار التنجيز فى كل سبب شرعى الا ماخرج و (انه يبطل لو علق) شيأ (لصفة متوقعة) الحصول فيما ياتي بل او متيقنة بلا خلاف ولا اشكال — (جواهر الكلام شرح شرائع الاسلام كتاب الوقف صفحه . طبع طهران) *

* يشترط تنجيزه و دوامه و اقباضه و اخراجه عن نفسه و نية التقرب يشترط في الوقف ايضا امور اخري احدها تنجيزه فلو علق بشرط او صفة مثل ان يقول اذا جاء زيد فقد وقفت داري و اذا جاء راس الشهر وقفت عبدي لم يصح لعدم الجزم كما لا يصح تعليق البيع و الهبة — (جامع المقاصد شرح قواعد كتاب الوقف) *

† وشرطه مضافا الى ما سلف التنجيز فلو علقه على شرط او صفة بطل الا ان يكون واقعا و الواقف عالما بوقوعه كقوله وقفت ان كان اليوم الجمعة و كذا غيره من العقود — (شرح لمعه دمشقيه كتاب الوقف) *

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Now it is clear from these texts that the doctrine of *tanjiz*, 'تنجيز' which is unanimously approved by the highest authorities of the *Shia* law, requires as one of the essential conditions precedent to the validity of a *waqf* that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even where it is certain to occur, such as the beginning of the next month or the occurrence of the death of the *waqif*, *i.e.*, the appropriator.

I now proceed to explain how this doctrine practically operates, imposing, as it does, the stringency which I have described. The **[457]** best illustration of the application of the rule is the question of delivery of actual possession by the *waqif* himself of the appropriated property to the *mutawalli* or the person appointed as superintendent of the *waqf* property.

Upon this point I again take the text of the *Sharayi-ul-Islam* and its two recongnised commentaries of the highest authority. The text of the *Sharayi-ul-Islam* and the explanation thereof in the *Masalik-ul-Afham* are thus worded :—

"A *waqf* does not become obligatory except by delivery of possession". (Sharaea, p. 234, Calcutta edition.)*

"The author says,—'A *waqf* does not become obligatory except by delivery of possession.' There is no difference of opinion among our masters in the matter of seisin being a condition for the validity of a *waqf*. So it does not become a contract without seisin in the same manner as it does not become a contract by a proposal without acceptance or *vice versa*. Thus seisin forms a part of the cause by which the transfer of ownership is effected. This does not appear from the wording of the author as it negatives obligation. But he will soon, hereafter, state expressly what we have mentioned where he says in the 4th section that seisin is a condition for the validity of a *waqf*. The use of this principle appears in the case of accession, if any, between the contract and seisin, for it (accession) is for the *waqf* as we have shown. It is obvious that the fact of seisin being a condition for obligation is not inconsistent with the accession being for the benefit of the *maukuf-alaih* (beneficiary); the reason being that the *waqf* is constituted though it is not binding; for regarding the ownership of accession obligation has no importance, so much so that the contract effecting the transfer is constituted, though such contract is optional in the opinion of the author and other doctors, as the principles of optional sale and the like tend to show. It may be perhaps that by negativing the obligatory character of a *waqf* in the absence of seisin, the author meant to contradict some of the *common people* (*Sunnis*) who hold that **[458]** a *waqf* becomes obligatory merely by using the word, though possession may not have been obtained ; and, therefore the author has used such words as contradict that person expressly, without having regard to the inference to be drawn from the signification thereof, and then after that he has expressed what he meant." (*Masalik ul-Afham*).*

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* و لا يلزم الا بالاقباض — (شرائع صفحه ۲۳۴ مطبوعه كلكته) *

* قوله ولا يلزم الا بالاقباض لا خلاف بين اصحابنا في ان القبض شرط الصحة الوقف فلا ينعقد بدونه كما لا ينعقد بالايجاب مجرداً عن القبول او بالعكس فيكون القبض جزء السبب الناقل للملك و عبارة المصنف ينفي اللزوم فلا يفيد ذلك ولكنه فيما سياتي سيصرح بما ذكرناه حيث يقول في القسم الرابع والقبض شرط

More explicit on the subject of delivery of possession as a condition precedent to the validity of a *waqf* under the *Shia* law is the commentary of the *Sharayi-ul-Islam*, the *Jawahir-ul-Kalam*, which, dealing with the text, runs as follows :—

"So a contract of *waqf* does not become obligatory except by delivery of possession, which means seisin by permission ; therefore it is competent for either of the two (the *waqif* or the *maukuf-alaih*) to put an end to it before seisin. This is however not incosistent with seisin being one of the conditions for validity used in the sense of the production of the effect or the fact of the *maukuf-alaih* becoming the owner of profits, &c., as explained hereafter by the author and others : nay, the learned even have deduced therefrom that a *waqf* becomes void by the death of the *waqif* before seisin and other principles. The necessity (of saying that a *waqf* contract does not become obligatory except by delivery of possession) is the [459] object to state here either that before seisin it is not, as some common people (*Sunnis*) say it is, obligatory, or that it does not follow from the happening of the contract that delivery of possession which is one of the conditions of validity is compulsory : though this (that delivery of possession is compulsory) has been imagined in consequence of the resemblance of the subject (*waqf*) by reading together the words of God, the Most High, 'fulfil (your promises)' and the argument which shows the importance of possession for validity which means the constitution of ownership and the like. The reason (for the view that 'it does not follow * * * is compulsory') is that although the words of God negative the originality of exemption, &c., yet they are not in conformity with the argument which almost evidently shows the importance of possession : nay, Azir * even evidently shows that cancellation before obtaining a possession is lawful, and that the *waqif* does not (thereby) commit a sin. 'I asked,' says Safwan in his book called *the Sahih*, 'about a person who made a *waqf* of an estate, and in whose mind it entered afterwards to make some alteration in the *waqf*.' Thereupon Abul Hasan said, 'if the person made a *waqf* of the estate in favour of his children and others, and appointed a manager of the estate, it is not open for him to revoke : if they (the *maukuf-alaihim*) are minors and having stipulated the superintendence thereof on their behalf till their attaining majority, manages the estate on their behalf, it is not open for him to revoke the transaction. If they are of age and he did not deliver the estate to them, while they did not litigate for taking the management thereof from him, then it is open for him to revoke the transaction : because, notwithstanding their being of age, they do not take the management thereof from him." There is a report from Asadi of the answer to his questions, received by him from Umri, who received the same from the Imam of the age (Imam-i-Mahdi), may my life be sacrificed

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فی صحته ویظهر فائدته فی النماء المتخلل بین العقد والقبض علی تقدیر حصوله
فانه للواقف علی ما حققناه و علی ظاهر کونه شرطا فی اللزوم لاینافی ان یکون
للموقوف علیه لتحقق الوقف و ان لم یلزم فان اللزوم غیر معتبر فی ملک النماء
حیث یتحقق العقد الناقل و ان کان جائزاً عند المصنف وغیره من المحققین
(کمانبه علیه فی البیع بخیار و نحوه) و لعله حاول بنفی لزومه بدون القبض
الرد علی بعض العامة حیث جعله لازماً بمجرد الصیغة و ان لم یقبضه فاتی
بعبارة ترد علیه بالصریح و لم یعتبر دلالة مفهومها ثم صرح بمراده بعد ذلک —
(مسالک الافہام)

* The name or abbreviation of the name of some book.

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for him! (The report is as follows):—As to your question about a person who makes a *waqf* in our favour, and makes the property ours, and, who afterwards requires it, the owner [460] of the property is at liberty as regards the property which has not been made over; but as regards the property which has been made over the owner is not at liberty, whether he require it or not, and whether he stand in need of it or is indifferent to it.' Further on he (Iman of the age) said:—'As to your question regarding a person who has made an estate ours and made it over to a manager who manages it, peoples it, pays out of its income the Government demand (*khiraj*) payable in respect thereof and its liabilities, and makes the remaining income ours, all that is lawful for the person whom the owner of the estate has appointed as the manager thereof, but not for a person other than him.' But the two traditions, as you see, do not directly, or even apparently, show that seisin is a condition for the validity used in the sense of the production of effect, which is ownership and the like; because the two traditions are necessarily in conformity with each other in showing that seisin is a condition for obligation. The use of the principle appears in an accession made between a contract and seisin. But in (*) and (†) it is denied repeatedly that there is any difference of opinion as to seisin being a condition for validity; nay, the two books even show that the opinion is unanimous." (*Jawahir-ul-Kalam*).‡

[461] Similar is the effect of another work of high authority in the *Shia* law, namely, the *Sharah Lamah Damishkia*, which I now quote, not only as relevant to the point now under consideration, namely, the

* † Abbreviations of the names of some books.

‡ فلا يلزم عقد الوقف الا بالاقباض الذى هو القبض بالاذن فلكل منهما حتى فسخه قبله و هذا لاينافى كونه مع ذلك من شرائط الصحة التى هى بمعنى ترتب الاثر من ملك الموقوف عليه المنفعة وغيره كما سيصرح به المصنف وغيره بل فرعوا عليه البطلان بموت الواقف قبله وغيره ضرورة كون المراد هنا بيان عدم اللزوم قبله نفيا عن بعض العامه او بيان ان وقوع العقد لايقتضى وجوب الاقباض الذى هو من شرائط الصحة و ان توهم من نظير المقام جمعا بين قوله تعالى اوفوا و مادل على اعتباره فى الصحة التى هى بمعنى ترتب الملك و نحوه اذ هو مع انه مناف لاصالة البراءة و غيرها لايوافق مادل هنا على اعتباره مما هو كالصريح بل صريح فى الاذن بالفسخ قبل حصوله و انه لا اثم عليه قال صفوان فى الصحيح سألت عن الرجل يوقف الضيعة ثم يبدو له ان يحدث فى ذلك شيئا فقال ان كان وقفها لولده و لغيرهم ثم جعل لها قيما لم يكن له ان يرجع و ان كانوا صغارا و قد شرط ولايتها لهم حتى يبلغوا فيحوزها لهم لم يكن له ان يرجع فيها و ان كانوا كبارا لم يسلمها اليهم و لم يخاصموا حتى يحوزوها عنه فله ان يرجع فيها لانهم لا يحوزونها عنه و قد بلغوا و عن الاسدي فيما ورد عليه من جواب مسائله عن العمري عن صاحب الزمان (روحي له الفداء) و اما ما سئلت عنه من الوقف على ناحيتنا و ما يجعل لنا ثم يحتاج اليه صاحبه مالم يسلم فصاحبه فيه بالخيار و كل ما سلم فلا خيار فيه لصاحبه احتاج او لم يحتج افتقر اليه او استغنى عنه الى ان قال و اما ما سألت عنه من امر الرجل الذي يجعل لنا حصته ضيعة و يسلمها من قيم يقوم فيها و يعمرها و يودي من دخلها خراجها و مؤنتها و يجعل مابقى من الدخل لناحيتنا فان ذلك جائز لمن

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necessity of delivery of possession, but also as introductory to the next step of reasoning, which I shall adopt in this judgment relating to testamentary power in the *Shia* law for creation of *waqfs*. The *Sharah Lamah Damishkia* runs as follows:—

"The *waqf* does not without seisin become obligatory after the completion of the words constituting it. So if a *waqf* be made for a public purpose, the superintendent of the *waqf* property or the ruler, or the manger appointed by the *waqif* to take possession thereof, should take possession of it, the happening of such possession will be recognized if it happen by the permission of the *waqif* because disposition of another's property is prohibited without his permission. The fact is that a *waqf* property is not at all transferred to the *maukuf-alaih* (beneficiary) without seisin. If the *waqif* die before possession for which he gave permission the *waqf* becomes void. A tradition reported from Obeid, the son of Zurarah, is clear on this point, and it shows that immediate possession is not important. Apparently the same is the case with [462] the death of the *maukuf-alaīh*, though there is possibility that his heir may stand in his place. From the negation of obligation by him (the author of *Lamah*) it may be understood that the contract is valid before seisin, so that the transfer of ownership is unsure and becomes absolute by means of seisin: other authors have said so in express terms. It is apparent from the "*Durus*" that seisin is a condition for validity. The use of this principle appears in the case of accession between the contract and seisin. Obligation may possibly be taken here in the sense of validity and it is inferred from the circumstance that a *waqf* is said to be void if the *waqif* dies before seisin, which circumstance is due to invalidity and not to the absence of obligation. So it is stated in the chapter on "Gift" in the "*Durus*." From what some of the masters have said in this matter it appears that the author may have meant (validity)." (*Sharah Lamah Damishkia*).*

بجعله صاحب الصيغة فيهما عليهما انما لا يجوز ذلک لغيره لكن هما كما ترى غير
صريحين بل ولا ظاهرين في الشرطية في الصحة بمعني توقف الاثر الذي
هو الملک و نحوه ضرورة انطباق مافيهما على كونه شرطا في اللزوم و تظهر الثمرة
في النماء المتخلل بينهما لكن في مع هذ و في الک نفي الخلاف فيه عن
كونه شرطا فيها مكررا بل فيها الاجماع على ذلک — (جواهر الكلام) *

* ولا يلزم الوقف بعد تمام الصيغة بدون القبض فانكان في جهة عامة قبضها
الناظر فيها اوالحاكم اوالقيم المنصوب من قبل الواقف لقبضه و يعتبر وقوعه
باذن الواقف لغيره لامتناع التصرف في مال الغير بغير إذنه والحال انه لم
ينتقل الى الموقوف عليه بدونه فلومات الواقف قبله اى قبل قبضه المستند
الي اذنه بطل و رواية عبيد ابن زرارة صريحة فيه و منه يظهر انه لايعتبر فوريته
والظاهر ان موت الموقوف عليه كذلک مع احتمال قيام وارثه مقامه و يفهم
من نفيه اللزوم بدونه ان العقد صحيح قبله فينتقل الملک انتقالا متزلزلا يتم بالقبض
و صرح غيره و هو ظاهره في الدروس انه شرط الصحة و تظهر الفائدة في النماء
المتخلل بينه و بين العقد و يمكن ان يريد هنا باللزوم الصحة بقرينة حكمه
بالبطلان لومات قبله فان ذلک من مقتضي عدم الصحة لااللزوم كما صرح به
في هبة الدروس و احتمل ارادته من كلام بعض الاصحاب فيها — (شرح لمعه
دمشقيه كتاب الوقف) *

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Briefly stated, the effect of these texts is to sustain the following propositions :—

(1) That the *Shia* law (as distinguished from the *Sunni* doctrine) regards *waqf* as a transaction falling under the category of contract (*aqd*, عقد, '*pactum*) *inter vivos.*

[463] (2) That *tanjiz*, تنجيز (*i.e.*, immediate operation of the transaction absolute and unconditional), is one of its essential elements.

(3) That actual delivery of possession by the *waqif* (*i.e.*, appropriator) himself or by his permission is a condition precedent to its validity and effect.

(4) That acceptance by the beneficiaries of the *waqf* is essental for its validity, except in cases where by the very nature of the *waqf* such acceptance is impracticable, such as in the case of a mosque and charitable endowment in favour of mendicants in general (*faqirs*, فقراء) that is, the indigent public.

(5) That suspension of a *waqf*, that is, the rendering its operation contingent upon any future event, be that event certain to occur or uncertain to occur, is absolutely void.

Then comes the last part of the case so far as the first question referred to the Full Bench is concerned : and I think it can be conveniently dealt with along with the second question referred to the Full Bench, because the original texts of the *Shia* law are common to both. The turning point is the extent of the testamentary power in the *Shia* law as to the creation of *waqfs*, that is to say, the power to render such transfers of property valid without delivery of possession *inter vivos.* Upon the general testamentary power of the *Shias* the ruling of the Privy Council in *Nawab Aminood-dowlah* v. *Syud Roshun Ali Khan* (1) was cited, and it was there held that a nuncupative will by a Muhammadan of the *Shia* sect bequeathing property less in amount than one-third of his estate was valid, and that such bequest would have been valid even if beyond a third of the testator's estate, provided the heirs concurred in the bequest.

I have mentioned this case because it is the principal judicial authority cited in support of the proposition pressed on behalf of the plaintiffs that under the *Shia* law, notwithstanding the fact that [464] *waqf* is a contract, notwithstanding the fact that *tanjiz* تنجيز, and delivery of possession are its essential conditions, yet *waqfs* may be created by testamentary disposition without immediate operation and actual delivery of possession of the appropriated property.

Now I proceed to show from the most authoritative texts of the *Shia* law itself that this contention is unsound and proceeds upon obliviousness of the exigencies of the contract of *waqf* as understood under that law. I will first quote the authorities and then discuss them.

The first authority which I quote is the *Sharayi-ul-Islam* together with its commentary the *Masalik-ul-Afham.*

These texts are as follows :—

"Seisin is a condition for the validity of a *waqf*. So if a person make a *waqf* and then die without delivering possession, the *waqf* property shall become a heritage." (*Sharayi-ul-Islam*, Calcutta edition, p. 237.)*

(1) 5 M.I.A. 199.

* والقبض شرط في صحته فلو وقف ولم يقبض ثم مات كان ميراثاً —
(شرائع الاسلام صفحه ۲۳۷ مطبوعه كلكته) *

"Seisin is a condition for the validity of a *waqf* * * *. There is no difference of opinion among us as to seisin being a condition for the completion of a *waqf* as regards its taking effect. This means that the transfer of ownership depends upon proposal, acceptance and seisin. So a contract forms a part of the cause effecting the transfer and seisin completes it (the cause). Hence before possession a contract is valid in itself; but the transfer of ownership is not effected thereby, and therefore it may be revoked before seisin and is rendered void by death before seisin. The accession made between a contract of *waqf* and seisin is for the *waqif*. This shows that seisin is one of the conditions for the validity of a *waqf*, as stated by the author and many others. But some of the jurists state that seisin is a condition for obligation. They, however, do not mean anything other than what we have mentioned, though the word 'obligation' gives rise to the possibility of the contract being complete, effecting a transfer of ownership not [465] obligatory in its nature, as in the case of the ownership of a thing sold during the period of option; whereas on such a supposition an accession made in the interval would be for the transferee, and such is not the case here unanimously. By the fact of seisin being a condition for obligation the author has meant nothing beyond that either the contract is neither complete nor so obligatory as to take effect, or the transfer is not obligatory and is not constituted without seisin or the like. That it is lawful to revoke a *waqf* before seisin according to all opinions appears from a correct tradition reported by Safwan, son of Yahya, from Abul Hasan (peace be with him!) Safwan says:—'I asked him (Abul Hasan) about a person who made *waqf* of an estate, and in whose mind it entered afterwards to make some alteration in the *waqf*.' Thereupon Abul Hasan said:—"If the person made a *waqf* of his estate in favour of his children and others, and appointed a manager of the estate, it is not open for him to revoke. If they (the *maukufalaihim*) are minors, and having stipulated the superintendence thereof on their behalf till their attaining majority manages the estate on their behalf, it is not open to him to revoke the transaction. If they are of age and he did not deliver the estate to them, while they did not litigate for taking the management thereof from him, then it is open for him to revoke the transaction; because, notwithstanding their being of age they do not take the management thereof." That a *waqf* is rendered void by the death of the *waqif* before seisin appears from a tradition reported by Obeid, son of Zurarah, from Abu Abdullah that in the matter of a person who made *sadaqah* in favour of his children who were of age Abu Abdullah said:—'If they did not take possession till he died, the property becomes an heritage: but if he made a *sadaqah* in favour of his child who has not attained majority it is valid; because it is the father who controls the child's affairs.' The masters have understood from the tradition that *sadaqah* means *waqf*, and they use it as an argument for what we have mentioned; though there is a possibility of the word *sadaqah* being used in its particular sense, in which case the tradition [466] is no argument. It (that *sadaqah* means a *waqf* is supported by what Abu Abdullah said at the end of the tradition, namely, that a person 'cannot revoke a *sadaqah* if he made it to seek the favour of God, the Most High,' which provision is applicable to a *sadaqah-i-ammah* (public charity) specially, and not to a *waqf*. It is obvious that the death of a *maukuf-aliah* (beneficiary) is like the death of a *waqif* (author of trust); for such being the case with an optional contract, the same case will *a fortiori* be with one whose ownership is not complete; but the learned have contended themselves with what has been reported. There is a possibility here of the

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second generation representing the *maukuf-al-alaih* as regards seisin. The distinction between the two deaths is that the death of the *waqif* transfers his property to his heir, and this necessitates voidness, in the same manner as if he has transferred his property in his lifetime: but the case is different with the death of the *maukuf-aliah*, in which case the property remains in its original state and has not been transferred to another owing to imperfectness of ownership. The author of——(1) has hesitated as to the validity of a *waqf* in case the second generation take possession; but he (the author of the book) has not mentioned it in any other book, nor as any person other than the author mentioned it. Lunacy and swoon are treated like death. Now, this having been settled, the seisin deserving consideration here (in *waqf*) is the same that deserves consideration in sale, and we have shown it there. There more forcible opinion is that immediate seisin is not necessary, because of the constitution of the origin and the absence of any argument showing it (the importance of immediate possession). The above two traditions direct to it (immediate seisin not being necessary), because voidness in the absence of seisin has been suspended till death, which fact proves that seisin, whenever obtained before death, is sufficient. There is a possibility of immediateness being worthy of consideration, because seisin is an ingredient in a contract, and stands for acceptance, specially according to the opinion that acceptance is not a necessary condition. In this (immediateness [467] being worthy of consideration), seisin *in waqf* differs from seisin in sale where ownership and the contract are complete without seisin and consequently immediate seisin is not at all necessary for its taking effect." (*Masalik-ul-Afham.*)*

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(1) Abbreviation of the name of some book.

* والقبض شرط في صحته الخ — لا خلاف عندنا في اشتراط القبض
في تمامية الوقف بحيث يترتب عليه اثره بمعنى كون انتقال الملك مشروطاً
بالايجاب والقبول والقبض فيكون العقد جزء السبب الناقل و تمامه القبض
فقبله يكون العقد صحيحاً في نفسه لكنه ليس بناقل للملك فيجوز فسخه
قبله و يبطل بالموت قبله والنماء المتخلل بين العقد والقبض للواقف و بهذا
يظهر ان القبض من شرائط صحة الوقف كما عبر به المصنف و جماعة و لكن
بعضهم عبر بانه شرط اللزوم ولا يريدون به معنى آخر غير ما ذكرناه و ان كان
من حيث اللفظ محتملاً لكونه عقداً تاماً ناقلاً للملك نقلاً غير لازم كالملك في
زمن الخيار للمبيع فان النماء المتخلل على هذا التقدير لمن نقل اليه وليس
كذلك هنا اتفاقاً و انما اراد بكونه شرطاً في اللزوم ان العقد لا يتم ولا يلزم بحيث
يترتب عليه اثره او ان الانتقال لا يلزم ولا يتحقق بدونه و نحو ذلك — و تدل
على جواز الرجوع فيه قبل القبض مع الاجماع صحيحة صفوان ابن يحيى عن
ابي الحسن عليه السلام قال سألته عن الرجل يوقف الضيعة ثم يبدو له ان
يحدث في ذلك شيئاً فقال ان كان اوقفها لولده و لغيرهم ثم جعل لها قيما
لم يكن له ان يرجع و ان كانوا صغاراً و قد شرط ولايتها لهم حتى يبلغوا فيحوز
ها لهم لم يكن له ان يرجع فيها و ان كانوا كباراً ولم يسلمها اليهم ولم يخاصموا
حتى يحوزوها عنه فله ان يرجع فيها لانهم لا يحوزونها وقد بلغوا وعلى بطلانه
بموت الواقف قبله رواية عبيد بن زرارة عن ابي عبدالله انه قال في رجل
تصدق على ولد له قد ادركوا فقال اذا لم يقبضوا حتى يموت فهو ميراث فان
تصدق على من لم يدرك من ولده فهو جائز لان الوالد هو الذي يلي امره وقد

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[468] Another authority of great consequence is the *Jawahir-ul-Kalam*, a well-known commentary of the *Sharayi-ul-Islam*, and it runs as follows consistently with the preceding commentary :—

"So where a person makes a *waqf* and then dies before seisin, the *waqf* is void and becomes an heritage in the former case, nay even in the latter case. Similarly a *waqf* becomes void if the *waqif* turns made or swoons, as is the case with all the conditions of validity, when in the course of the fulfilment of those conditions there comes something which bars them before the completion of the cause, namely, what is apparently shown to be the cause, or which is caused to be believed to be so, by the importance of the continuance of capability till the completion of the cause; and there is no distinction (in this matter) between the proposer, the acceptor and the subject-matter of the contract. Hence there seems no difference of opinion among the masters, in all matters, as to a cause becoming a nullity by being barred in the course of its completion, though the bar may cease to exist afterwards. But if we say that seisin is a condition for obligation, then the *waqf* is nullified by the death of the *waqf* under the correct tradition to be mentioned hereafter, on the ground that the word '*sadaqah*' occurring in it means *waqf*." (*Jawahir-ul-Kalam*).*

[469] To these texts which were cited upon the point now under consideration I may add the following, which is from the *Jami-ul-Maqasid*, who and whichilst an authority on the Shia law, is not a commentary on the *Sharayi-ul-Islam*, for it is a commentary on another text of high authority, namely, the *Qawaid*. The *Jami-ul-Maqasid* has the following:—

فهم الاصحاب من الحديث ان المراد بالصدقة الوقف واستدلوا به على ما ذكرناه
مع احتمال ان يريد بالصدقة معناه الخاص فلا يكون دليلاً ويؤيده قوله في
آخر الحديث وقال لا يرجع في الصدقة اذا تصدق بها ابتغاء وجه الله تعالى فان
هذا الحكم من خواص الصدقة العامة للوقف والظاهر ان موت الموقوف عليه
قبل القبض كموت الواقف لان ذلك من شأن العقد الجائز فضلاً عن الذي لم يتم
ملكه ولكنهم اقتصروا على المروي ويحتمل هنا قيام البطن الثاني مقامه في القبض
و يفرق بينهما بان موت الواقف ينقل ماله الى وارثه و ذلك يقتضي البطلان كما لو
نقله في حياته بخلاف موت الموقوف عليه فان المال بحاله ولم ينتقل الى
غيره لعدم تمامية الملك وحينئذ يتوقف في صحته اذا قبض البطن الثاني ولم يذكره
في غيره ولا غيره وفي معنى الموت الجنون والاغماء اذا تقرر ذلك فالقبض المعتبر
هنا هو المعتبر في البيع وقد حققناه ثمه والاقوى انه لا يشترط فيه الفورية لعقد الاصل
وانتفاء دليل يدل عليه و في الروايتين السابقتين ارشاد اليه حيث علق البطلان بعدم
القبض الى ان يموت فان مقتضاه الاكتفاء قبل الموت متى حصل ويحتمل
اعتبار الفورية لانه ركن في العقد فيجري مجرى القبول خصوصاً على القول بعدم
اشتراط القبول و بهذا يفارق قبض البيع فان الملك والعقد يتم بدونه فلا يشترط
في تحقق حكمه فوريته قطعاً — (مسالك الافهام) *

* فلو وقف ثم مات قبل القبض بطل و كان ميراثاً على الاول بل والثاني
و كذا يبطل لو جن او اغمي عليه كما هو الشان في جميع شرائط الصحة
اذا حصل المانع منها في اثنائها قبل تمام السبب الذي ظاهر ما دل على سببية
او المتيقن منه اعتبار دوام التأهل الى تمام السبب من غير فرق بين الموجب

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"Possession is a condition for validity of it (*waqf*), and if he (the *waqif*, appropriator) has made a *waqf* but has not delivered the appropriated property and has then died, the property becomes inheritance in consequence of the *waqf* being void because of the absence of its essential condition, and this doctrine is explained in the tradition stated by Obeid Ibn-i-Zurarah from (Imam) Sadiq, on whom be peace."*

But it has been argued by Pandit *Sundar Lal* that in cases (such as the will of Muhammad Ali dated the 3rd of November 1863, to which this discussion relates) where a *waqf* is created and delivery of possession and acceptance have not taken place, the *waqf* does not become void but takes effect as a will to the extent of one-third of the property of the deceased appropriator. For this contention he relies, *inter alia*, upon the following texts of the *Mabsut* :—

"If the transfers are to come (into effect) after death ;—*thus*—in the case of a *waqf* made by a will or when he directed manumission of a slave by his will, or, when he made a will for the sale of a house at a nominal price, and others like it :—

[470] "If one-third of the property be sufficient to meet all this, it will be done accordingly. If one-third be not sufficient to meet all this (and there be no will for the manumission of a slave) the one-third will be applied to meet them all in proportionate shares and none shall have preference over the other, because all these must come into effect *at once*, *viz.*, —on the (date) of death. This is according to the saying of the opposite sect (*i.e.*, the *Sunnis*). According to us the first mentioned will have preference over the next and so on till the one-third is exhausted." (The *Mabsut* by Sheikh Abu Jafar, p. 273, lines 23 to 25.*

In quoting this text I have quoted the translation furnished by Pandit *Sundar Lal*, but before dealing with the text I wish to point out a serious error in it, which is more important than a merely verbal criticism. The text in the opening part in enumerating various kinds of grants which are intended to take effect after death mentions as an illustration wills for *waqfs*. The original Arabic words are مثل إنْ يوصي بوقف which in the learned Pandit's translation is rendered in the following words :—"In the case of a *waqf* made by a will." The literal and grammatical translation should be in the following words :—"For instance, if he make a bequest for a *waqf*,"

والقابل والعين التي هي متعلق العقد و من هنا لم يظهر خلاف بين الاصحاب في سائر المقامات في بطلان السبب بعروض المانع في اثنائه وان زال بعد ذلك نعم لو قلنا بكونه شرط اللزوم انفسخ بموت الواقف الصحيح الآتي بناءا على ارادة الوقف فيه من الصدقة — (جواهر الكلام) *

* قوله والقبض شرط في صحته فلو وقف و لم يسلم الوقف ثم مات كان ميراثاً لبطلان الوقف بانتفاء شرطه وقد ورد التصريح في رواية عبيد ابن زرارة عن الصادق عليه السلام — (جامع المقاصد كتاب الوقف) *

* فاما اذا كانت العطايا موخرة مثل ان يوصي بوقف او عتق او بيع بمحابات وما اشبه ذلك فان وفى الثلث بالجميع فذاك وان لم يف بالجميع فان لم يكن في جملتها عتق قسم الثالث عليها بالحصص ولم يقدم بعضها على بعض لانها كلها تنجزت في وقت واحد وهو وقت الموت هذا عند المخالف وعندنا انه يقدم الاول فالاول مثل الاول — (عبارت مبسوط صفحه ۲۷۳ باب الوقف) *

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which, taken with the context, means that the deceased has given a testamentary direction to his legal representatives to appropriate a certain portion of his property towards charitable endowments according to the terms of the bequest. It does not mean that the execution of a will can *ipso facto* create a *waqf in præsenti*. In other words, the text properly understood does not lay down any rule as to the constitution and requisites of a *waqf*, but lays down rules as to the administration of the estate of a deceased testator.

[471] The importance of the distinction which I have thus drawn will become more clear as I deal with the other texts cited by Pandit *Sundar Lal* himself on behalf of the plaintiff. One of these is the following from the *Tahrir-ul-ahkam* of Allama Hilli :—

"If he had said :—'Make ye a *waqf* after my death in such a fashion,' that beomes a *wasiyat-bil-waqf*, وصیت بالوقف (testament for a *waqf*). It must be taken out of one-third. And if he had said :—' That is *waqf* after my death,' then in its being *wasiyat-bil-waqf* (which is) lawful or *waqf* contingent upon death (which is) void there is *nazar*."*

Both Pandit *Sundar Lal* for the plaintiff and Mr. *Karamat Husain* for the defendants agree in the accuracy of this translation of the text, and I also approve of it as a good literal translation. They are, however, not agreed as to the meaning of the last word in the text, namely *nazar*. نظر. Pandit *Sundar Lal* maintains that the word is a technical word indicating that the point is an unsettled one. I may say at once that the word literally means *cogitation*, and it does imply that the rule to which it refers is not a settled matter and requires consideration.

Before proceeding further I may quote another text relied on by Pandit *Sundar Lal* and Mr. *Karàmat Husain* on behalf of their respective clients, but they are not agreed as to the exact meaning and import of the text. I am therefore responsible for the following translation, which I will make as close and literal as linguistic exigencies will allow :—

" And if he said :—It is *waqf* after may death——this is susceptible both of being void, as it is suspension (of the *waqf*), and of being predicated as convertible into a *wasiyat-bil-waqf*, because it (the sentence) is more expressive than his saying :—' Make it a *waqf* after my death.' Its (the phrase's) use in making wills [472] is frequent, and this is the more correct, because it is (means) disposal of his property to take effect after death, which is the meaning of *wasiyat* (testamentary disposition)." *Izah* of Allama Hilli, p. 355.*

In order to explain the controversy between the parties based upon these two texts it is necessary to state that there are two Arabic phrases which must be distinctly borne in mind as they occur in the texts. These phrases are—

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*لو قال قفوا بعد موتی کذاکان وصیة بالوقف یخرج من الثلث ولو قال هو وقف بعد موتی فھي کونه وصیة بالوقف صحیحة او وقفا مشروطاً بالموت باطلا نظر — (تحریر الاحکام علامه حلي صفحه ٥١٦) *

* ولو قال هو وقف بعد موتی احتمل البطلان لانه تعلیق والحکم بصرفه الی الوصیة بالوقف لانه ابلغ من قوله قفوا هذا بعد موتی والاستعماله فی الوصیة کثیر وهو الاصح لانه تصرف مالي معلق بالموت و هذا معنی الوصیة (ایضاح تصنیف فخرالمحققین محمد بن علامه حلي صفحه ٣٥٥) *

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(1) *Qifu baada mauti kaza* (قفوا بعد موتي كذا) which means—"*Make ye a waqf after my death, thus.*"

(2) *Hawa waqfun baada mauti* (هو وقف بعد موتي) which means—*It is waqf after my death.*

Now the *Shia* law attaches stringent importance to technical formalities and expressions employed. So far as the first of these phrases is concerned, it is admitted on all hands that it amounts to a testamentary direction to the heirs to make a *waqf*, that is, to appropriate property to the purposes and in the manner indicated by the testator. Such tetamentary direction is technically called *wasiyat-bil-waqf* (وصيت بالوقف), that is, bequest for the purpose of a *waqf*, which falls under the same category as other similar dispositions such as those described in the text from the *Mabsut* which I have already quoted ; and it cannot be doubted that under the *Shia law* (as, indeed, also under the *Sunni* law) such legacies are to be carried out to the extent of one-third of the estate of the deceased, *subject* to such rules and restrictions as govern the administration of the estate of a deceased person, by his legal representatives, with reference to his debts and other legal liabilities of his estate. Indeed, there is no context between the parties as to this point, and I need not therefore dwell upon it any further.

[473] The real controversy relates to the second phrase, *viz.*:—"*Is it waqf after my death*" (هو وقف بعد موتي) and much in the texts which have been cited is devoted to discussing the exact signification, import and effect when it is employed. Now the word *waqf* (وقف), being a noun, does not in itself import either any tense or direction such as the imperative (قفوا) which occurs in the first phrase. This being so, doubts have arisen as to whether the phrase in which it occurs when used has the signification of being a *wasiyat-bil-waqf* (وصيت بالوقف) that is, a testamentary direction to heirs for *waqf*), in which case it would be valid, of whether it signifies a *waqf-bil-wasiyat* (وقف بالوصيت), that is a *waqf* suspended or contingent upon the death of the *waqf*, which being a future event would render the *waqf* void under the *Shia* law.

The manner in which the question of preference between these two alternative interpretations is discussed by the *Shia* authorities is well illustrated by a text of the *Jami-ul-Maqasid* upon which both the parties have relied. The text in the original Arabic runs as follows:—*

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* ولو قال هو وقف بعد موتى احتمل البطلان لانه تعليق والحكم بصرفه
الى الوصية بالوقف لاريب انه لايراد بهذا الصيغة الخبر قطعاً فبقى ان يراد بها
الانشاء وهي بنفسها انما يدل مطابقة على انشاء الوقف بعد الموت بهذه الصيغة الماتى
بها الان و ذلك يقتضى البطلان لا خلاله يكون الصيغة سبباً تاماً فى حصول الوقف
بل يكون لحصول الموت دخل فى ذلك و ذلك معنى التعليق فيكون
باطلاً لان العقود انما يصح اذا كانت سبباً تاما فى انشاء مايطلب بها والا لم
يترتب عليها اثرها و ذلك هو معنى البطلان ولا دلالة لها على الوصية الا بتكلف

[474] The parties have put in their translations of this text, but they are not agreed as to the interpretation and import of some words and phrases, and I have therefore compared the two translations and the original and am responsible for the accuracy of the following translation:— 1892 MAY 9. — FULL BENCH. — 14 A. 429 = (F.B.) = 12 A.W.N. (1892) 187.

"And if he said:—'it is *waqf* after my death' this is susceptible both of being void, as it is suspention of the *waqf*, and of being predicated as convertible into a *wasiyat-bil-waqf*. There can certainly be no doubt that by such a declaration (صيغه) predication is not intended. It then remains that by the declaration making an offer was intended; and this in itself indeed indicates nothing other than conformity with offer for a *waqf* after death by means of the declaration (صيغه) just mentioned above and this matter requires nullity by reason of its disturbing the rule relating to the declaration (صيغة) being a complete cause for the constitution of (حصول) *waqf*. But the occurrence of death enters into the matter as one of its constituent elements. This is exactly what is meant by *ta'lalik*, تعليق (suspension). Therefore it is void because contractual words are not regarded as correct unless they themselves be the perfect cause of the creation of what is intended by them; otherwise the desired effect will not follow and this is what is meant by nullity. There is no indication in it (the declaration, صيغه used) of a *wasiyat* except by putting an affected construction which the words do not warrant or indicate, and there is no authority for constraining it to mean:—'I intend it to be made *waqf* after my death'; to put such a construction is a pure deviation from the right path (تعسف محض); and to pass legal orders upon words of this kind which do not [475] indicate the intention (of the speaker) is a matter extremely farfetched (مستبعد).

"It has already been stated that if one says to another:—'Take possession of the debt due to me by such a one for yourself', is is not

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تدبير لا يدل عليه الصيغة ولا يدل عليه دليل بان ينزل على ان المراد ازيد جعله
وقفا بعد الموت و ارتكاب مثل ذلك تعسف محض و اجراء الاحكام الشرعية
على امثال هذه الالفاظ التي لا دلالة لها على المراد من الامور المستبعدة جدا فقد
سبق انه لو قال قائل الاخر اقبض ديني الذي على فلان لك لم يصح و
ان كان المامور دائنا للآمر و قد سبق في الوكالة انه لو قال اشتر لي بمالي
كذا لم يصح مع ان المراد معلوم والتقدير ممكن والاحتجاج بان ذلك
مستعمل في الوصية كثيرا و بان الاصل الصحة ولا يتحقق الا بالحمل ضعيف
لمنع الاستعمال المدعى والتزام عدم تاثيره ما لم يصر معنى اللفظ حقيقة او مجازا
واصالة الصحة في الصيغة المذكورة لا يقتضي جعلها وصية ما لم ينضم اليها ما يدل
على ذلك و في حواشي شيخنا الشهيد ان هذا اذا لم يعلم القصد فان علم فلا
بحث و فيه نظر لان مجرد القصد لا تاثير له ما لم يوجد اللفظ الدال عليه حقيقة
او مجازا والذي يقتضيه النظر و سبق الحكم في نظائره البطلان نعم لو شاع
استعمال ذلك في الوصية واشتهر لم يبعد القول بصحة الوصية — (جامع المقاصد
باب الوقف صفحه ٥١٦ و ٥١٧) *

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valid, although the person ordered has a debt due to him by the person who orders; and it has been stated on agency that if he says:—'Purchase such a thing for me by thy own goods,' it is not valid, notwithstanding that the intention is known, and to put such a construction is possible.

"The contention that such words are frequently used in wills and that validity is the legal presumption and that it cannot be realized without transferred meaning is futile (doctrine), because of the prohibition of the use so claimed and the necessity of its being ineffective until justified by the real or conventional meaning of the words employed. The presumption (اصالت) of validity of the above-mentioned *sigha* (صيغه) formula, does not require that it should be rendered as *washiya* unless something is added thereto indicating the same.

"It is stated in the *Hamashi* of our *Sheikh* the *Shahid* that this is the case when the intention is not known, and if known then there is no controversy. This requires cogitation, because mere *intention* has no *effect* unless the words indicating it really or conventionally are found: and that is required by cogitation and by what was stated in similar cases points to *nullity* (of the transaction). Of course, if the use of the phrase in the sense of *wasiyat* would have been common and well known it would not have been out of place to regard it as a valid *wasiyat*." (*Jami-ul-Maqasid*, pp. 516 and 517.)

Understanding this text as I do, I have no doubt that, whilst dealing with questions of legal interpretation, it lays down the rule that under the *Shia* law no *waqf* can be created if its operation is rendered contingent upon any future event such as the death of the donor. In other words, the text shows that a man cannot say:—"I created a *waqf* now, but it will take effect upon my [476] death." Such phrases are dealt with by the *Shia* law as mere phrases expressive of intention, but not constituting a *waqf*, and in the absence of offer, acceptance and actual delivery of possession, the contract of *waqf* is not constituted, and therefore what is known to jurisprudence as the transvestitive fact does not occur till actual delivery to possession of the *maukuf-alaih* (موقوف عليه), that is the person in whose favour the *waqf* is made, except, of course, in cases where by the very nature of the *waqf*, such as in the cases of a mosque and public medicants, the acceptance of such possession is impossible.

I have already said enough to show what the effect of death of the *waqif* (واقف) before delivery of possession is upon the validity of the *waqf*, namely, that the *waqf* becomes void and the property is dealt with as the estate of the deceased, subject to the laws of inheritance and administration of his estate. This view is by analogy in full keeping with the principle of another class of dispositions of property requiring actual delivery of possession as the condition precedent to the validity of the transaction; I mean *hiba* or gift, which again is regarded by the *Shia* law as a contract subject to the doctrine of *tanjiz*, already explained. There the rule in connection with that and common to *waqf* is laid down in the *Sharayi-ul-Islam* to be that:—

"If the donor should die after the contract and before possession has been taken of the gift it falls back into his in heritance. Permission of the donor is a condition of valid seisin, and if the thing given be taken

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possession of without his permission it is not transferred to the donee." (Baillie's Imameea Law, page 204).*

The stringency with which the *Shia* law regards as void *waqfs* which are not unconditional and absolute and in pursuance of which actual delivery of possession has not taken place is well illustrated in the *Jami-ul-Shattat* in the form of question and [477] answer. I will quote the original text, as also the translation, for which I am responsible, as it was not cited by either of the parties, though it comes nearest to the facts of the case, out of which this reference has arisen. The original text is as follows (p. 349, Tehran edition) :—*

The authoritativeness of the work from which this text is taken is undoubted, for both parties have relied upon the book in the course of their arguments. The following is my translation of the original text :—

"*Question.*—Whether when a person makes a *waqf* and provides that the *mutawalli* shall after the death of the *waqif* employ the profits of the property for holding prayers and fasting—is such a *waqf* to be regarded as a *waqf* for himself (وقف بر نفس) for the taking out of the *waqif* (from the proprietorship of the property)? Are entire profits to be regarded of this kind, or there is any distinction between what applies to the whole and a portion thereof?

"*Answer.*—The accepted opinion (ظاهر) is that such a *waqf* is a *waqf* on one's self (وقف بر نفس) or a condition reserving profits for himself from the *waqf*; and since it thus becomes dependent it also has another defect, namely, that destructive of the original transaction itself, because so long as the *waqif* lives there is no beneficiary of the trust. The accepted opinion is that no difference exists (as to the applicability of the rule) between the whole or a part."

The general effect of the text may be stated to be that such a *waqf* when rendered contingent for its operation on the death [478] of the *waqif* is invalid, as, during the continuance of the *waqif's* life, he would continue to enjoy profits and therefore it could not be regarded as "entirely taken out of the *waqif*, or appropriator, himself" in the sense of the *Shia* law. (*Vide* Baillie's Imameea Law, p. 218)

On behalf of the plaintiff Pandit *Sundar Lal* has quoted numerous texts, of which he has also filed translations. It would be unduly lengthen-

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* ولو مات الواهب بعد العقد و قبل القبض كانت ميراثا ويشترط في صحة القبض اذن الواهب فلو قبض الموهوب من غير اذنه لم ينتقل الى الموهوب له. (شرائع الاسلام مطبوعة كلكته صفحه ۲۳۶) *

* سوال — آيا شخصى ملكى وقف نمايد و از منافع آن قرار داد نموده كه متولى بعد از وفات واقف بجهت او استيجار صوم و صلوة نمايد هم چه وقفى وقف بر نفس است يا اخراج نفس درين صورت صادق مى آيد يا مجموع منافع از اين قبيل باشد يا بعض آن تفاوت دارد — جواب ظاهر اين است كه داخل وقف بر نفس است يا شرط انتفاع خود از آن و هرگاه منحصر باشد بر اين عيبى ديگر هم دارد كه منقطع الاول است چون مادام الحيوة موقوف عليه ندارد و اظهر اين است كه كل و بعض فرقى ندارد — جامع الشتات مطبوعه طهران صفحه ۳۴۹ *

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ing this judgment if I were to deal with every one of them separately, and it will be enough if I refer only to the more important and relevant ones. The texts have been cited to sustain the following propositions:—

(1) That a *waqif* can appoint himself *mutawalli* of the *waqf* property and therefore delivery of possession is not necessary.

(2) That even when the *waqif* appoints another person as *mutawalli* of the *waqf*, neither delivery of possession to such *mutawalli* nor acceptance by him of the *waqf* is necessary.

(3) That when the *waqif* dies before delivery of possession of the *waqf* property, the *waqf* is to be dealt with as a bequest and should be enforced to the extent of one-third of the estate of the deceased.

(4) That a *waqf* or appropriation *in præsenti* may be created and its operation may be lawfully suspended till the death of the *waqif*.

(5) That a *waqf* otherwise void becomes validated if the heirs of the deceased *waqif* consent to its conditions.

Upon the first of these points the following texts have been relied upon:—

"There is no difference of opinion as to the lawfulness of the *waqif* (author of trust) reserving for himself the *taulit* (control) of the business of the subject-matter of *waqf* and the supervision thereof; for he has the best right to attend to that and to use it for the beneficiaries. Similarly there is no difference of opinion as to the lawfulness of appointing, for the control of the subject-matter of *waqf*, another or another and himself together [479] or a person not in existence in succession to one in existence, such as by appointing Z who is in existence and his descendant who may be born next after the *waqf*. Verily Fatima (the blessings of God may be with her) entrusted the business of her seven gardens, of which she had made a *waqf*, to the Commander of the Faithful (Ali), after him to Hasan, after him to Husain, (peace be with both of them!) and after him to the eldest of her descendants; so has Abu Basir reported from Ali Jafar." (*Sharah-i-Mafatih* by Mulla Hadi, p. 491, lines 1, 2 and 3.)*

The rules of law which this text expounds are really not matters of controversy in this case, because it is not denied that an appropriator can appoint himself as the *mutawalli* of a *waqf*, and that in such a case change in the character of possession amounts to transfer of possession which would be required when the *mutawalli* appointed for the *waqf* is a person other than the *waqif* himself. There is nothing in the text to show that delivery of possession as a condition precedent to the validity of a *waqf* is dispensed with in cases such as the present, where the *waqif* did not appoint himself as *mutawalli*, but, on the contrary, specifically named and appointed Muhammad Taqi to be the *mutawalli*.

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* لا خلاف في جواز ان يجعل الواقف تولية امر العين الموقوفة والنظر اليها لنفسه لانه احق بان يقوم بذالك و يصرفه في اهله كما لا خلاف في جواز ان يجعل توليتها لغيره اوله و لنفسه معاً اولمعدوم تبعاً لموجود بان يجعل لزيد الموجود و لمن سيولد من اولاده و لقد فوضت فاطمة صلواة الله عليها امر حوايطها السبعة التي وقفتها الى اميرالمومنين ثم الى الحسن ثم الى الحسين عليهم السلام ثم الى الاكبر من ولدها كما رواه ابي بصير عن ابي جعفر — (شرح مفاتيح ملا هادي صفحه ۴۹۳ سطر ۱ و ۲ و ۳)

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Similar remarks apply to the next text relied upon, which runs as follows :—

" And it is in the *Hadees* that Amir-ul-Mominin endowed his property for obedience and love of God and sympathy to his relatives and after it made Imam Hasan the trustee of the *waqf*, and after him Imam Husain, and after him the person whom Imam Husain might appoint, as the case may be, and that the latter (Imam [480] Husain) should require the person so appointed trustee to keep the property (*corpus*) untouched, and to divide the usufruct in such manner as Imam Husain directs for God's sake or for sympathy to the relatives (*i.e.*, children of Hashim and children of Mutallib) whether near or remote, and that no portion of the *corpus* be sold or gifted or transferred by inheritance to any other. So far is the *Hadees*.

"You must have observed that this *Hadees* does not show anything but that after *waqf* it is essential that the *corpus* be untouched and not to change its features and that there should be no interference therein such as those mentioned above or the like and that the usufruct be spent in the manner enjoined by the donor ; and this *Hadees* does in no way show that the property endowed can be transferred to any person. This *Hadees* sets aside the general saying that the endowed property is tranferred in such cases to the donee, and although this *Hadees* is long enough, there is nothing in it to show that Amir-ul-Mominin gave possession of the property endowed to any person ; on the contrary, it shows that he remained in possession of the endowed property during his life-time and used to spend the usufruct thereof in the above-mentioned expenses, that after his death the trusteeship was with Imam Hasan, and after him it was with Imam Husain, and after him with the person alluded to in the *Hadees*. Therefore had possession been a condition to the validity of the endowment there should have been some hint thereof in the *Hadees*. And to suppose that he held possession as ruler is possible, but it is very remote, inasmuch as no authority exists for that (that possession is essential) and the like ; whereas you have been informed above that there is no authority that possession is essential in such cases." (*Hadaiq* of Sheikh Yusuf Bahraini, pp. 515 and 516.)*

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* و في حديث وقف امير المومنين امواله على جهة الطاعات و القربات
و صلة الرحم بعد ان ذكر الولي القيم بذلك الحسن ثم الحسين ثم ما يختاره
الحسين ما هو صورته و ان اشترط على الذي يجعله اليه ان يجعل المال على
اصوله و ينفق الثمرة حيث يامره به من سبيل الله و ذو الرحم من بني هاشم و
بني المطلب القريب والبعيد و لا يباع منه شيء و لا يوهب ولا يورث الى غير
ذلك الحديث و ليس فيه كما ترى ازيد من انه بعد الوقف يجب ابقاء اصوله
على ما هي عليه ولا يتصرف فيها بشيء من هذه التصرفات و نحوها و
يصرف الحاصل في الوجه الذي عينه ولا دلالة فيه على الانتقال لاحد و هو ظاهر
في الرد على القول المشهور من انه ينتقل في هذه الصورة الى الموقوف عليه و
ليس في الخبر ايضاً على طوله ما يشعر بانه اقبضه احد — بل ظاهره انه مدة
حيوته كان في يده يصرفه في الوجه المذكور و بعد موته فوض الامر فيه الى الحسن
ثم الحسين ثم من ذكره في الخبر ولو كان القبض في هذه الصورة شرطا في
صحة الوقف لوقع — الاشارة اليه في الخبر و احتمال انه قبضه بالولاية العامة

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[481] It will at once be observed that the case mentioned in the text is one in which the *waqif*, Ali had appointed *himself* as *mutawalli* of the *waqf* and administered it as such, thus fulfilling the requisite change in the character of possession which takes the place of actual transfer of possession when the *waqif* appoints another person as *mutawalli*. Neither of these texts therefore goes the length of the learned Pandit's contention. Nor is he supported by the text (No. 7) which he has cited from the *Tazkirat-ul-Fukha* by Allama Hilli (p. 433), which need not be quoted as it relates to a *will* made by Fatima, the daughter of the Prophet and lays down nothing as to *waqf* or delivery of possession to the *mutawalli*.

Upon the second point of Pandit *Sundar Lal's* argument, namely, that even where the *waqif* has appointed a *mutawalli*, delivery of possession is not necessary, he has relied *inter alia* upon the following text:—

"I say, let it not be concealed to the person who resorts to *Hadees* overlooking what lawyers have said. The *Hadeeses* [482] certainly show that when the donee (*maukuf-alaih*) is existing the ownership is transferred to him, and consequently the *Hadeeses* contemplate the *condition* of possession on the part of the donee or of the guardian of the donee, so that the ownership of the donee, may be completed by possession and so that the donor (*waqif*) may become unable to retract from that act as said in the *Hadeeses* above-mentioned. And when the donee be a class, such as beggars, or when the donation be merely charitable, such as mosques, in such cases whatever is the rule which is established by these *Hadeeses* is that the property is excluded from the ownership of the donor; but the *Hadeeses* do not prove whether the property thus given becomes the property of God or of any one else. These *Hadeeses* come to the conclusion that the property after being endowed and after being excluded from the ownership of the donor it is necessary that the subject of endowment should be kept up, and it is not proper and valid to appropriate it by means of sale, gift, inheritance and the like, which deprive it from its character of charity for which it was transferred. Of course, possession has been made a condition to it, as is generally known that possession is conditional to the validity of endowment. In such a case possession will be taken by the trustee appointed by the donor or by the ruler of the faith (lawyer or lawgiver), "*Hakim Sharah*," or by some other person for which there is no provision in the *Hadeeses*. The place wherein these *Hadeeses* require possession to be essential, of course, is a place where the donee is existing, and appointed and specified. (*Hadaiq* of Sheikh Yusuf Bahraini, page 516, lines 8-18.)*

و ان امکن الا ان الظاهر بعده انه هو فرع وجود الدلیل علی اشتراط القبض فی هذه الصورة و نحوها وقد عرفت انه لا دلیل علی ذلک فی ما مضی فی الصورة المتقدمة — (عبارت کتاب حدائق - صفحه ۵۱۵ سطر ۲۰ لغایت ۲۲ و صفحه ۵۱۶ سطر ۱ لغایت ۷) *

" اقول لایخفی علی من راجع الاخبار و قطع النظر عن کلامهم فان المستفاد منها انه متی کان الموقوف علیه موجوداً منحصراً فانه ینتقل الملک الیه و لهذا دلت علی اشتراط قبضه او قبض ولیه لیتم بذلک الملک و یمتنع الرجوع فیه کما تقدمت الاخبار به و متی کان الموقوف علیه جهة عامة کالفقراء او مصلحة کالمساجد فان غایة مایفهم منها هو انه بالوقف یخرج عن ملک الواقف و اما انه یصیر الی الله سبحانه او غیره فلا دلالة فی شیئی منه الاخبار علیه و انما تدل علی انه بعد الوقف و خروجه عن ملک الواقف

[483] Now, as I understand this text, far from supporting the argument of the learned Pandit, it has a contrary effect, because it clearly lays down the necessity of delivery of possession as a condition for the validity of *waqf*. The same cannot be said of another text which he has cited, but of which the translation furnished by him is erroneous. The text runs as follows with my translation of it:—

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"It appears that seisin is a condition for obligation and not for validity, as is the case with a sale during the period of option; so that by a mere contract a complete transfer is constituted, but the *waqif* can revoke it before the delivery of possession. The accession made between the time of contract and seisin will be for the *maukuf-alaih*, and the death of the *maukuf-alaih* (beneficiary of the *waqf*) in the interval will not vitiate the contract." (*Sharah Mafatih* by Mulla Hadi, p. 485.)*

This text no doubt partly supports the Pandit's arguments, but it is opposed to far more authoritative works such as the *Sharayi-ul-Islam* and the *Masalik-ul-Afham* and other text-books which I have already quoted, showing that delivery of possession is not merely a matter of form but an essential element in its constitution, as in the case of *hiba* or gift. The *Shara Mafatih* by Mulla Hadi is a work of comparatively modern date and is [484] not to be compared in point of authoritativeness with the *Sharayi-ul-Islam* or the *Masalik-ul-Afham* (*vide* account of these works at pp. 171-173, Tagore Law Lecture for 1874 by Shama Charan Sircar). I therefore reject the authority of the text and prefer that of the *Sharayi-ul-Islam* and other works from which I have quoted.

Upon the question of acceptance by the *mutawalli* or beneficiary of the *waqf* the pandit has cited two texts. One of them is the following:—

"A person in whose favour supervision has been stipulated is not bound to accept. If he accepts he will not be bound to supervise for ever, because it is similar to *taukil* (the appointing of an agent) in its significance. Where supervision becomes void it will be deemed as if supervision was not stipulated." (*Sharah Lamah* by *Shahid* II, p. 105, line 28.)*

يجب ابقاء العين ولا يجوز التصرف فيها ببيع ولا هبة ولا ميراث ولا نحو ذلك من الامور الموجبة لاخراجها عما صارت اليه وصرف حاصلها فى تلك الجهة او المصلحة المعينة و انما اذا يشترط القبض فيها كما هو المشهور من ان القبض شرط فى صحة الوقف مط فيجب القبض هذا من القيم الذي ينصبه الواقف او الحاكم الشرعي او غير ذلك فلا دليل عليه فى الاخبار و مورد النص فيها انما هو فيما اذا كان الموقوف عليه موجود معينا محصورا — (عبارت كتاب حدائق صفحه ٥١٥ سطر ٨ لغايت ١٨) *

* و مستلفو و من ظاهرها ان القبض شرط للزومه لا لصحته كالمبيع فى زمن الخيار فبالعقد تحقق النقل التام الا انه له الخيار فى فسخه مالم يقبضه فالنماء المتخلل بين العقد والقبض يكون للموقوف عليه ولا يبطل بموته بينهما — (شرح مفاتيح جناب ملا هادي صاحب صفحه ٤٨٥ سطر ٣١) *

* ولا يجب على المشروط له القبول ; لو قبل لم يجب عليه الاستمرار لانه فى معنى التوكيل وحيث يبطل النظر يصير كما لو لم يشترط — (كتاب شرح لمعه شهيد ثاني صفحه ١٠٥ سطر ٢٨) *

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Similar is the effect of the other text (No. 14) from the *Masalik-ul-Afham* by Shahid II (p. 344), which, however, I need not quote because their simple effect is that the person appointed to supervise a *waqf* is under no legal obligation necessarily to accept the trust unless he wishes it, and also that after having once accepted it he is at liberty to resign. The texts cannot be understood to mean that delivery of possession and acceptance are not conditions precedent to the validity of a *waqf*.

I now pass on to the third point of the Pandit's argument, namely, that the death of the *waqif* before delivery of possession converts the *waqf* into a bequest which is to be enforced to the extent of one-third of the estate of the deceased. For this contention he relies upon the following text:—

"It is reported from Kafi by Abassalah that if a person make a charitable donation (*sadaqah*) for any of the said purposes and make witnesses upon himself in that respect, and die before delivery, [485] then if the *sadaqah* is for a mosque or good purpose, it is enforcible. If it is in favour of a person, possession by whom or whose guardian is valid, then it is a bequest, and the provisions of bequest shall be applied to it. In *Al Morasim* Sallar has not at all mentioned possession amongst the conditions. All that will show the reasons for what is said in *Masalik, Riaz* and other books as to possession being unnecessary in *waqf*. So much so that the unanimity of opinion is reported from *Tankih*." (*Jawahir-ul-Kalam* by Shaikh Muhammad Hasan Najfi, p. 488, lines 28-30.)*

The text plainly read relates to *sadaqah* (صدقه , or alms; but the Pandit has argued that it relates to *waqf* also, though the word does not occur in the text, and in support of this contention he has cited the following two texts:—

"In many traditions the word *sadaqah* has been used for *waqf*; nay, no word other then *sadaqah* has been reported in respect of the *waqfs* made by the Imams, peace be with them." (*Jawahir-ul-Kalam* by Shaikh Muhammad Hasan Najfi, p. 487, line 45).†

"It is one of the *sadaqahs*. Similarly it is said in *Nihayat* and *Morasim* that a *waqf* and a *sadaqah* are one and the same. Perhaps this is the reason why the author of *Durus* has defined it as a 'perpetual *sadaqah*;'

وعن كافي بني الصلاح اذا تصدق على احد الوجوه المذكورة و اشهد على نفسه بذلک ومات قبل التسليم فانكانت الصدقة على مسجد او مصلحة فهي ماضية و انكانت على من يصح قبضه او وليه فهي وصية يحكم فيها باحكام الوصايا وعن سلار في المراسم عدم ذكره من الشروط اصلا و بذلک كله يظهر لک ما في مسالک والرياض وغيرها من المفروغية عن اشتراطه فيها حتى فيها حكي عن التنقيح من الاجماع على ذلک — (كتاب جواهر الكلام جناب شيخ محمد حسن صاحب نجفي صفحه ۴۸۸ سطر ۲۸ لغايت ۳۰) *

† و اطلاق الصدقة عليه في كثير من النصوص بل لم يذكر فيها و رد مما اوقفوه عليهم السلام الا بلفظ الصدقة — (كتاب جواهر الكلام جناب شيخ محمد حسن صاحب نجفي صفحه ۴۸۷ سطر ۴۵ يعني آخر سطر) *

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nay, even in *Masalik*, *Taskira*, *Mohazzab*-[486]*ul-barey* and *Tankih* the learned have said that it means *sadaqah*." (*Jawahir-ul-Kalam*, p. 486, last line, and p. 487, first line.)*

Now in regard to these texts, whilst it may be conceded that the word *sadaqah* (صدقة) and its derivatives may be used under circumstances and conditions which would amount to a *waqf*, yet where such circumstances and conditions do not exist, its use will not constitute a *waqf*. This is clear from the text of the *Sharayi-ul-Islam*, which I have already quoted, giving the definition and constitution of *waqf* (*vide* Baillie's Imameea Law, p. 211). Comparing that definition with the incidents of *sadaqah* (صدقة) or alms described in the *Sharayi-ul-Islam* (*vide* Baillie's Imameea Law, p. 256) it seems clear that, among other distinctions, *waqf* has the effect of tying up the *corpus* or substance of a thing and leaving its usufruct free for being employed for the purposes of the *waqf* in perpetuity and subject to other conditions (*vide* Baillie's Imameea Law, p. 218) which are not applicable to *sadaqah* (صدقة) or alms. Indeed in *sadaqah* (صدقة) the *corpus* of the property itself is bestowed and perpetuity is not one of its conditions. I do not consider it necessary to dwell upon this subject beyond saying that *waqf* and *sadaqah* (صدقة) are separately treated in the authoritative law works, and that the nature of the two transactions being distinguishable in many incidents it would be erroneous to confound the rules relating to the one with the rules relating to the other. I will go further and say that, even if I could have accepted the interpretation with Pandit *Sundar Lal* has placed upon what is said in the text of the *Jawahir-ul-Kalam* as to the *sadaqah* (صيغه) being applicable to *waqf* also, I would not have adopted it, as upon such interpretation the text will be opposed to the far higher authority of the *Sharayi-ul-Islam*, the *Masalik-ul-Afham* and other works from which I have quoted in the early part of this judgment.

[487] The next class of texts which the learned Pandit has cited relates to gifts and *waqfs*, or charitable donations made in death-illness (مرض الموت) : as an illustration of these texts the following may be quoted:

"If a person made a gift or *waqf* or charitable donation in his death-sickness, it is to be satisfied out of one-third, according to the better of the two opinions, excepting in the case of the heirs giving sanction. The same rule applies if he did so in good health and delayed possession till sickness." (*Sharah Lamah* by Shahid II, p. 108, lines 10 and 11.)*

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* وانه من الصدقات كما في النهاية محكي المراسم ان الوقف والصدقة شيئي و احد و لعله لذا عرفه في س بانه الصدقة الجارية بل في المسالك و محكي التذكرة والمهذب البارع والتنقيح قال العاماء المراد به الصدقة — (عبارت كتاب جواهر الكلام شيخ محمدحسن صاحب صفحه ۴۸۶ سطر اخير و سطر اول صفحه ۴۸۷) *

* ولو وهب او وقف او تصدق فی مرض موته فهي من الثلث على اجود القولين الا ان تجيز الوارث و مثله مالو فعل ذلك في حالة الصحة و تاخر القبض الى المرض — (كتاب شرح لمعه شهيد ثاني صفحه ۱۰۸ سطر ۱۰ و ۱۱) *

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This text is authoritative and shows that gifts or *waqfs* made during death-illness (*marz-ul-maut*) (مرض الموت), which is a technical phrase of the Muhammadan law, are to be held valid to the extent of one-third, as described. But there is nothing in the text to justify the contention that a gift or *waqf* made during death-illness becomes valid without all the incidents constituting it, such as delivery of possession. The text in using the words gift and *waqf* means valid gifts and valid *waqfs*, both of which require delivery of possession to render them valid. The rule as to the *marz-ul-maut* (مرض الموت) affecting transfers relates not to transfers which are *ab initio* void, but to transactions which, being valid, are affected by the rule. In this very text which I am now considering the last part shows that the same rules apply to a gift or *waqf* made in good health, but in which possession was not delivered till the transferor fell ill. The phrase *takhir-ul-qabz* (تاخیر القبض) which has been rendered in the learned Pandit's translation by the words—"delayed possession till sickness," might have been more clearly rendered by the words:—"the delivery of possession having been delayed till sickness." What I mean to explain is that the text *implies* that both in the case of gift or *waqf* delivery of [488] possession *has taken place during death-illness*, and that it cannot be understood to mean that delivery of possession may be dispensed with altogether when such transfers are made during death-illness. Upon this point I may in passing refer by analogy to the ruling of this Court in *Musammat Labbi Beebee* v. *Musammat Bibbun Beebee* (1) which in dealing with the effect of *marz-ul-maut* (مرض الموت) or death-illness, upon gifts made, makes it clear that the will would have been void if no possession had been given at all during the illness of the donor. I may also perhaps refer to the case of *Yusuf Ali* v. *The Collector of Tippera* (2) where it was laid down that under the Muhammadan law a gift of property *in futuro*, that is, a gift made to take effect at any future definite period is not valid unless possession has been delivered. These are cases governed by the *Sunni* law, but upon this point as to the necessity of delivery of possession in gifts the *Sunni* law is in accord with the *Shia* law, as appears from the quotation which I have already made from the *Sharayi-ul-Islam*, namely, the text which lays down that "if the donor should die after the contract and before possession has been taken of the gift it falls back into his inheritance." (*Vide* Baillie's Imameea Law, p. 204, also p. 203 as to definition and constitution of gift.)

For similar reasons the other texts which the Pandit has cited as to *waqfs* or gifts made in *marz-ul-maut* (مرض الموت), or death-illness does not go the length of supporting the learned Pandit's contention that such *waqfs* and gifts are independent of delivery of possession as essential to their validity. I will quote the text and it runs as follows:—

"Where a person made a *waqf* in his dangerous illness, and similarly where he made a *Sadqat-ul-tamlik* (assignment of ownership by way of charity) a gift or a bequest, our masters have two reports in respect thereof. One of the two is that it is to be satisfied out of one-third, and this is the doctrine of the opposite sect (*Sunnis*). The other is that it takes

(1) N.W.P.H.C.R. 1874, p. 159. (2) 9 C. 138.

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effect immediately. Now if the first report be established, then if the beneficiary be an [489] heir, the *waqf* shall at all events be binding as regards one-third (of the estate) among us, while among the opposite sect (*Sunnis*) nothing is binding until the rest of the heirs give sanction, because they say,—'verily there can be no bequest in favour of an heir.' If the *waqf* be made in favour of a stranger, and it can be satisfied out of one-third the *waqf* is binding; but if it cannot be satisfied out of one-third, and the heirs sanction the excess, it shall be binding as regards the whole, and if they do not sanction that, it shall be binding to the extent of one-third, and 'shall be void in respect of the excess.'" (*Mabsut* by *Sheikh Abu Jafar*, p. 273, lines 17-20.)*

Now this text, whilst describing minor differences between the *Sunni* and the *Shia* law, contains nothing as to the dispensibility of delivery of possession in the case of *waqfs* made during death-illness. The text, like the preceding one, in referring to *waqf*, gift or other transactions mentioned therein, implies that each one of those transactions has been completed according to the exigencies of the rule governing each. To put the matter shortly, neither of these texts can be understood to refer to invalid and incomplete transactions such as a *waqf* or gift would be under the *Shia* law without possession.

In support of the fourth part of his argument, namely, that a *waqf* or appropriation *in præsenti* may be created and its operation may be lawfully suspended till the death of the *waqif*, the learned Pandit has relied upon the following two texts :—

[490] "*Proposition.*—The necessary incident of a *waqf* in the opinion of all our doctors is immediate perpetuity, whether he did or did not postpone it after his death, and whether a Judge did or did not pass a decree therefore." (*Tazkirat-ul-Fukha*, by Allama Hilli, p. 439, lines 39 and 40.)*

"There is no difference between his fixing the time (of *tauliat*) in the life-time, and his making a will (therefor) in the matter of the stipulation and specification made by him becoming obligatory. If a person make no restriction in his making a *waqf* and do not make a provision for *tauliat*

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* اذا وقف في مرضه المخوف وكذلك صدقة التمليك والهبة والوصية لاصحابنا فيه روايتان احديهما ان ذلک من الثلث وهو مذهب المخالفين والاخرى ان ذلک منجز فى الحال فاذا ثبت الاول فان كان الموقوف عليه وارثا عندنا لزم من الثلث على كل حال و عند المخالف لايلزم شيئي حتى يجيزوا باقى الورثه لقولهم انه لا وصية لوارث فانكان على اجنبي و خرج من الثلث لزم الوقف و انكان لايخرج من ثلثه فان اجاز الورثة مازاد على الثلث لزم فى الجميع و ان لم يجز ذلک لزم فى قدر الثلث و بطل فيما زاد عليه — (كتاب مبسوط شيخ ابو جعفر صفحة ٢٧٣) *

* مسئله مقتضى الوقف الدوامة فى الحال سواء اضافه الى مابعد الموت اولم يضفه وسواء قضى به قاض اولم يقض عند علمائنا اجمع — (كتاب تذكرة الفقهاء علامه حلى صفحه ٤٣٩ سطر ٣٩ و ٤٠) *

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(governance of the trust) in favour of any one, it shall be deemed that the *waqif*, author of trust, is to supervise, because supervision and appropriation primarily rest with him, and since he did not withdraw them from himself, they remained where they were." (*Tazkirat-ul-Fukha*, page 441, lines 27 and 28.)*

These two texts come from one and the same work, which is of lower dignity in point of authority than the *Sharayi-ul-Islam* or the *Masalik-ul Afham* and the other words which I have already cited. Those works require *tanjiz* as explained by me and also delivery of possession as conditions precedent to the validity of a *waqf*, and I prefer their authority to the authority of these texts; and I may add that the texts understood even in the sense in which Pandit *Sundar Lal* interprets them fall short of showing that delivery of possession is not a necessary condition for the validity of a *waqf* under the *Shia law.*

Among the other texts which he had cited two relate to the question how far the admission of a *waqif* as to his having delivered [491] possession of the *waqf* property is binding upon him. These texts are the following:—

"*Proposition.*—If a person admit a gift and seisin together and say,—'I made a gift to him and delivered possession,' or,—'I made it over to him, or,—'he took it from me,' he will be bound by the admission and judgment shall be given in respect thereof according to the purport thereof. So if he retracts and denies seisin no attention shall be paid to his denial, because it involves the falsification of his own statement; although he may offer an explanation of his admission by saying,—'I made the admission because my agent had informed me of his having delivered possession to the donee, whereas he (the donee) had not got possession' or (by saying) 'I did not remember.'" (*Tazkirat-ul-Fukha* published at Tehran, p. 169, line 1).*

"*Question.*—A person wrote under is own hand that he made a valid and lawful *waqf* of his such-and-such house without mentioning the delivery of possession, which is a condition for the validity of the contract of *waqf*, and for its being obligatory, and he caused witnesses to testify to the correctness of what he wrote. Is or is not that sufficient for the establishment of the *waqf* and for its being obligatory?

"*Answer.*— What appears from the jurists on gift, &c., is that an admission as to a gift, a *waqf* and anything similar to them in which delivery of possession is necessary, does not amount to an admission as

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† ولافرق بين ان يفرض في الحيوة و بين ان يوصي في وجوب العمل بماشرط و عينه و لواطلق في وقفه ولم يشترط التولية لاحد احتمل ان يكون النظر للواقف لان النظر و التصرف كان اليه فاذا لم يصرفه عن نفسه بقي على ماكان عليه — (تذكرة الفقها علامه حلي صفحه ۴۴۱ سطر ۲۷ و ۲۸) *

† مسئله ولواقربا لهبة والقبض معا فقال وهبته واقبضته اوملكته منه اواخذه مني لزمه الاقرار و حكم عليه بمقتضاه فان عاد وانكرالقبض لم يلتفت الى نكاره لاشتماله على تكذيب نفسه سواء ذكر لاقراره تاويلا بان يقول كان و كيلي اخبرني بانه اقبضه فاقررت به ولم يكن قد قبض اولم يذكر — (تذكرة الفقهاء علامه حلي چهاپه طهران ۱۶۹ سطر اول) *

to delivery of possession; but what appears on making reference to the practice of the day, when attestation is probable, is that *admission as to a waqf means a valid admission containing all the elements and fulfilling all the conditions.* The same rule applies when the making of a gift, a *waqf* or the like [492] becomes obligatory by new promise and other thing creating an obligation. Notwithstanding all that, it is necessary in such questions to resort to the Judge of final jurisdiction, and to lay the case before him, and not to content oneself with the mere dictum. God knows well." (*Zakhirat-ul-Maad* by Sheikh Zain-ul-Abdin Hujjat-ul-Islam, p. 651, lines 11—21.)*

It is not necessary to discuss these texts minutely because whilst they distinctly affirm the principle as to the delivery of possession being necessary for validity of a *waqf*, they lay down no rule of the substantive law of *waqf*, but propound rules of adjective law or procedure relating to the effect of admissions, and when such admissions may be rebuttable, when irrebuttable, and when they may amount to an estoppel. These are matters which under the procedure of our Courts appertain to the province of the law of evidence which we have to administer according to the Indian Evidence Act (I of 1872). I go further and say that even if it were not so, there is nothing in these texts to warrant the contention that the mere fact of a person having written a deed such as Muhammad Ali's will of the 3rd of November, 1863 (which is in question in this case) would debar his heirs from proving that the recitals of the deed to the effect that actual delivery of possession had already taken place by the act of the *waqif* to the *mutawalli*, namely, Muhammad [493] Taqi, were not true, and that as a matter of fact no possession was ever delivered to the *mutawalli*. Indeed, in regard to this matter there is upon the record a judgment of Mr. Sapta, District Judge of Cawnpur, dated the 20th of January, 1866, which is mentioned in the referring order and which was the result of a litigation between the *mutawalli*, Muhammad Taqi, as plaintiff and Musammat Kanizak Fatima, daughter and sole heir of the deceased *waqif*, Muhammad Ali, as defendant,—the object of the suit being to recover possession of the *waqf* property, and the defence being that the *waqf* was invalid and no delivery of possession had taken place and the *mutawalli* had declined to accept the trust. The suit was dismissed upon acceptance of the pleas in defence in that case, and it will no doubt be for the Division Bench which has to deal with this case to consider whether the District Judge's

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* سوال – رجل کتب بخطه انه وقف داره الفلانية وقفا صحيحا شرعيا من دون تعرض الاقباض الذی هو شرط فی صحة عقد الوقف و لزومه و أشهد علی صحة ماکتبه فهل یکفی ذلک فی ثبوت الوقف و لزومه ام لا (ج) — الذی یظهر من الفقهاء فی بحث الهبة و غیرها ان الاقرار بالهبة والوقف و نحو هما مما یشترط فیه الاقباض لیس اقرار بالاقباض و لکن الذی یظهر من المراجعة الی عرفنا الیوم مضافاً الی قرینة الاشهاد ان الاقرار به منزل علی الصحیح المستجمع الاجزاء المقید لوجود الشرائط کما اذا لزم بالنذر والعهد او سایر الملزمات باصدار الهبة او الوقف و نحو هما و مع ذلک فاللازم فی امثال هذه المسایل الرجوع الی الحاکم الحاسم والمرافعة عنده ولا یقنع بمجرد الفتوی والله العالم — (عبارت ذخیرة المعاد جناب شیخ زین العابدین صاحب حجة الاسلام صفحه ۶۵۱ سطر ۱۱ لغایت ۲۱) *

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judgment of the 20th of January, 1866, in the former case does not operate as *res judicata* in this case, and if so, to what extent.

The remaining texts quoted by Pandit *Sundar Lal* have a bearing upon the third point referrred to the Full Bench, namely, whether the consent of the *waqif's* (appropriator's) heirs to a testamentary *waqf*, which was in itself invalid would validate such a *waqf*. In reference to this point many texts have been cited, but of these I need take only two as specimens and quote them. These are the following:—

"The heir's sanction after death has weight. As to whether it is valid if given before death there are two opinions. The more celebrated of the two is, that it is binding on the heirs. When the sanction takes place after death, it is one for the testator's act. It is not the commencement of a gift, and consequently the validity thereof does not depend upon seisin." (*Sharayi-ul-Islam*, p. 209, lines 18 and 19.)*

[494] "So if a person bequeath more than one-third and the heirs give sanction, the bequest is valid. If the heirs refuse to sanction it, it becomes void. If some of the heirs sanction it, the sanction will take effect to the extent of his share in the excess. If the heirs sanction a portion of the excess, the bequest will be valid in respect of that portion specifically. If a person make a will for the sale of his estate for the market value,* then there is doubt as to the sanction being necessary. Sanction is the enforcement of the testator's act and not the comencement of a grant. Therefore it does not require seisin, and the expressions,—'I sanctioned,' 'I enforced,' —and the like are sufficient. So if a person emancipate a slave, who is the only property he has, or makes a will for the slave's manumission, and then the heirs give sanction, the right of *wala* is entirely for his residuary and not for that of the heir. There is no distinction between the testator being sick or in good health. Sanction takes effect if it takes place after (the testator's death) according to all and as to its taking effect before death there are two opinions." (*Qawaid-ul-Ahkam* by Allama Hilli, p. 397, lines 5-11.)†

In regard to these texts it is enough to say that they do not deal with the point under consideration and are irrelevant. They relate to valid

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* و اجازة الوارث تعتبر بعد الوفاة و هل تصح قبل الوفاة فيه قولان
اشهر هما انها تلزم الوارث و اذا وقعت بعد الوفاة كان ذلک اجازة لفعل الموصى
و ليس ابتداء هبة فلا يفتقر صحتها الى قبض — (شرايع الاسلام صفحه ۲۰۹
سطر ۱۸ و ۱۹) *

* The original literally means ' value of the similar.'

† فلو اوصي بازيد من الثلث فاجاز الورثة صحت و ان امتنعوا – بطلت
ولو اجازه بعض الورثة نفذت الاجازة بقدر حصته من الزيادة ولو اجاز – وابعض
الزائد صح خاصة ولو اوصي ببيع تركته بثمن المثل ففي اشتراط الاجازة اشكال
والاجازة تنفيذ لفعل الموصي لاابتداء عطية فلا يفتقر الى قبض فيكفى اجزت
و نذرت و شبهه فلو اعتق عبدالامال له سواه او اوصي بعتقه فاجاز الورثة فالولاء
كله لعصبته دون عصبة الوارث ولا فرق بين ان يكون الموصي مريضا او صحيحاً
و ينفذ الاجازة ان وقعت بعدالموت اجماعا و في نفوذها قبله قولان —
(قواعدالاحكام علامه حلي صفحه ۳۹۱ سطر ۵ لغايت ۱۱) *

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bequests and how far such bequests are enforcible when they exceed the recognised one-third share of the estate of the deceased by reason of the consent of the heirs. There is nothing in these texts or in the others which have been cited to show that [495] *waqf*s which are void gifts, which have lapsed, and in which no possession was ever delivered by the deceased *waqif* or donor are to be dealt with under these rules. I am of opinion that neither these texts nor the others which have been cited by Pandit *Sundar Lal* upon the effect of the consent of heirs to the will of the deceased testator have any relevancy to the present inquiry where the question relates, not to valid bequest, but to a *waqf* which, as I have already shown, must be regarded as void under the *Shia* law, not only by reason of non-delivery of possession by the *waqif* to the *mutawalli*, but also by reason of the non-acceptance of the trust by the *mutawalli*.

It is not for the Full Bench to enter into the minute details of the will of Muhammad Ali of the 3rd of November, 1863, nor the effect of the District Judge's judgment, dated the 20th of January, 1866, beyond what has been stated in the referring order, and I therefore refrain from entering into that discussion here in the Full Bench.

My answer to the first question referred to the Full Bench is in the *negative*, and to the second question my answer is in the *affirmative*. To the third question my answer is in the *negative*, because it is a principle, not only of Muhammadan jurisprudence, but of all civilized systems of law, that a transaction which is void in itself cannot be validated by any subsequent act of the heirs of a deceased person. If they wish to give effect to an invalid transaction themselves they can of course do so by a valid transaction of their own; but no consent by them can validate a transaction of their predecessor-in-title which was void in law and never took effect.

With these answers to the three questions referred to the Full Bench I would return the case to the Division Bench for disposal upon the other points which arise in this case.

EDGE, C.J.—I have had an opportunity of reading and considering the judgment which my brother Mahmood has just delivered. I entirely agree with it and have nothing further to add.

KNOX, J.—I concur with my brother Mahmood in considering that the replies which should be returned to the questions referred [496] to us are:—(1) that a *waqf-bil-wasiyat* is not valid under the Muhammadan law of the *Shia* school in the absence of actual delivery by the *waqif* himself of possession of the appropriated property to the *mutawalli* or person appointed as superintendent thereof by the deed by which the *waqf* is created; (2) that the death of the *waqif* before actual delivery of possession by him to the *mutawalli* or beneficiaries of the trust does invalidate the *waqf* so as to render it null and void *ab initio* under the *Shia* law; and (3) that the consent of the appropriator's heirs to such testamentary *waqf* under the conditions just noticed cannot validate such a *waqf*.

The various texts which have been cited during the hearing of this reference have been so exhaustively treated by my brother Mahmood, that, although I had considered them carefully and satisfied myself as to the construction which should be placed upon the more important of them, I shall content myself with saying that the constructions which I was prepared to place on those texts coincide with those at which my brother Mahmood has independently arrived. I am fully satisfied that, whatever may be

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the *Sunni* doctrine as to the essence, nature and incidents of *waqf*; the *Shia* school regards the transaction as a contract and as subject to the incidents which that law imposes on a contract. The author of the *Jawahir-ul-kalam* in the passage beginning ,—" فلا يلزم عقد الوقف الا بالاقباض " brings this point out very clearly, and the learned Counsel who appeared for the appellant himself had no hesitation in admitting that this work was a work of undoubted authority. The passage cited from p. 332. Teheran edition, of the *Jami-ul-Shattat* also speaks with no uncertain voice so far as this question is concerned.

I was at first much pressed by a difficulty raised by the learned Pandit and based on the portion of this extract beginning, " اما اشتراط قبول " as showing that instances must occur, and occur frequently, in which there could be no acceptance by the beneficiaries of the *waqf*, and where either the doctrine that every *waqf* was of the nature of a contract, or else the *waqf* itself must fail; but, as my brother Mahmood has pointed out, the passage becomes quite clear and consistant when compared with what has been [497] written by the author of the *Durus* on the same point in the passage beginning —" ورابعها القبول المقارن الخ "

I will only now comment briefly on two other arguments addressed to us by Pandit *Sundar Lal* for which at first there seemed to be some foundation of authority, and which would, if correct, militate against the doctrine noticed above. The learned Pandit contended at the commencement of his argument that a legal *waqf* could be constituted under the *Shia* law and operation made to depend on the occurrence of an event in the future if that event were quite certain and positive. This view seems to have found favour with the learned author of the Tagore Law Lectures for 1884; but after careful research no sound authority for this view was adduced, at any rate from the *Sharayi-ul-Islam*, in fact all the texts of higher authority say that immediate operation must be given by the *waqif*, or appropriator of a *waqf*, to the *waqf*. The difficulty also which the same learned Counsel raised and founded upon the passage from the *Jawahir-ul-Kalam* beginning—" بان يقول هو وقف بعد وفاتي " has been well met by Mr. *Karamat Husain* in the distinction which he drew in his argument between a *wasiyat-bil-waqf* and a *waqf-bil-wasiyat*.

Once the doctrine that according to the *Shia* law *waqf* is a contract is accepted, and of this I have now no doubt left, the answers to the questions referred to us become clear, and can only in my opinion be the answers which at the commencement of this judgment I proposed to give. The reasoning for each step has been so clearly and exhaustively given by my learned brother that it is needless for me to say anything further.

The case was then remitted to the Division Bench for disposal.

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[498] APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Knox.

LAL BAHADUR SINGH (*Plaintiff*) v. SISPAL SINGH AND OTHERS (*Defendants*).* [2nd May, 1892.]

Joint Hindu family—Partition to detriment of minor—Suit by minor on attaining majority to recover his full share—Limitation—Act XV of 1877, *sch.* ii, *arts.* 95 *and* 96.

Certain members of a joint Hindu family partitioned the family property among them in such a way as to give one member of the family, who at the time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle, though the uncle was not the natural guardian of the minor, nor in any other way entitled to deal with the minor's property. The minor on attaining majority brought a suit for recovery of the full share to which he was entitled. *Held* that this was not a suit for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor. The suit was therefore not subject to the limitation of three years prescribed by arts. 95 and 96 of the second schedule of Act No. XV of 1877.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Spankie* and Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

TYRRELL and KNOX, JJ.—This was an action brought by a member of a Hindu family for a declaration of his title to one-quarter of the ancestral estate and to obtain possession of the same by partition. The defendants are the cousins of the plaintiff and his uncle, who during the plaintiff's minority divided the estate between them in the year 1877. The plaintiff and the seventh defendant are descendants of Saran Singh, who was entitled to one moiety of the whole estate; the defendants one to six being the sons of Saran Singh's brother, and, as such, entitled to the other moiety. But in the transaction of 1877 an arrangement was made between the plaintiff's uncle on the one hand, and the defendants one to six [499] on the other, under which such estate was divided between them, the former getting $\frac{2}{3}$, the latter $\frac{1}{3}$ only. It may be taken, though the evidence on the point is slender, that the plaintiff was 14 years old or thereabouts when his father, Gajadhar Singh, died in 1877. He was therefore *sui juris* in 1881 or 1882. In 1884 he brought a suit *in forma pauperis* to get the relief he now seeks. The suit was one which obviously must fail, and he withdrew it. He brought the present suit in May, 1887, being then aged about 24 years. He pleaded that he was not bound by his uncle's act in 1877; that his uncle had no authority as his natural guardian or otherwise to dispose of his title to the estate; that his uncle's acts, even if they professed to have been done on the plaintiff's behalf in 1877, were not and could not be a bar to the present suit, nor could they of themselves convey to the defendants one to six a good title to a part of the plaintiff's rights and interests in the ancestral estate under the Hindu law. The learned Counsel for the plaintiff referred to the law on the subject as laid down in

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* First Appeal, No. 215 of 1889 from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 12th August, 1889.

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Durga Prasad v. *Kesho Persad Singh* (1) and *Khem Karan* v. *Har Dayal* (2) and contended with force that, except under some express authority of law, Rup Narain Singh, defendant No. 7, was incompetent to make any valid disposal of his nephew's estate during his minority. We have read the learned Subordinate Judge's judgment, and it seems to us that his reasons for taking the contrary view are unsound. The learned vakil who supported the decree below urged that the suit is barred by the three years' limitation of arts. 95 and 96 of sch. ii of Act No. XV of 1877 and he cited *Natha Singh* v. *Jodha Singh* (3) and *Bajaji Krishna* v. *Pirchand Budharam* (4) in support of his contention. Those rulings do not apply to the facts before us. We have no hesitation in agreeing with the Court below on this issue. Upon this the learned vakil intimated his assent to an order remanding the case for trial upon the merits under s. 562 of the Code of Civil Procedure on the basis of the preliminary finding of law that the plaintiff is not bound in law by the arrangement made by the seventh defendant and his uncle in 1877 [500] with the other defendants, or by the subsequent proceedings connected with the alleged arbitration award.

Setting aside the decree below, we order accordingly, costs heretofore being costs in the cause.

Cause remanded.

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14 A. 500=12 A.W.N. (1892) 62.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

NIAZ BEGAM (*Opposite party*) *v.* ABDUL KARIM KHAN AND ANOTHER (*Applicants*).* [3rd May, 1892.]

Act XIX of 1873, *ss.* 113 *and* 114—*Partition, application for—Order on objection as to title raised in course of partition proceedings* "*Order*" *or* "*decision*"—*Appeal.*

A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N. W. P. Land Revenue Act (Act No. XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order or decision on such point. An appeal will lie from the "order" or "decision" of such Collector or Assistant Collector.

[F, 4 O.C. 298.]

IN this case the respondents Abdul Karim Khan and Ibrahim Khan applied under s. 109 of Act No. XIX of 1873 to the Assistant Collector of Moradabad for perfect partition of a certain specified area of land. To this application Musammat Niaz Begam, the appellant, filed an objection to the effect that a cetain mango grove comprised in the land to which the above-mentioned application for partition referred was her exclusive property, and prayed that it might be exempted from partition. To this objection the respondents replied by a counter-application denying the title of the appellant to the grove claimed by her. The Assistant Collector tried the question of title and disallowed Musammat Miaz Begam's objection. Musammat Niaz Begam then appealed to the District Judge, who

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* Second Appeal, No. 75 of 1890, from a decree of H. F. Evans, Esq., District Judge of Jhansi, dated the 23rd November, 1889, confirming a decree of Maulvi Muhammad Fazal Azim, Assistant Collector of Moradabad, dated the 9th August, 1889.

(1) 8 C. 656. (2) 4 A. 37. (3) 6 A. 406. (4) 13 B. 221.

dismissed her appeal on the merits. She then appealed to the High Court and the appeal coming before Mahmood, J., was referred by him to a Bench of two Judges.

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APPEL-LATE CIVIL.

14 A. 500 = 12 A.W.N. (1892) 62.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

[501] EDGE, C. J., and BLAIR, J.—This appeal arose out of a proceeding for the partition of a *mahal*. The appellant here filed objections raising a question of title. The Assistant Collector framed an issue on the point; took evidence and proceeded during the trial in accordance with the Code of Civil Procedure. He likewise recorded in accordance with s. 113 of Act XIX of 1873 a proceeding declaring "the nature, extent, &c., of the interests of the parties, &c." He rejected the objection finding that the objector, appellant, had failed to make out title, and passed an order disallowing the objection. The objector appealed to the Court below, and her appeal was dismissed. She has brought this second appeal. It has been contended on the authority of the decision in *Ranjit Singh* v. *Ilahi Bakhsh* (1) that there should have been a formal decree drawn up by the Assistant Collector. In our opinion the third clause of s. 113 must be read as it actually is, and it enacts merely, so far as this point is concerned, that the procedure to be observed by the Collector of the District or Assistant Collector in trying such cases shall be that laid down in the Code of Civil Procedure for the trial of original suits. The important words in that section are "trying" and "trial." There is not apparently anything in the section to show that a formal decree, as apart from the "proceeding" of s. 113 and the "orders" and "decisions" of s. 114, should be prepared, and it is to be observed that s. 114, which gives the statutory right of appeal, gives it from the "orders" and "decisions" which are to be held to be the decisions of a Court of Civil Judicature of the first instance. We have here the proceeding, the order and the decision of the Assistant Collector, which seems to be all that is required by the Act. In any case, the appellant would be in a difficulty. If a decree, as distinct from an order and decision, is necessary, then the appeal below was not brought from such a decree, for no such decree was drawn up, and the appeal, if it was from the decision, as we must take it to have been, of the Assistant Collector, could not have succeeded, as the "decision" could not in itself be wrong merely by reason of the fact that the decree subsequently to be drawn up was not drawn up. The appellant [502] has failed to make out her first point. Her second point is that some witnesses on her behalf were not summoned. The answer to that is that she did not pay the *talbana* along with her application, or at all. The appeal is dismissed with costs.

Appeal dismissed.

(1) 5 A. 520.

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MAY 6.

APPELLATE CRIMINAL.

14 A. 502=12 A.W.N. (1892) 95.

14 A. 502=12 A.W.N. (1892) 95.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

QUEEN-EMPRESS v. MULUA AND OTHERS.*
[6th May, 1892.]

Criminal Procedure Code, ss. 233, 234, 537. 338, 339,—Separate offences, effect of trial in the same proceeding—Evidence, admissibility of—Pardon, withdrawal of—Trial of person whose pardon has been withdrawn.

In a Criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of which the trial is being held. *Reg.* v. *Briggs* (1) referred to.

An accused person to whom a tender of pardon has been made, and who has given evidence under that pardon against persons who were co-accused with him, should not, if such pardon is withdrawn, be put back into the dock and tried as if he had never received a tender of pardon, but his trial should be separate from and subsequent to that of the persons co-accused with him.

Where four accused were at one and the same trial tried for offences of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours previously and at a place close to the scene of the robbery and murder :—*Held* that the trial of these separate offences together, though an error or irregularity within the meaning of s. 537 of the Code of Criminal Procedure, would not necessarily render the whole trial void.

[F., 23 B. 493 (494) ; F. and Expl., 20 A. 529 (532) = 18 A.W.N. 152 ; R., 33 B. 221 (229) = 10 Bom. L.R. 973 = 9 Cr. L.J. 226 = 4 M.L T. 450 ; 22 C. 50 (69) ; 27 C. 839 (845); 32 M. 173 (176) = 9 Cr. L.J. 571 (574) = 2 Ind. Cas. 343 (344); A.W.N. (1907) 208 = 6 Cr. L.J. 215 ; 14 Bur. L.R. 306 = 7 Cr. L.J. 245 (246) = U B R. 1907, 4th Qr., Cr. P.C. 7 (8); 2 L.B.R. 10 (12) ; 6 O.C. 236 (237) ; 7 P.R. 1901, Cr. = 88 P.L.R. 1901.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. C. Dillon*, for the appellants.

The Public Prosecutor (the Hon'ble Mr. *Spankie*), for the Crown.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—Mulua, Kamraj, Binda, and Suraj Pal have been convicted under s. 302 of the Indian Penal Code and have been respectively sentenced to death. They have also been convicted of two charges under s. 392 of that Code and have [503] been formally sentenced respectively to seven years' rigorous imprisonment on each charge.

Mr. *Dillon* has appeared for the appellants, and, in addition to contending that they ought not to have been convicted on the evidence, he has raised some objections as to the validity of the proceedings and convictions in the Sessions Court.

The murder was committed, roughly speaking, at about a quarter past 8 o'clock on the night of the 19th of November 1891, on a road leading from Batesar fair. A party consisting of women and their attendants were attacked by four men with the object of robbery. Whilst the robbery was being carried out, a chaukidar, attracted by the noise, ran up shouting—" Take care, I am coming." Upon that, according to the evidence for the prosecution, the four men who were engaged in the robbery ran at the chaukidar and each of them hit him with a *lathi*. The

* Criminal Appeal No. 235 of 1892.

(1) 2 M. and R. 199.

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chaukidar died from fractures of the skull, which caused effusion of blood upon the brain. There can be no doubt that his death was caused by *lathi* blows inflicted by the men, or some of them, who were engaged in the robbery of Musammat Bijan's party. Of that robbery and that murder these four appellants have been convicted. Now there was a robbery committed between 5 and 6 o'clock that evening on the same road at a place from 3 to 3½ miles distant from the scene of the murder. These four appellants were at the same trial charged with, tried for, convicted of, and sentenced for the robbery committed between 5 and 6 o'clock.

The first point taken by Mr. *Dillon* was that it was illegal for the Sessions Judge to try the case of the first robbery along with the case of the subsequent robbery and murder. In our opinion there can be no doubt that the robbery which took place first, was, within the meaning of s. 233 of the Code of Criminal Procedure, 1882, a distinct offence from the offence of murder which was committed in the perpetration of the second robbery. The first robbery and the murder were not offences of the same kind within the meaning of s. 234 of the Code, and in our opinion, in cases of so serious a nature as that of murder, offences not immediately [504] connected with the murder ought not, for the purposes of charge and trial, to be dealt with together. Now the question is whether the procedure involved more than an irregularity within the meaning of s. 537 of the Code. We are of opinion that the trial of the first robbery and the subsequent murder together was an error or irregularity within the meaning of s. 537 of the Code, and was not illegal in the sense which would make the whole trial void. Still that error or irregularity would make it necessary for us to set aside the proceedings in the trial below and order a new trial unless we were satisfied that the error or irregularity had not occasioned a failure of justice. Giving a wide meaning to "failure of justice," and adopting for the purposes of this case only the contention that Mr. *Dillon* urges that a failure of justice would have been occasioned if his clients were prejudiced by the charge for the first robbery and the charge for the murder being tried at the same trial, it is necessary to see in what respect these persons could have been prejudiced. Mr. *Dillon* contends that they were prejudiced, arguing that the evidence as to the first robbery which was given in support of that charge was not admissible in support of the charge relating to the second robbery and the murder. If that contention is sustainable, no doubt these men have been prejudiced in their trial, but in our opinion that contention is based upon a misconception of the law of evidence. Of the four men who were tried and convicted, Mulua had confessed fully to the robberies and the murder. That confession he made before the Magistrate. He also pleaded guilty at the Sessions trial. The other three men in their statements before the committing Magistrate had alleged *alibis* and had named witnesses to be summoned on their behalf to prove those *alibis* at the Sessions trial; so that it was manifest that the main contention at the Sessions trial would, so far as the three men other than Mulua were concerned, be one of identity. It was consequently material and relevant to show that these men were on that Batesar road on the night in question, and not beyond the Chambal or elsewhere as their indicated *alibis* would suggest. Now, it is quite clear that on the question of identity and also on the question of whether or not on that night within two or three hours before the murder, they were at [505] a place sufficiently near the scene of the murder as not to preclude the possibility that they took part in the murder,

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evidence was admissible to show that between 5-30 and 6 o'clock that evening these men were together on the Batesar road and at the place where in fact the first robbery occurred. The only question can be as to whether evidence of what they were doing at that particular place was admissible or not. In our opinion it was clearly admissible. It went to show the opportunities which the persons who spoke to the accused having taken part in the first robbery had of identifying the persons who took part in that robbery with the men in the dock at the trial. Evidence of this kind would be clearly admissible in England. Many years ago Baron Alderson, who was one of the most careful Judges on the English Bench in his time, admitted for the purposes of identification evidence to prove that the person whom he was trying for robbery had on the same night committed a different robbery on a different person in the neighbourhood. That was in the case of *Regina* v. *Briggs* (1). It has been established in England by a long course of decisions, of which the common sense and propriety cannot be doubted, that evidence otherwise admissible cannot be excluded at a trial merely on the ground that that evidence shows that the prisoner against whom it is given has committed some other offence with which he was not charged at the trial. To confine the evidence as to the presence of these men at the scene of the first robbery to mere evidence that they were there and to exclude the circumstances under which attention was drawn to them would be to emasculate the evidence and to leave the Judge or the Jury or the Assessors without an opportunity of forming a judgment as to whether the witnesses who spoke to such identity had good opportunities of observing the persons whom they were identifying. We are, consequently, of opinion that, even if these appellants had not at this trial been tried for the first robbery, the evidence which was produced to show that they had taken part in it would have been extremely relevant and admissible on the question of identity which had to be determined in the trial for murder. Holding this view of the law and the facts we are of opinion that the **[506]** error or irregularity in trying these appellants for the first robbery and for the second robbery and murder in the same trial did not occasion a failure of justice and did not prejudice the appellants to any greater extent than an accused may be said to be prejudiced by evidence as to his identity being rendered more conclusive, which could not be said to be a failure of justice. That disposes of the first point taken by Mr. *Dillon*.

The second point was that there were two Assessors and that the record of the trial before us contains only a record of the opinions of one of those two Assessors. The learned Sessions Judge states distinctly in his judgment that the Assessors unanimously convicted on all three counts. We are quite certain that he would not have made that statement in his judgment unless he had obtained from them their opinions and unless they had expressed their opinions that the prisoners before them were guilty of all three charges. How it is that the record of the trial contains the record of the opinion of one Assessor only we are unable to say, and as the learned Sessions Judge is on leave there is no immediate opportunity of clearing up the subject. If he did not record the opinion of the second Assessor, he committed an error, an omission and an irregularity within the meaning of s. 537 of the Code of Criminal Procedure but it has not occasioned, in our opinion, a failure of justice.

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The third point is that Mulua was tendered a pardon under s. 338 of the Code of Criminal Procedure. He had at the Sessions trial already pleaded guilty to all the charges, and two witnesses had been examined when the Sessions Judge made a tender of the pardon under s. 338. The pardon tendered was a pardon in respect of all the three charges, namely, the two charges of robbery and the charge of murder. Mulua was put into the witness-box and examined as a witness on the faith of the pardon tendered to him, and he gave his evidence. At the conclusion of that evidence the Sessions Judge formed the opinion that Mulua's evidence as to the second robbery and the Murder was untrue. He came to that conclusion without having heard any witnesses in the case, except the [507] first two witnesses called. Those witnesses proved nothing to show that Mulua's evidence at the trial was false evidence. The Sessions Judge had before him, no doubt, the confession made by Mulua before the Magistrate, and he had probably also looked at the depositions taken by the committing Magistrate, and he had further on the Magistrate's record the deposition of the Civil Surgeon. The Sessions Judge being of opinion that Mulua's evidence as to the second robbery and the murder was false evidence, revoked the tender of pardon and put Mulua back from the witness-box into the dock and proceeded with the trial as against him and the other three accused. Whether or not that proceeding was illegal, it is quite clear to our minds that it might most seriously prejudice the defence of a man who was taken out of the dock in the middle of a trial to give evidence upon a tender of pardon, to put him back into the dock after his evidence had been taken and to proceed to try him as if the tender had never been made. It would be most difficult for a man placed in such circumstances to deal with the evidence or to defend himself and put forward any points which might be in his favour with any effect. It is very doubtful to our minds whether Mulua having given true evidence with respect to the charge relating to the first robbery was not entitled to the benefit of the pardon with respect to that charge. That charge as a criminal charge was quite distinct from the charges as to which the Sessions Judge considered Mulua's evidence to be false. In our opinion, where a man has given evidence upon the tender of pardon, and where that evidence has been false evidence or evidence in which he has wilfully concealed something essential, he ought not to be put back into the dock at once and tried, but the trial against him on the original charge ought to be a subsequent proceeding. Section 339 is not very clear in its wording, but it says that such person "may be tried for the offence in respect of which the pardon was so tendered, &c" and that rather points, in our opinion, to the trial of such person not being merely a continuation of the trial at which he gave the false evidence, but a trial, so far as he is concerned, *de novo*. We have had great difficulty in making up our minds as to what would be the proper course to take with regard [508] to Mulua, and we think that there being a doubt as to the legality of the procedure adopted with regard to him we should act on that doubt and set aside the convictions and sentences in his case and direct him to be re-tried in the Court of the Sessions Judge according to law. The Sessions Judge, should Mulua plead his tender of pardon as an answer to the charge relating to the first robbery, will have carefully to consider such plea. The convictions and sentences relating to Mulua are accordingly set aside, and he is directed to be re-tried. As to the other men, they are proved by evidence which leaves no doubt in our mind, to have been present on the road that night on the occasion of the first robbery, and to have taken part

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in it, and to have been present at and to have taken part in the second robbery. We believe the evidence for the prosecution that Kamraj, Binda and Suraj Pal did strike the chaukidar with their *lathis*, and that they were active participators in the murder. We say nothing as to whether Mulua took a part in that murder or not, as he will have to be re-tried; but it must not be assumed from our refusing to express an opinion as to the witnesses against Mulua, that we doubt the correctness of their evidence. Those men who killed the chaukidar were engaged in the commission of a very serious offence, *viz.*, the offence of robbery. He was acting in the execution of his duty when he ran up, and they turned on him and brutally murdered him. In the opinion which we have formed, we have not used the confession of Mulua before the Magistrate or his evidence at the Sessions trial against any of these three men, indeed his evidence at the Sessions trial would not appear to have been admissible against them, because, as we infer from the record, the tender of the pardon was withdrawn and he was put into the dock as a prisoner before the other accused had had an opportunity of cross-examining him. We have, however, been asked by Mr. *Dillon* to consider Mulua's evidence relating to the murder so fas as it is in favour of Binda and Kamraj. No doubt Mulua did put the whole murder, so to speak, upon the shoulders of Suraj Pal, but we prefer to follow the evidence of the other witnesses in the case which shows that Binda, Kamraj and Suraj Pal all took an active part in the murder. The evidence for the defence proves [509] nothing so far as Binda, Kamraj and Suraj Pal are concerned.

We dismiss the appeals of Binda, Kamraj and Suraj Pal, and we confirm in each case the conviction of murder and the sentence of death, and we direct that in each case the death sentence be carried out.

Appeals dismissed.

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14 A. 509 = 12 A.W.N. (1892) 98.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

JHINKA (*Defendant*) *v.* BALDEO SAHAI (*Plaintiff*).* [11th May, 1892.]

Mortgage—Suit for sale by mortgagee against auction-purchaser, mortgagee having accepted part of the proceeds of the former sale—Act VIII of 1859, s. 271—Estoppel.

On the 10th of February 1872, one S. R. mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March 1877, J. P. and G. P. brought to sale in execution of money decrees against S. R. two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale, Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction-purchaser for sale of one biswa in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage.

THE facts of this case sufficiently appear from the judgment of the Court.

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* Second Appeal No. 185 of 1890, from a decree of Maulvi Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 30th October 1889, confirming a decree of Babu Madhub Chander Banerji, Munsif of Bareilly, dated the 7th April 1889.

Mr. *Amir-ud-din*, for the appellant.
Babu *Jogindro Nath Chaudhri*, for the repondent.

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14 A. 509 = 12 A.W.N. (1892) 98.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—This case is a simple one. The suit is for a declaration that a one-biswa share purchased by the defendant, Musammat Jhinka, at an auction sale under a decree in 1877 is liable to be brought to sale and sold under a mortgage held by [510] the plaintiff. The plaintiff got a decree on his mortgage and sought to bring this share to sale. The defendant Musammat Jhinka, who is the appellant in this appeal, filed objections, and her objections were allowed; hence this suit. One Sita Ram, who was a defendant to the suit, but is not a party to the appeal, was the owner of three biswa shares. On the 10th of February 1872, he mortgaged one biswa share without defining it or indicating it in any way to the plaintiff. On that mortgage the plaintiff brought a suit on the 16th of April 1877, and obtained a decree on the 10th of May 1877. It was a decree for enforcement of his lien. The decree was as indefinite as the mortgage as to the biswa share against which it might be enforced. Now, one Jwala Prasad and one Ganga Prasad obtained each of them a decree, each decree being apparently a money-decree, against Sita Ram. These decrees were put into execution and two biswas out of the three biswas of Sita Ram were sold at auction sale under these decrees and purchased by the defendant-appellant for Rs. 2,475. That sale took place on the 20th of March 1877. It was confirmed on the 23rd of April 1877. The proceeds of that sale were applied in the first instance to discharging the moneys due to the decree-holders under whose decrees the two biswas were sold, and the balance was applied in this way; part of it in payment to one Shib Dat, an execution creditor, and Rs. 1,464-14-9 in payment of the 13th of June 1877 to the plaintiff. The two biswas which were sold to the defendant-appellant at the auction-sale of the 20th of March 1877 were specifically earmarked and there can be no doubt as to their identity. The plaintiff now seeks to bring to sale one of those two biswas in execution of his decree, in default of his demand for Rs. 650 and costs being satisfied. The question is whether the biswa in suit is the biswa mortgaged to the plaintiff on the 10th of February 1872. The late Subordinate Judge of Bareilly found that it was. He arrived at that conclusion from a consideration of certain transactions to which the defendant here was no party. He came to the conclusion that the biswa in question was the biswa mortgaged to the plaintiff, because under another mortgage one biswa of the three biswas was mortgaged to Bansidhar. The mortgage in each case was absolutely indefinite in the sense that it did not define or [511] specify the biswa. The biswa in suit might just as well, from anything that can be inferred from that evidence, have been the biswa mortgaged to Bansidhar as the biswa mortgaged to the plaintiff; but, indeed, it appears to us that it was not open to the plaintiff to allege that the biswa in suit was the biswa which was mortgaged to him. At the time when the plaintiff received out of the proceeds of the sale to the defendant the Rs. 1,464-14-9, Act No. VIII of 1859 was in force. S. 271 of that Act is the section which must be applied to this case. The Munsif apparently thought that s. 295 of the present Code of Civil Procedure was the section which was to be regarded in ascertaining what where the rights of the parties. He did not pay attention to the date of the transaction in 1877. Now it appears to us that if in 1877 the plaintiff desired to assume the position that either of the two biswas sold to the defendant was sold subject to his mortgage,

1892 MAY 11. — APPELLATE CIVIL. — 14 A. 509=12 A.W.N. (1892) 98.

he was not entitled to obtain from the Court of payment to him of any portion of the proceeds of the sale. That section provides for distribution of sale-proceeds, and it contains this proviso:—"When any property is sold subject to a mortgage the mortgagee shall not be entitled to share in any surplus arising from such sale." As the law stood then that was an equitable and just provision, and undoubtedly it was intended to prevent the occurrence of such a case as this; if indeed the plaintiff's mortgage covered either of the biswas sold. Here the plaintiff in 1877 went into Court and claimed the surplus of the proceeds of the sale of the two biswas, and, having got the surplus of the sale into his pocket, he now turns round and says that the defendant whose money has been lying in the plaintiff's pocket all these years obtained nothing as against him, and that he, the plaintiff, was entitled to bring this property to sale in discharge of his mortgage, so that he would get part payment of the mortgage debt out of the innocent defendant, and if his case be correct, he would the next day be entitled to sell in satisfaction of his mortgage the property which the defendant had paid for the day before. In our opinion, the plaintiff having taken Rs. 1, 464-14-9 on the 13th of June 1877, is not now entitled to say that either of the biswas thus sold was the one undefined and unear-marked biswa mortgage to him [512] in 1872. Ss. 270 and 271 of Act No. VIII of 1859 were not as wide or as carefully drafted as is s. 295 of the present Act. The plaintiff's suit ought to have been dismissed on two grounds, that he was estopped from alleging that the biswa in suit was the biswa mortgaged to him, and that even if there had been no estoppel he had failed to establish the identity of the two biswas. The suit as against Musammat Jhinka will stand dismissed with costs in all Courts, this appeal being allowed.

Appeal decreed.

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14 A. 512=12 A.W.N. (1892) 80.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

MOHAN LAL AND ANOTHER (*Defendants*) *v.* BILASO (*Plaintiff*).*
[16th May, 1892.]

Civil Procedure Code, s. 43—Splitting remedies—Suit for declaration of title and for possession—Subsequent suit for possession.

Where a previous suit for a declaration of title to immoveable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure. *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1) followed.

[F., 34 A. 172 (183)=9 A.L.J. 111=13 Ind. Cas. 154; 6 Ind. Cas. 926 (927)=6 N.L.R. 81 (82)=8 Ind. Cas. 9 (11); R., 17 A. 174 (177); 7 C.P.L.R. 63; 14 Ind. Cas. 55.]

THE facts of this case are as follows:—On the 13th of September 1878, one Dodraj made a disposition of his property by way of a deed of

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* Second Appeal, No 223 of 1890, from a decree of T.R. Redfern, Esq., District Judge of Bareilly, dated the 27th November 1889, confirming a decree of Maulvi Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 12th June 1889.

(1) 8 C. 819.

1892 MAY 16.

APPELLATE CIVIL.

14 A. 512 = 12 A.W.N. (1892) 80.

gift, or deed of partition, in favour of his daughter-in-law, the plaintiff, Musammat Bilaso, and of Mohan Lal, his grandson, and Vidya Ram, his great-grandson, who were defendants in the suit. Under this deed the plaintiff became entitled to a share in certain property known as the "White Mahal" of mauza Barkhera, and certain other land known as "Talayawali" land. On the 8th of September 1888, the plaintiff instituted a suit in the Court of the Subordinate Judge in which she claimed a declaration of her rights in respect of mauza Barkhera, but that suit was dismissed on the ground that her possession over the land in question was not proved. On the 5th of March 1889 the plaintiff instituted a second suit, on this occasion for partition and separate possession of her share in mauza Barkhera and also in the "Talayawali" land. The suit was resisted [513] by the defendants, the grandson and great-grandson of the donor, on the ground, amongst others, that the claim was barred by s. 43 of the Code of Civil Procedure. They also impugned the validity of the deed of gift upon which the claim was based. The Subordinate Judge decreed the plaintiff's claim in full. The defendants then appealed to the District Judge, who agreeing with the lower Court that the deed of gift was proved, and that there was no bar to the suit by reason of s. 43 of the Code of Civil Procedure, dismissed the appeal. The defendants thereupon appealed to the High Court.

Mr. *D. Banerji* and Babu *Jogindra Nath Chaudhri*, for the appellants.

Mr. *Roshan Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—The short question is whether s. 43 of the Code of Civil Procedure is a bar to a suit for possession of land in relation to which the plaintiff had brought a previous suit under s. 42 of the Specific Relief Act for a declaration of title, which suit had been dismissed on the ground that the plaintiff was not in possession. We are not aware of any authorities in this Court. We have not been referred to any case in this Court in which it was even suggested that s. 43 of the Code of Civil Procedure was applicable to such a case. The point has been decided by the High Court at Calcutta in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1), and, we think, rightly. In our opinion s. 43 does not apply to such a case as this. The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 C. 819.

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MAY 20.

APPELLATE CIVIL.

14 A. 513 = 12 A.W.N. (1892) 80.

14 A. 513 = 12 A.W.N. (1892) 80.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

MUSAHEB ZAMAN KHAN (*Judgment-debtor*) v. INAYAT-UL-LAH (*Decree-holder*).* [20th May, 1892.]

Mortgage—Suit for sale on a mortgage—Rights of mortgagee in respect of non-hypothecated property of the mortgagor—Res judicata—Act IV of 1882, *ss.* 68, 88, 89 *and* 90 *—Civil Procedure Code, sch. IV, forms Nos.* 109 *and* 128.

Where there is nothing to show a contrary intention of the parties, every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee [514] must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief over against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under the provisions of s. 90 of the Transfer of Property Act, and if such relief is refused the refusal will not bar a subsequent application under s. 90. *Hafiz-ud-din Ahmad* v. *Damodar Das* (1) approved: *Balak Nath* v. *Pitambar Das* (2), distinguished: *Sutton* v. *Sutton* (3), *Raj Singh* v. *Parmanand* (4), *Miller* v. *Digamtari Debya* (5) and *Durga Dai* v. *Bhagwat Prasad* (6), referred to.

Observations on the meaning and application of ss. 88, 89, and 90 of the Transfer of Property Act. Explanation of the term "legally recoverable" in s. 90. *Sonatun Shah* v. *Alie Newaz Khan* (7), discussed.

[Diss., 15 A. 334; 28 A. 365 = 3 A.L.J. 171 = A.W.N. (1906), 44; F., 15 A. 331; 20 A. 512 (514); 21 A. 453; Appr., 20 A. 386; 2 A.L.J. 379 = A.W.N. (1905), 144; R., 33 C. 867 = 4 C.L.J. 141; 32 M. 534 = 4 Ind. Cas. 1120 = 5 M.L.T. 246; 19 A.W.N. 72; 19 A.W.N. 208; 4 C.L.J. 246 (252); 4 C.L.J. 510 (517); 9 C.L.J. 5 = 13 C.W.N. 138; 1 Ind. Cas. 442 (443); 1 N.L.R. 143 (145); 6 O.C. 30 (32).]

THE facts of this case are as follows:—

On the 26th of January 1885, Inayat-ul-lah obtained a decree for sale of certain mortgaged property under a mortgage-deed, dated the 26th of August 1879. The decree was framed under s. 88 of the Transfer of Property Act (Act No. IV of 1882), and was executed under s. 89 of the same Act; but on the mortgaged property being sold it was found that the proceeds fell short of the money due under the mortgage by Rs. 428-15. On this the decree-holder at first applied to execute his decree under s. 88 against the other property of the judgment-debtor, but that application was rejected on the 21st August 1889. The decree-holder accordingly applied for a decree under s. 90 of the Transfer of Property Act for the abovementioned sum with interest. To this application the judgment-debtors (representatives of the original mortgagor) objected that inasmuch as the decree-holder in his plaint in the suit had asked for relief over against non-hypothecated property and that prayer had been disallowed, his claim for a decree under s. 90 was *res judicata*. They pleaded also that the decree-holder's application was barred by reason of the rejection of his previous application. Both these objections were disallowed and a decree under s. 90 was given to the applicant. The judgment-debtors then appealed to the Subordinate Judge relying on the objections which they had urged before the Munsif. This appeal was dismissed and the judgment-[515] debtors the appealed to the High Court, pleading, in addition to

* Appeal No. 38 of 1891 under s. 10 of the Letters Patent.

(1) 9 A.W.N. (1889) 149. (2) 13 A. 360. (3) 22 Ch. D. 511 (515).
(4) 11 A. 486. (5) 10 A.W.N. (1890) 142.
(6) 13 A. 356. (7) 16 C. 423.

the pleas taken in the lower appellate Court, that the balance claimed was not legally recoverable from them under the deed of the 26th of August 1879, and that the application was barred by limitation. This second appeal was dismissed by Knox, J., on the 30th of July 1891, and thereupon the judgment-debtors again appealed under s. 10 of the Letters Patent, on this occasion relying on an additional ground, *viz.*, that the mortgage not having provided for relief over against the non-hypothecated property of the mortgagor no such relief could be granted.

1892 MAY 20. — APPELLATE CIVIL. — 14 A. 513 = 12 A.W.N. (1892) 80.

Munshi *Govind Prasad*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—This is an appeal from a decree made under s. 90 of the Transfer of Property Act. The appeal is on behalf of the defendants to the suit. The suit was brought on a mortgage of the 26th of August 1879. The defendants are the heirs of the mortgagor. In the plaint in the suit, in addition to a decree for sale being asked for, there was a prayer for relief against non-hypothecated property. A decree for sale was made under s. 88 of the Transfer of Property Act; it was executed under s. 89 of the Transfer of Property Act, and after it had been executed it was ascertained that the nett proceeds of the sale under s. 89 were insufficient to pay the amount due for the time being on the mortgage. Upon that a decree under s. 90 was applied for. In the decree under s. 88 no relief over against non-hypothecated property was granted, and the first point taken here is that the relief over against non-hypothecated property not having been granted when the decree under s 88 was made, s. 13 of the Code of Civil Porcedure barred the mortgagee's claim for a decree under s. 90 of the Transfer of Property Act. On that point several authorities, some of them having very little to do with the question, were cited. Amongst other cases that were relied on for the appellant was the case of *Batak Nath* v. *Pitambar Das* (1). That case was referred to as deciding that a Court in a suit for sale under a mortgage [516] under the Transfer of Property Act could in the first instance give a decree under s. 88 of that Act coupled with a decree for sale of non-hypothecated property. Now with regard to that case it is only necessary to observe that the decision was given, not in an appeal from the decree, but in an appeal which arose in the execution of a decree made against the hypothecated property and non-hypothecated property. The original decree which was in execution had not been appealed from and was final, and the Court executing that decree was bound to execute it according to its terms. It is consequently not an authority on this point. Another case to which we have been referred is the case of *Hafiz-ud-din Ahmad* v. *Damodar Das* (2). In that case Mr. Justice Straight said:—"I do not myself see how it is possible to hold that anything in the terms of the original decree passed on the mortgage can be said to make any question that could arise under s. 90 of the Transfer of Property Act as *res judicata*. Taking s. 88 and reading it in conjunction with s. 90 it is clear that there are two distinct decrees to be passed, the decree under s. 88 in the suit for sale, and the decree under s. 90 upon the application of the decree-holder in accordance with the terms of that particular section." That, in our opinion, is a perfectly correct view of the law. In *Raj Singh* v. *Parmanand* (3) it was held by this Court that a decree under s. 90 is a decree to be made in

(1) 13 A. 360. (2) 9 A.W.N. (1889) 149. (3) 11 A. 486.

1892 MAY 20. — APPELLATE CIVIL. — 14 A. 513 = 12 A.W.N. (1892) 80.

the original suit and not in a fresh suit. In the case of *Miller* v. *Digambari Debya* (1) this Court held that the plaintiff was entitled to join with his claim for enforcement of the mortgage a further claim for a declaration that if the sale proceeds should prove insufficient to discharge the debt its discharge might be enforced against the person and other property of the defendant. There is nothing to prevent the plaintiff asking for such a relief; the only question is at what period of the suit has the Court power to grant relief against non-hypothecated property. In *Durga Dai* v. *Bhagwat Prasad* (2) it was considered that the application for a decree under s. 90 was an application in execution, and so an application for a decree under s. 90 is in one sense an application **[517]** in execution, but we do not think that it can be regarded as an application in the execution of a decree made under s. 88 of the Transfer of Property Act. The time for making an application under s. 90 and for the Court making a decree under that section does not arrive until the remedies under ss. 88 and 89 have been exhausted. When the decree passed under ss. 88 which is ordered to be executed under s. 89 has failed to discharge the money due at the time under the mortgage, then for the first time in the suit for sale under the Transfer of Property Act the Court has power to decree the sale of non-hypothecated property. The decree for sale under s. 88 is limited to the hypothecated property.

We have been referred to forms Nos. 109 and 128 in the 4th Schedule of the Code of Civil Procedure. It is true that the form No. 109, which is a general form of plaint for a suit for sale under a mortgage, does include in its prayers for relief a prayer that if the proceeds of the sale of the mortgaged property shall not be sufficient for payment in full of the amount to be ascertained the defendant should pay to the plaintiff the amount of the deficiency. It may be inferred from that form, that it would not be improper to claim originally in the suit the subsequent relief; but when we turn to form No. 128, which is a general form of decree for sale in a mortgage suit, we find that that form is confined, so far as the present purposes are concerned, strictly to a decree under s. 88 of the Transfer of Property Act and does not include any subsequent relief. It might be inferred from these two forms that the subsequent relief, although it might be claimed in the plaint, was not to be included in the decree for sale under s. 88. In our opinion the more correct way of drawing up a decree in a suit for sale on a mortgage would be to confine the decree for sale, *i.e.*, the first decree to be passed, to a decree under s. 88 against the mortgaged property, and that any subsequent relief to which, after that decree had been executed, it might appear that the plaintiff was entitled, should stand over for a decree under s. 90. In our opinion s. 13 of the Code of Civil Procedure would not apply to an application under s. 90 for a decree, no matter whether the plaintiff had or had not claimed originally in **[518]** his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the Court when making the decree under s. 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under s. 88 had been exhausted.

Another objection which was relied on for the defendants, was that the balance in respect of which the decree under s. 90 has been made was not legally recoverable from the defendants otherwise than out of the property sold. It will be remembered that the defendants are not the mortgagors, but the heirs of the mortgagor, and they are Muhammadans,

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(1) 10 A.W.N. (1890) 142. (2) 13 A. 356.

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and that the property which it is sought to sell under the decree under s. 90 is property which was of the mortgagor in his lifetime and has come to the defendants as his heirs. Mr. *Abdul Majid* for the respondent, the decree-holder, has relied upon the decision of the Calcutta Court in *Sonatun Shah* v. *Ali Newaz Khan* (1) as an authority to show that the balance legally recoverable under s. 90 from the defendants otherwise than out of the property sold is the balance remaining due to the decree-holder under the decree obtained under s. 88 of the Transfer of Property Act. In our opinion, however, effect must be given to the words "legally recoverable" and "otherwise than out of the property sold" which that decision does not appear to give. These words, in our opinion, mean, by way of illustration, that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold or a balance the recovery of which is not barred by limitation, *e.g.*, the suit might have been brought at a period of time when, if the plaintiff was relying on his personal remedy against the defendant, his suit for the personal remedy would be barred by time, although within time as a suit for sale on the mortgage. We do not say that this is exhaustive. We merely refer to these two cases as illustrations. Now in the mortgage here there is nothing to preclude the plaintiff from obtaining a decree under s. 90 and it has not been suggested that there is any bar of limitation, but **[519]** it is contended on behalf of the defendants that the mortgage contained no covenant or promise upon which the mortgagor or his heirs holding assets could be made liable, and that the only remedy was against the property mortgaged. If it be the fact, we do not say that it is so, that on the true construction of the mortgage there is no express covenant or provision to pay the mortgage money otherwise than out of the mortgaged property, still there is the implied promise to pay, which, if there is nothing in the mortgage from which a contrary intention should be inferred, the law will presume from the fact of the mortgagor's accepting the loan. Where there is in a mortgage nothing to the contrary the "mortgage contains within itself, so to speak, a personal liability to repay the amount advanced." [See the observations of Sir George Jessel, M. R. in *Sutton* v. *Sutton* (2).]

In support of the argument on behalf of the defendants that the balance was not legally recoverable except from the property mortgaged, it was further suggested that s. 68 of the Transfer of Property Act debarred the plaintiff from any remedy except against the mortgaged property. It is quite true that s. 68 precludes a mortgagee from suing the mortgagor for the mortgage money except in the cases provided for in that section, that is, it would preclude the mortgagee from maintaining a suit in which his primary relief was a relief against the mortgagor personally unless the case came within the exception to that section. That section in our opinion in no wise debars a mortgagee from seeking the decree provided for by s. 90. The mortgagee suing on his mortgage for sale gets a decree under s. 88, executes his decree under s. 89, and, if the nett proceeds of the sale are insufficient, then, without any suit against the mortgagor personally, the mortgagee is given in his suit on the mortgage a further remedy by way of a decree under s. 90. For these reasons we hold that our brother Knox, from whose judgment this is a Letters Patent appeal, was right in dismissing the judgment-debtor's appeal to this Court. We dismiss this appeal with costs.

Appeal dismissed.

(1) 16 C. 423.

(2) 22 Ch. D. 511 (515, 516).

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MAY 21.

REVISIONAL CIVIL.

14 A. 520 = 12 A.W.N. (1892) 99.

14 A. 520=12 A.W.N. (1892) 99.

[520] REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

RAHIMA (*Decree-holder*) *v.* NEPAL RAI (*Judgment-debtor*).*
[21st May, 1892.]

Act IV of 1882, *s.* 87—*Civil Procedure Code*, *ss.* 2, 244 *and* 622—*Revision.*

An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgage money by a mortgagor is a decree within the meaning of ss. 2 and 244 of the Code of Civil Procedure, 1882, and therefore no application will lie under s. 622 of that Code for revision of such order.

[F., 26 B. 121=2 Bom. L.R. 554; 10 A.L.J. 520=17 Ind. Cas. 912 (913); R., 25 M. 244 (290) (F.B.); 25 M. 300 (313).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

The Hon'ble Mr. *Spankie*, for the applicant.

Mr. *Abdul Raoof*, for the opposite party.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—This is an application for revision in which we are asked to exercise our powers under s. 622 of the Code of Civil Procedure, and to set aside an order of the Subordinate Judge of Ghazipur postponing the day appointed for payment under a foreclosure decree. The decree was made under s. 86 of the Transfer of Property Act. A date was fixed for payment. After the expiry of that date the Subordinate Judge, on the application of the defendant, made the order which we are asked to revise. The order was not a ministerial order such as the order in the case of *Hulas Rai* v. *Pirthi Singh* (1), or the order in the case of *Bandhu* v. *Shah Muhammad Taki* (2). It was an order which was made under s. 87 of the Transfer of Property Act, and, if the Court had power to make it at all, it could only have been made upon good cause shown. Consequently, it was a judicial and not a ministerial order. In our opinion it was an order which related to the execution or discharge of a decree within the meaning of clause (*c*) of s. 244 of the Code of Civil Procedure. It was consequently appealable as a decree. This view is consistent with that taken by this Court in the case referred to in the note at page 502 and is not inconsistent with the case of *Hulas Rai* v. *Pirthi Singh*.(1) As the [521] order in question was appealable, it cannot be the subject of revision under s. 622 of the Code of Civil Procedure. The application for revision is dismissed with costs.

Application rejected.

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* Application for Revision No. 63 of 1891, under s. 622 of the Civil Procedure Code.

(1) 9 A. 500. (2) 8 A.W.N. (1888) 119.

14 A. 521=12 A W.N. (1892) 110.

1892
JUNE 7.

EXTRA-ORDINARY ORIGINAL CRIMINAL.

14 A. 521= 12 A.W.N. (1892) 110.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* STANTON AND FLYNN. [7th June, 1892.]

Practice—Sessions trial—Witness for the Crown not called at Sessions trial though examined before the committing Magistrate—Duty of the prosecution with regard to the production of such witness.

At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness' testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the committing Magistrate present at the trial so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. *Dhunno Kazi* (1) and *Empress of India* v. *Kaliprosonno Doss* (2), approved. *The Empress* v. *Grish Chunder Talukdar* (3) and *The Empress* v. *Ishan Dutt* (4), dissented from.

[R., 16 A. 84 (F.B.)=14 A.W.N. 7.]

THIS was a trial before Knox, J., and a jury at the Criminal Sessions of the High Court. The accused, Patrick Stanton and John Flynn, were charged with offences punishable under ss. 457, 380, 411 and 414 of the Indian Penal Code. At the close of the case for the prosecution, Counsel for the defence called the attention of the Court to the fact that one of the witnesses who had been examined by the committing Magistrate had not been called by the prosecution, and contended that such witness ought to be called by the prosecution or at least tended for cross-examination, or should be examined by the Court. The arguments on both sides are stated in the ruling of Knox, J.

The Public Prosecutor (the Hon'ble Mr. *Spankie*), for the Crown.

[522] Mr. *J. E. Howard*, for the prisoners.

RULING.

KNOX, J.—The prosecution in this case having concluded their case without calling a certain witness, one Michael Tyrrell, who had been examined by the committing Magistrate, Mr. *Howard*, who appeared for the defence, contended that it was the duty of the prosecution at any rate to place that witness in the witness-box so that Counsel for the defence might exercise his right of cross-examination. If this was not done, he contended further that the Court, in the interests of the defence and of justice, ought to send for that witness and examine him as a witness called by the Court. The learned Counsel referred the Court to the practice which, according to him, had prevailed for the first eight or nine years, if not further, from the institution of the Court, and observed that the principle for which he was arguing was a principle too well known to need the weight of authority. He was unable to refer the Court to any precedent save that of the *Empress* v. *Grish Chunder Talukdar* (3). That was a case tried before Jackson and Tottenham, JJ., and Mr. Justice Jackson there laid down that "the ordinary practice in properly constituted Courts is, that where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him; and certainly

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(1) 8 C. 121. (2) 14 C. 245. (3) 5 C. 614. (4) 15 W. R. Cr. R. 34.

1892 JUNE 7. — EXTRA-ORDINARY ORIGINAL CRIMINAL. — 14 A. 521= 12 A.W.N. (1892) 110.

where the Judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination." For this view Mr. Justice Jackson has cited no authority, and, with the exception of the case of *The Empress* v. *Ishan Dutt* (1), I have been unable to find any criminal case ruling to the same effect. On behalf of the Crown I have been referred to the case of *The Empress of India* v. *Kaliprosonno Dass* (2). That was a very strong case. In it Counsel for the Crown, after putting forward such number of witnesses as he thought sufficient to support of the case for the Crown, tendered a number of others for cross-examination, but refrained from [523] examining or tendering for cross-examination a witness of whom the Crown considered that no reliance could be placed upon his evidence. Mr. Justice Trevelyan held that under the circumstances he was of opinion that the prosecution were not bound to tender such a witness for cross-examination or to do more than have him present in Court for the accused to call him or not, as he might think fit. I was also referred to the case of *Dhunno Kazi* (3) in which the presiding Judges held that "the only legitimate object of a prosecution is to secure, not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing which can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth." Mr. *Spankie* contended as to the principle which should govern the decision in this case that the Code of Criminal Procedure gives ample facilities to an accused person for placing before the Court and Jury every witness from whom he considers it likely that anything to his benefit may be elicited. Looking to the way in which cases are prepared in India, I am distinctly of opinion that the principle laid down in the later Calcutta cases, in *Dhunno Kazi* and in *Kaliprosonna Dass*, is the right principle. The Code of Criminal Procedure nowhere lays upon the prosecution the burden of putting forward as a witness in support of their case any person on whose evidence they cannot place reliance. The duty of a Public Prosecutor, in India especially, is one attended with great difficulty, and he should be allowed the utmost freedom in marshalling his evidence, for in most cases he will find, so far as my experience goes, no proper attempt made to do so by the Court below. Looking to the old practice, I cannot find that any further duty was imposed on the prosecution in this country than that of having in attendance every witness who had been examined by the committing Magistrate. This the prosecution is [524] bound to do, and this they have done in the present instance. It might perhaps be contended that if the committing Magistrate had stated in his order of commitment that he had been influenced by a certain witness in ordering an accused person to be committed, Counsel for the Crown was in common fairness bound either to examine such witness or to tender him for cross-examination. In the present case the witness Tyrrell was a witness called especially by the Court, and, for reasons which will presently appear, I will say nothing

(1) 15 W.R. Cr. R. 34. (2) 14 C. 245. (3) 8 C. 121.

further than this—that after examining him the committing Magistrate placed on record that this evidence was not evidence which induced him to make or led him in any way up to his order of committal. I have said this much in order that Counsel may in future cases have a guide to what I believe ought to be the practice in criminal trials in this Court. As, however, many observations have been made respecting this witness to the jury, I will under the circumstances call him under the special powers given to me under s. 540.

1892 JUNE 7. — EXTRA-ORDINARY ORIGINAL CRIMINAL. — 14 A. 521=12 A.W.N. (1892) 110.

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14 A. 524=12 A.W.N. (1892) 104.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IMAM-UD-DIN AND ANOTHER (*Defendants*) v. LILADHAR (*Plaintiff*).*
[13th June, 1892.]

Suit—Non-joinder of parties—Limitation—Act XV of 1877, s. 22—*Civil Procedure Code*, s. 32—*Partnership—Right of surviving partner to sue for debts due to firm.*

Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand* v. *Balram Das* (1) and *Gobind Prasad* v. *Chandar Sekhar* (2) referred to.

A Court may, under s. 32 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added *Ramsebuk* v. *Ram Lall Koondoo* (3) and *Kalidas Keval Das* v. *Nathu Bhagvan* (4) referred to. *The Oriental Bank Corporation* v. *Charriol* (5) discussed.

[Not F., 27 C. 540 ; F., 15 A. 407 ; (409) ; 6 M.L.J. 27 ; R., 29 A. 311=4 A.L.J. 194=A.W.N. (1907), 58 ; 21 B. 154 (158) ; 33 M. 216 (219)=4 Ind. Cas. 392 (394)=20 M.L.J. 79 (84)=7 M.L.T. 67 ; 35 M. 685 (690)=10 Ind. Cas. 875 (877)=21 M.L.J. 508 (516)=(1911) 1 M.W.N. 442 (447) ; 5 C.L.J. 242=11 C.W.N. 350 ; 7 Ind. Cas. 252 (253)=8 M.L.T. 280 (281)=M.W.N. 1910, 472 (474) ; 10 M.L.T. 418 (425)=(1911) 2 M.W.N. 450 (457) ; 25 P.R. 1903=74 P.L.R. 1903 ; 4 S.L.R. 2 (9) ; D., 25 A. 378 (383) ; 33 A. 272 (278)=8 A.L.J. 256 (264)=13 Bom. L.R. 359 (366)=13 C.L.J. 345=15 C.W.N. 321 (327)=9 Ind. Cas. 739 (741)=21 M.L.J. 378=9 M.L.T. 343 (345)=(1911) 2 M.W.N. 395 ; 25 C. 285 ; 32 C. 582=9 C.W.N. 421.]

[525] THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *W.M. Colvin*, Babu *Jogindro Nath Chaudhri*, and Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *Hameed-ullah*, for the respondent.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This appeal has arisen in a suit brought on two *hundis*. The promisees of the *hundis* were a firm called Moti Ram, Liladhar. The drawers of the *hundis* are the defendants, appellants here. The suit was originally brought by Liladhar alone. The defendants required inspection of the books of the firm Moti Ram, Liladhar, and from time to time obtained further time for filing their written statement. When they filed their written statement they distinctly raised

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* First Appeal, No. 7 of 1892, from an order of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 18th December, 1891.

(1) 1 A. 453. (2) 9 A. 486. (3) 6 C. 815. (4) 7 B. 217. (5) 12 C. 642.

1892 JUNE 13. —— APPELLATE CIVIL. —— 14 A. 524 = 12 A.W.N. (1892) 104.

the objection that all the parties who should necessarily be joined as plaintiffs were not joined. Upon that Jiwa Ram applied to be made a co-plaintiff. Liladhur opposed, but in the result the Subordinate Judge, exercising his powers under s 32 of the Code of Civil Procedure, made Jiwa Ram a co-plaintiff with Liladhar. Now at the time when Jiwa Ram was made a co-plaintiff any suit on those *hundis* in which it was necessary to make him a party was barred by limitation. The Subordinate Judge found that Jiwa Ram, Liladhar and Moti Ram, who was their father, were joint owners and co-parceners in the firm of Moti Ram, Liladhar, and that on the death of Moti Ram the surviving "co-parceners," who, on those findings were the surviving co-partners, were Liladhar and Jiwa Ram. Liladar on his own behalf appealed against the decree of the Subordinate Judge, which had dismissed the suit on the ground of limitation. His grounds of appeal are as follows :—

(1) The shop of Moti Ram and Liladhar is not ancestral.
(2) The plaintiff alone is entitled to sue.
(3) Jiwa Ram has no right of suit.
(4) Jiwa Ram has been improperly made a plaintiff.

The District Judge on appeal allowed the appeal on the ground that "the defendants did not raise the plea of non-joinder at the [526] earliest possible period, nor before the first hearing; consequently they must be taken to have waived it, and the suit can proceed in Liladhar's, plaintiff's name," and remanded the case under s. 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought. The learned District Judge apparently confounded the right of a defendant to object on the ground of the want of parties with the power of a Judge to act under s. 32 when the fact of the want of parties is brought to his attention by the pleadings or otherwise. The objection as to want of parties was taken by the defendants in their written statement and could not well have been taken before. Section 117 of the Code of Civil Procedure shows that when a written statement has been filed, whether it has been filed at or before the first hearing of the suit, the Court, amongst other things, shall at the first hearing of the suit ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement, if any, of the opposite party and are not expressly or by necessary implication denied by the party against whom they are made. The written statement is the most formal document in which a defendant can raise an objection of want of parties or that he did not make the contract as alleged. In our opinion the objection was in this case taken at the earliest possible opportunity, and the Subordinate Judge was not precluded by s. 34, and by the fact that the objection was taken at the first hearing from making his order under s. 32. Having regard to ss. 64, 68 and 69 of the Code of Civil Procedure the first hearing of a suit might be the earliest opportunity which a defendant might have of raising any question as to want of parties. It is difficult to understand how a defendant could be deemed to have waived an objection for want of parties by not having taken the objection before the first hearing when he had no opportunity of taking his objection until the first hearing, or was until then ignorant of the facts on which the objection depended. Whether under such circumstances a defendant could be deemed to have waived the objection or not, his omission could not deprive the Court of the power to act under s. 32. Now the plaintiff, Liladhar, had taken out a certificate for the purposes of this case which [527] covered only one-half of the amount claimed. The explanation given for that is

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that he required no certificate so far as his own moiety of the firm's claim is concerned, and that a certificate was only required in respect of the share of his deceased father. This negatives the suggestion that this was not a case of partnership, but only a case of survivorship in a joint family. The meaning of the first ground in the memorandum of appeal in the Court below is not very plain. It had been found that the business or firm of Moti Ram Liladhar was a co-partnership. The second, third and fourth grounds of appeal appear to raise only questions of law on the findings of fact in the first Court. The lower appellate Court did not come to any finding of fact inconsistent with any findings of fact in the first Court. It apparently assumed that they were correct. Two questions arise. The first is, where a contract is made with or a debt incurred to a firm consisting of three partners and one of those partners dies, can a suit be maintained by one of the two surviving partners alone against the contractors or debtors? In our opinion it cannot, except possibly in the case of an assignment by one of the two surving co-partners to the other, which is not the case here. It was decided by this Court in the case of *Dular Chand* v. *Balram Das* (1) that a suit cannot be maintained by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. It was decided by this Court in *Gobind Prasad* v. *Chandar Sekhar* (2) that the surviving partner or partners were the persons to sue on a contract made with the firm. In our opinion that is good law, and it was necessary in order that this suit should be maintainable that the surviving partners of the firm of Moti Ram, Liladhar should be plaintiffs in the suit. The next question is what is the effect of one of those surviving partners not having been made a party until after the period of limitation for such a suit had expired? In *Ramsebuk* v. *Ram Lal Koondoo* (3) and *Kalidas Kevaldas* v. *Nathu Bhagvan* (4) it was held that where an objection on the ground of non-joinder of parties was taken in proper time by the defendants, and limitation had run so far as the [528] persons were concerned who should have been joined as plaintiffs and had not been joined, the whole suit must be dismissed. It appears to us that the same result must follow where a Judge acting under s. 32 of the Code of Civil Procedure adds a person as a necessary plaintiff after the period of limitation for a suit by him alone or with others has expired. S. 22 of the Indian Limitation Act, 1877, would clearly apply to the right of suit of the person so added, and the suit could not be maintained without him. The only case which has been suggested as throwing any doubt on that being the correct view of the law is the case of *The Oriental Bank Corporation* v. *Charriol* (5). All that that case apparently decided was that limitation does not preclude a Court from acting under s. 32 of the Code of Civil Procedure in adding a person as a necessary party to a suit. It is not obvious how the observations of the learned Judges in that case could be reconciled with the specific provisions of s. 22 of the Indian Limitation Act, 1877, if those observations are to be read as implying that any Court could do otherwise than dismiss a suit which was barred by limitation. The power of a Court to add a party and the duty of that Court to dismiss the suit as barred by limitation are two different questions. Some of the illustrations referred to in that case appear to be cases contemplated in the provisoes to s. 22 of the Indian Limitation Act, 1877. The recent Full Bench case of *Bindeshri Naik* v. *Ganga Saran*

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(1) 1 A. 453. (2) 9 A. 486. (3) 6 C. 815.
(4) 7 B. 217. (5) 12 C. 642.

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Sahu (1) as to the question of limitation where a party is joined related to the joinder of a party under the provisions of s. 559 of the Code of Civil Procedure.

In our opinion the decree of the first Court was right. We set aside the order under appeal and affirm the decree of the first Court.

Appeal decreed.

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14 A. 529 = 12 A.W.N. (1892) 106.

[529] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

JAI KISHN (*Defendant*) *v.* BHOLA NATH AND ANOTHER (*Plaintiffs*).*
[20th June, 1892.]

Civil Procedure Code, s. 214—Pre-emption—Decree for pre-emption conditioned on payment within fixed time—Omission to state consequence of non-payment—Limitation.

Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period :—*Held* that the plaintiff, unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption. *Kedai Singh* v. *Jaisri Singh* (2) referred to, *Bandhu Bhagat* v. *Shah Muhammad Taqi* (3) dissented from.

[F., 53 P.R. 1903=107 P.L.R. 1903 ; R., 16 A. 65 ; 8 Ind. Cas. 592 (593)=3 Bur. L.T. 2 ; 18 Ind. Cas. 48=53 P.W.R. 1913 ; 44 P.L.R. 1913.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Pandit *Bishambar Nath*, for the respondents.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This was a suit to redeem a mortgage. The plaintiffs were assignees of the mortgagor. The defendant set up a defence that the mortgage no longer existed, as he had become, in pursuance of a decree of the Court, the purchaser in pre-emption, pre-emption having arisen on the sale of the equity of redemption. Jai Kishn is the defendant. On the 20th of May 1887, he got his decree in pre-emption in the Court of the Subordinate Judge subject to his paying the pre-emptive price within one month from the date of the decree. He appealed to the District Judge. The District Judge in appeal varied the decree so far as the price was concerned and fixed one month from the date of his decree for payment. The District Judge did not go on to declare that if the money and costs were not paid within the month, the suit should stand dismissed with costs, and therefore technically his [530] decree was not in complete accordance with s. 214 of the Code of Civil Procedure ; but it is quite clear from that decree that Jai Kishn's pre-emptive right could only be enforced under the decree if he made the payment within the month, and that if he failed to make the payment within the month the

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* First Appeal, No. 32 of 1892, from an order of M. S. Howell, Esq., District Judge of Shahjahanpur, dated the 7th December, 1891.

(1) 14 A. 154=12 A.W.N. (1892) 13. (2) 13 A. 376.

(3) 12 A.W.N. (1892) 40.

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decree which he had obtained was useless to him, as his right was decreed to be dependant on the payment within the month. Jai Kishn appealed to this Court, and this Court dismissed his appeal and confirmed the decree of the District Judge. When this Court made its decree it did not extend the time for payment of the pre-emptive price. Most probably the Court was not asked to do so. The pre-emptive price was not paid into Court until long after the expiration of the month limited by the decree of the District Judge. Now in this suit Jai Kishn, the defendant, is relying on that decree in his pre-emption suit. The first Court in this suit accepting his contention dismissed the suit. The second Court set aside the decree and passed an order of remand under s. 562 of the Code of Civil Procedure. Jai Kishn has brought this appeal from that order of remand. Mr. *Madho Prasad* has contended that, as the decree of the District Judge in the pre-emption suit, although it fixed one month from the date of the decree for payment of the money and costs, did not declare that if the money and costs were not paid within the month the suit should stand dismissed, the defendant had three years limitation from the date of that decree or from the date of the decree in appeal in this Court to pay in the money. He relied on the case of *Bandhu Bhagat* v. *Shah Muhammad Taqi* (1) in which it was held that where a decree under s. 92 of the Transfer of Property Act did not declare what was to take place if the redemption money was not paid within the period fixed by the decree the mortgagor had three years limitation for the execution of his decree, notwithstanding that he had not paid the money within the time fixed by the decree. Any judgment of the Judge who decided that case is entitled to careful consideration and great weight, but it appears to us that s. 92 of the Transfer of Property Act fixes the outside period of limitation within which a Court may fix a day for the payment of the [531] money, and that outside limit is 6 months and not 3 years. The section also enacts what the decree shall be. Section 93 shows what may take place according to law if the money is paid or is not paid within the period limited by the decree under s. 92. When a decree under the Transfer of Property Act fixes a time within 6 months for the payment of the money, we fail to see how a plaintiff, unless he could get extension of the time, could have a right to make the payment after the time limited had expired. In the case of *Kodai Singh* v. *Jaisri Singh* (2) three of the Judges concurred in the decision of Mr. Justice Straight, which was not inconsistent with the view which we hold in this case, and two of those three Judges expressly protected themselves from being understood as expressing any opinion on the cases referred to by Mr. Justice Mahmood in his judgment. In our opinion Jai Kishn, not having made the payment within the time limited by the decree, lost the benefits of that pre-emption decree and cannot protect himself under it. The decree of the Judge of Shahjahanpur was right. We dismiss this appeal with costs.

Appeal dismissed.

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(1) 12 A.W.N. (1892) 40. (2) 13 A. 376.

1892 JULY 22.

APPELLATE CIVIL.

14 A. 531 = 12 A.W.N. (1892) 154.

14 A. 531 = 12 A.W.N. (1892) 154.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

FATIMA BIBI (*Plaintiff*) v. ABDUL MAJID (*Defendant*).*
[22nd July, 1892.]

Act X of 1877, ss. 45 *and* 212, 244, *clause* (a)—*Suit for recovery of immoveable property and for mesne profits—Separate trials of the two claims—Transfer of suit by order of High Court, duty of Court to which the transfer is made.*

When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the Districh Judge for trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge.

In a suit on title in which the recovery of immoveable property and *mesne* profits are claimed the Court may, under s. 45 of the Code of Civil Procedure, order separate trials in respect of the claim for the recovery of the immoveable property and in respect of the claim for *mesne* profits.

Where under s. 212 of the Code of Civil Procedure a Court in such suit passes a decree for the property and directs an inquiry into the amount of mesne profits that [532] direction as to the inquiry into the amount of *mesne* profits need not necessarily be contained in the decree. *Puran Chand* v. *Roy Radha Kishen* (1) referred to.

[R., 26 A. 623 = A.W.N. (1904) 146.]

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *T. Conlan, Amir-ud-din, A. Strachey, Abdul Raoof* and Babu *Jogindro Nath Chaudhri*, for the appellant.

The Hon'ble Mr. *Spankie*, Mr. *D. Banerji*, Munshi *Jwala Prasad* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—In order to understand the question which we have got to deal with here it is necessary shortly to refer to the proceedings in the suit. The suit was brought by a Muhammadan lady against her nephew for a declaration of title to, and for possession of, certain shares in immoveable property. The plaintiff also claimed *mesne* profits for the years 1283, 1284 and 1285 Fasli. It would appear that the question as to her title to be awarded *mesne* profits in case her title to the shares was established was not disputed. The defendant, in fact, paid into Court some Rs. 15,000 in respect of the claim for *mesne* profits. It would also appear that in order to ascertain what the *mesne* profits were for the years in question to which the plaintiff would be entitled a troublesome and prolonged inquiry would be necessary. We should say that the plaintiff's claim for *mesne* profits amounted to some 99,000 odd rupees. The suit was instituted in the Court of the Subordinate Judge of Jaunpur on the 5th of May, 1879, and on the 3rd of October 1879 the Subordinate Judge passed an order that the case should be brought forward for determination of the claim to the property, and that it be separately brought forward for inquiry into and determination of the claim for *mesne* profits. That order undoubtedly meant that there should be, so to speak, two separate inquiries and determinations in the same suit, *viz.*, that the question of title to the property should be first determined and that after that was determined the question of *mesne* profits should be disposed of. Previously to that order, namely, on the 26th of June 1879, the Subordinate

* First Appeal, No. 218 of 1891, from a decree of Babu Nil Madhab Rai, Subordinate Judge of Jaunpur, dated the 2nd June, 1890.

(1) 19 C. 132.

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APPELLATE CIVIL.

14 A. 531 = 12 A.W.N. (1892) 154.

Judge had fixed nine issues for determination in the [533] suit. The first seven issues did not relate to the question of *mesne* profits, but related to the question of title to the property and the kind of possession, if any, to which the plaintiff was entitled. The eighth issue related to the amount of *mesne* profits; the ninth issue was as to costs. On the 18th of June 1880 the Subordinate Judge not having gone into question of *mesne* profits made a decree as to title and possession. The decree itself was silent as to the question of *mesne* profits, but the earlier part of the judgment on which the decree was based shows why the question of *mesne* profits had been allowed to stand over, and although that judgment deals with the other issues, it says, as to the eighth and ninth issues:—"The last two issues cannot now be decided and must be left to my successor to decide." There can be, consequently, no suggestion that the question of *mesne* profits had been tried or determined, or that it can be inferred from the decree being silent as to then that the plaintiff's claim to *mesne* profits had been rejected by the Subordinate Judge. The defendant appealed to this Court from that decree, and this Court on the 6th of January, 1882, dismissed that appeal. In the judgment dismissing the appeal the learned Judges, in referring to *mesne* profits, said:—"As to the *mesne* profits, interest thereon and costs relating thereto, we have for the present nothing to do." From that decree in this Court the defendant appealed to Her Majesty in Council, and his appeal was on the 27th June, 1885, dismissed. On the 25th of February 1882, the then Subordinate Judge of Jaunpur framed and fixed certain issues relating to the question of *mesne* profits. On the 15th of March 1882, the defendant applied to the Subordinate Judge to have further issues fixed, and on the 21st of March 1882, the Subordinate Judge made an order fixing certain additional issues. For reasons which may or may not have been good the trial of the question of *mesne* profits was removed from the Court of the Subordinate Judge to the Court of the District Judge. Then, after the then Subordinate Judge had been replaced by his successor, the trial as to *mesne* profits was sent back to the Court of the Subordinate Judge. It was then ultimately sent back to the Court of the District Judge. The last-mentioned order was [534] made on the 3rd of February 1885. On the 24th of February 1886, the then District Judge of Jaunpur, having absolutely no jurisdiction to transfer the case from the Court, passed an order transferring it to the Court of the Subordinate Judge. The case was then under the orders of this Court, which was the only Court having jurisdiction to make an order of transfer in the case, in the Court of the District Judge, and it was the duty of the District Judge to obey the law and the orders of this Court, and himself to dispose of the case which had been transferred by this Court to his. Up to that time there had been endless delays. The plaintiff had been anxious to get her *mesne* profits determined. There appears to have been an equal anxiety on the part of the defendant to hinder and delay the determination of the question of *mesne* profits. The file and record in the case under the order of the District Judge of the 24th of February 1886, went back to the Court of the Subordinate Judge of Jaunpur, and the then incumbent of that office on the 2nd of June 1890, having heard apparently arguments at some length from learned counsel, held in his judgment of that date that the order of the District Judge was *ultra vires* that the Court of the Subordinate Judge had no jurisdiction, and that, if it had, as the plaintiff declined to adopt the suggestion of the District Judge that it was necessary to bring the decree into accordance with the judgment, the only

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course for the Subordinate Judge was to strike the case off his file. He accordingly passed a decree or order striking the case off the file and ordering one-quarter costs to be allowed to the defendant. That order is dated apparently the 17th of June 1890. That is an incorrect date. It should have borne the same date as the judgment. From that decree or order this appeal has been brought. That decree or order was at, any rate, a determination by the Subordinate Judge that the question as to *mesne* profits could not be decided in this Court, and, consequently, so far as his Court was concerned, it, subject to appeal, concluded that question. The plaintiff had from time to time made attempts, sometimes in the Court below and twice in this Court, to get the question of the *mesne* profits to which she was entitled determined. Notwithstanding orders of this Court, the question has still remained unde-[535] termined. The defendant apparently has succeeded, by raising difficulties and making applications, in keeping the plaintiff out of what she is in justice entitled to, namely, a determination of the amount of *mesne* profits to which she is entitled, and consequently, if the plaintiff is entitled to a larger sum for *mesne* profits than the Rs. 15,000 paid into Court, the defendant has successfully kept her down to the present moment out of possession of such *mesne* profits. Such delays amount to an abuse of the process of the Civil Courts. It is the duty of Civil Courts to facilitate the determination of questions such as these here, and by their decrees and orders to put the successful litigant promptly in possession of what he proves himself to be entitled to. It would almost appear as if in the Courts at Jaunpur during the period when this lady was trying to obtain her rights a powerful and obstructive defendant was able to defeat justice. Some of the judicial officers who had to do with this case undoubtedly tried to do their duty, and no blame is to be attached to them. It is now contended on behalf of the plaintiff, appellant here, that the District Judge of Jaunpur had no jurisdiction to make the order of the 24th of February, 1886. That is also admitted by the able Counsel who represents the defendant. We are satisfied that the District Judge had no jurisdiction to make the order of transfer, and that what the Subordinate Judge should have done was to have returned the record to the Court of the District Judge and not to have passed a decree or order awarding costs in the case. It has been contended on behalf of the respondent that the plaintiff is now debarred of all right to have the question of *mesne* profits determined. That contention is based upon a suggested construction of s. 212 of the then Code of Civil Procedure. It is argued that the latter part of s. 212 applies only to enable the Court to include in its decree for possession in a direction that *mesne* profits should be ascertained, and that the decree itself not containing such direction, the question of *mesne* profits cannot now be raised, unless by bringing the decree into accordance with the judgment. The object of that contention, which was the contention before the District Judge of Jaunpur in 1886, is obvious. If the plaintiff did apply to bring the decree into accordance with the Judgment, the [536] defendant would raise the question as to whether an application for that purpose was not time-barred, and there would thus be another opportunity afforded of prolonging the period for which the plaintiff is to be deprived of her right to have the *mesne* profits determined. Now s. 212 does not say that the direction for an inquiry into the amount of *mesne* profits shall be entered in the decree; but Mr. *Spankie* contends that s. 212 is controlled and governed by s. 244 of the Code, and that cl. (*a*) of s. 244 indicates that the direction to ascertain the *mesne* profits under s. 212

must be entered in the decree. We cannot interpret s. 212 by s. 244. If we were to do so it would be necessary in all cases in which a direction for inquiry into *mesne* profits was made under s. 212 that the execution of the decree should remain in the Court which passed the decree, because it is the Court which under s. 212 directs an inquiry which has "to dispose of the same" on further orders, and consequently the powers, and very necessary powers, of transferring a decree for execution elsewhere contained in the Code would be inapplicable to a case coming within the latter portion of s. 212 if the contention were correct. In our opinion cl. (*a*) of s. 244 only applies to a case in which a decree deals specifically with *mesne* profits, *i.e.*, decrees the period for which *mesne* profits are to be allowed, and the property in respect of which they are to be allowed, and does not apply to the ordinary case where a decree is passed for the property and an inquiry as to the amount of *mesne* profits is directed under s. 212. The Subordinate Judge who made the decree obviously thought that he was acting under s. 212 of the then Code of Civil Procedure. In our opinion he had power to act as he did under s. 212 of the then Code, and we are also of opinion that he had power under s. 45 to try separately the questions of title and of *mesne* profits. We are rather inclined to the opinion that, although he thought he was acting under s. 212, his procedure came within s. 45 and was justified by that section. Mr. *Spankie* addressed to us a long argument on the meaning of the words "cause of action" in s. 45. It appears to us that the term "cause of action" has not been used in ss. 43, 44, 45, 46 and 47 of the then Code in precisely the same sense. S. 44 shows that the Legislature considered [537] that the cause of action for *mesne* profits of immoveable property was distinguishable from the cause of action for the recovery of immoveable property. A Full Bench of the High Court of Calcutta in the case of *Puran Chand* v. *Roy Radha Kishen* (1) held that a decree which was for the possession of immoveable property and which referred to the *mesne* profits as follows:—"The amount of *mesne* profits shall be ascertained in the execution department,"—was not a decree for those *mesne* profits, and that, so far as it referred to the *mesne* profits, it was merely an interlocutory order, and that the proceedings to determine the amount of the *mesne* profits were not in that case proceedings in execution of the decree, but were merely a continuation of the original suit and carried on as if a single suit were brought for *mesne* profits by itself. In that case the period for which the *mesne* profits were to be awarded was not ascertained or fixed by the decree. That judgment is consistent with our view as to the meaning of cl. (*a*) of s. 244 of the Code. It is clear that this lady is in justice entitled to have the *mesne* profits ascertained, in order that she may obtain payment of those *mesne* profits, if she succeeds in showing that they amount to more than the sum which has been paid into Court. We set aside the decree or order of the Subordinate Judge with full costs here and below to be paid by the defendant to the plaintiffs, and we direct the Subordinate Judge of Jaunpur to send the file from his Court to the Court of the District Judge, in which Court alone the case properly is, there to be disposed of by the District Judge in due course of law.

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NOTE.—The provisions of ss. 45, 212 and 244 of Act No. X of 1887 are identical with those of Ss. 45, 212 and 244 of the present Code of Civil Procedure (Act No. XIV of 1882).

Appeal decreed.

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(1) 19 C. 132.

I.L.R., 15 ALLAHABAD.

15 A. 1=12 A.W.N. (1892) 215.

[1] APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Blair.

JAMUN AND ANOTHER (*Defendant*) *v.* NAND LAL (*Plaintiff*).*
[7th June, 1892.]

Account stated—Acknowledgment of debt—Limitation—Act XV of 1877, *sch. ii, Art.* 64.

The striking of a balance in an account, the items of which are all on one side, does not amount to an "account stated" in the proper sense of the term.

Hence the signature of the debtor to such balance amounts to no more than an acknowledgment of a debt; and if the debt is barred at the time of signature will not give rise to any fresh period of limitation in favour of the creditor. *Nahanibai* v. *Nathu Bhau* (1), followed.

[F., 23 A. 502 (503)=21 A W.N. 150; 11 C.P.L.R. 65 (71); R., 3 O.C. 195 (201); Disappr., 68 P.R. 1904=123 P.L.R. 1904.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Mr. *J. E. Howard*, for the respondent.

JUDGMENT.

MAHMOOD and BLAIR, JJ.—The facts of this case are very simple. The plaintiff came into Court with a suit for recovery of a certain sum of money upon the allegation that a statement of account between the parties having taken place on the 16th of June 1889, the same was recorded and signed by the defendants.

The suit was resisted upon various grounds with which we are not concerned. But the ground taken by the defendants, and with which alone we are at present concerned, is that all the items to [2] which the alleged statement of account related were at the time the suit was instituted barred by limitation.

The Court of first instance found that all the items were barred by limitation on the 16th of June 1889, and that the transaction of that date could not be regarded as a statement of account within the meaning of art. 64 of the Indian Limitation Act (Act No. XV of 1877). The suit was filed on the 24th of April 1890.

Upon appeal the learned Subordinate Judge tried the only question whether or not the so-called statement of account could be so regarded with reference to art. 64 of the second schedule of the Limitation Act (Act No. XV of 1877), and he observed in dealing with the so-called statement of account that it did amount to such a statement of account. His words are—"The balance of Rs. 965-8-0 on page 75 is recoverable after accounts; the interest whereof is 2 annas per rupee every sixth month."

* First Appeal, No. 31 of 1891 from an order of Maulvi Muhammad Abdur Razzak, Subordinate Judge of Saharanpur, dated the 8th April 1891.

(1) 7 B. 414.

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Now the lower appellate Court regarded it as a sufficient statement of account to enable the plaintiff to reap the benefit of saving a fresh period of limitation from that date, and for this reason it decreed the appeal, and setting aside the decree of the Court of first instance remanded the case under s. 562 of the Code of Civil Procedure for trial upon the merits.

It is from the lower appellate Court's decree that this first appeal from order has been preferred under s. 588 of the Code of Civil Procedure, and the only point upon which Pandit *Sundar Lal*, holding the brief of Munshi *Ram Prasad*, has insisted is that art. 64 of the second schedule of the Limitation Act has no application to the present case because the entry of the 16th of June, 1889 cannot be called a statement of account within the meaning of that enactment.

It seems that this account, which ended with the entry of the 16th of June 1889, was not a mutual account between the parties, but on one side only. There was only the account of the money items advanced to the defendants, and not corresponding entries of items advanced by the defendants.

[3] In our opinion the interpretation of the meaning of 'statement of account' given by Mr. Justice West in *Nahanibai* v. *Nathu Bhau* (1), which was followed in *Tribhovan Gangaram* v. *Amina* (2), is correct, and we need add nothing to the explanation and reasons stated in the earlier of these two rulings. It comes to this that the plaintiff is suing for the recovery of items which the first Court held were barred by limitation and to which we find no objection was taken by way of appeal to the second Court. We must therefore take it as a matter of fact that these items were so barred.

In this view of the case we think that the Court of the first instance held rightly that the plaintiff's suit was barred by limitation. We decree the appeal, and setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs in all the Courts.

Appeal decreed.

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15 A 3=12 A.W.N. (1892) 113.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

INDARJIT PRASAD AND OTHERS (*Plaintiffs*) *v.* RICHHA RAI (*Defendant*).*
[27th June. 1892.]

Civil Procedure Code, s. 13—Res judicata—*Finding in judgment in conflict with term of decree.*

The decree in a suit gave the plaintiff an unrestricted right to the property claimed by him, but in the judgment on which that decree was based it was stated, the finding apparently not being a finding on any material issue in the suit, that the defendants were entitled to certain rights in respect of the property decreed to the plaintiff. No application was made to bring the decree into conformity with the judgment, and the decree as it stood was affirmed on appeal. *Held* that the defendants, as plaintiffs in a subsequent suit between the same parties relating to the same property, could not plead the finding in their favour in the judgment as constituting *res judicata* in the face of the clear wording of the decree.

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* Second Appeal, No. 1235 of 1889, from a decree of Rai Kulwant Prasad, Subordinate Judge of Azamgarh, dated the 4th July 1889, confirming a decree of Maulvi Munir-ud-din Ahmad, Munsif of Muhammadabad, dated the 7th February 1889.

(1) 7 B. 414. (2) 9 B. 516.

1892 JUNE 27. —— APPELLATE CIVIL. —— 15 A. 3= 12 A.W.N. (1892) 113.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellant.

Babu *Bishnu Chandra Moitra*, for the respondent.

JUDGMENT.

[4] EDGE, C. J., and KNOX, J.—The only question in this second appeal is as to whether s. 13 of the Code of Civil Procedure applies In a former suit the defendant in this Court was plaintiff and the plaintiffs in this suit were defendants. In this suit the plaintiffs claim one-half of the value of the produce of certain trees and one-half value of the wood of such of these trees as are cut down. It was found by the lower appellate Court that they had not established their right to the half value. The plaintiffs, however, in this suit rely on s. 13 of the Code of Civil Procedure. Now in the former suit the plaintiff, defendant here, sued for proprietary possession of these trees and to establish his proprietary and exclusive right to these trees on the basis that the defendants, plaintiffs here, never had any title to the trees at all. In the former suit the Munsif gave the plaintiff, defendant here, an unlimited decree decreeing his claim, *i. e.*, the Munsif decreed the claim for possession and for title as prayed, but in his judgment the Munsif had stated that the then plaintiff's possession of the trees would be subject to the defendants' right to half the value of the produce and half the value of the timber. That case went to appeal and objections under s. 561 of the Code of Civil Procedure were filed in the lower appellate Court. The Munsif had not found any issue directly raising the question as to whether the then defendants were entitled to any part of the produce or any part of the timber of the trees, although he had found a general issue as to whether the then plaintiff was entitled to the trees. In the appeal in that suit, the then plaintiff, who was respondent, by his objection under s. 561 questioned the statement in the Munsif's judgment that the defendants in that suit were entitled to a moiety of the produce and a moiety of the timber. The result was that the appellate Court dismissed the appeal and disallowed the objections, affirming consequently the decree of the Munsif. Now the question arises :—how does s. 13 of the Code of Civil Procedure apply in such a case? On the one hand, the defendant here has a decree in the former suit confirmed in appeal entirely in his favour, showing, so far as a decree can, that he had exclusive right and title to the trees, for that was decreed to him. On the other hand, the plaintiffs [5] here have a passage in the judgment of the first Court in the former suit that they were entitled to half of the produce and half of the timber of the trees. Now if the decree was at variance with the judgment an application ought to have been made to bring the decree into accordance with the judgment. That decree as it stands is a decree unlimited as to the now defendant's possessory right and title, and it appears to us that when there is an apparent conflict between a decree which is specific and clear in its terms and a statement of fact in the judgment upon which that decree was based, which, if material, was inconsistent with the decree, we must pay attention to the decree as it stands in preference to the statement of facts. This case is quite distinct from the case of *Kali Krishna Tagore* v. *The Secretary of State for India in Council* (1). The decree in the former suit there was, that in that suit the plaintiff

(1) 15 I.A. 186.

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was not entitled to the relief sought. That was not a decree which, having regard to the judgment, finally and for ever settled the question of title as between the litigants; it was more like a decree to the effect that the plaintiff's then suit was premature. We have no doubt that in every case where the application of s. 13 is in question it is not only necessary to look at the decree but at the judgment. Many immaterial issues may be raised and fought out in a case which an examination of the record would prove to have been absolutely immaterial. In our opinion, s. 13 was never intended to bar the trial of a material issue in a suit, because the Judge in a previous suit where that question was absolutely immaterial had tried the question and given an opinion upon it. There are also cases in which the decree possibly alone could not be understood without an examination of the pleadings, of the issues and of the judgment, but in all these cases the decree is the final judicial determination of the suit, and in our opinion if a decree is specific and is at variance with a statement in the judgment on which it is founded, it is the decree to which we must pay attention and not to the statement in the judgment. The decree and not the statement in the judgment must be taken on matters which are material [6] to the final determination of the Court on the subject; otherwise you might have a man lawfully in possession under a decree declaring his title to possession and you might have his opponent still entitled by reason of a statement in the judgment on which that decree was passed to question the title of the man in possession. We consequently hold that, so far as s. 13 of the Code of Civil Procedure applies, the plaintiffs, and not the defendant here, are barred by the former suit. We dismiss this appeal with costs.

Appeal dismissed.

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15 A. 6=12 A.W.N. (1892) 114.

APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell and Mr. Justice Blair.

QUEEN-EMPRESS *v.* BANKHANDI.* [30th June, 1892.]

Practice—Sessions trial—Witness—Rejection by Court of Sessions of witnesses sent up by the committing Magistrate.

It is the duty of a Sessions Court to examine all the witnesses sent up by the committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up unless it has good reason to believe that such witness came into the Court-house with a predetermined intention of giving false evidence.

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

The Public Prosecutor (The Hon'ble Mr. *Spankie*), for the Crown.

The appellant was not represented.

JUDGMENT.

TYRRELL and BLAIR, JJ.—Bankhandi appeals against his conviction and sentence to death for murder. His case also comes before us for confirmation of sentence.

On the 11th February 1892, between 9 A.M. and noon, the appellant's wife was nearly decapitated with a hatchet, the property of and found in

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* Criminal Appeal No. 404 of 1892.

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the house of the appellant. It was covered with blood. The only question in the case is whether Bankhandi, appellant, in a fit of rage, because his wife quarrelled with him about money lost in gambling, murdered her with the axe or whether, as Bankhandi from the moment of the crime down to the end of his [7] trial asserted, the woman was killed by Pal Singh and Jhandu Singh, the brothers-in-law of the appellant, who, as he said, was shortly afterwards grievously wounded in the throat by Pal Singh. There is no evidence in support of Bankhandi's story, and the case for the prosecution is well established by the medical and other evidence. The story of Bankhandi, both as to the death of his wife and as to the infliction of a wound or wounds on his own throat, is negatived almost conclusively by the medical evidence and largely by the statements of the villagers as to the events of the morning in question. We noticed with dissatisfaction that at the suggestion of the Court the prosecution withdrew, as witnesses against the prisoner, Ganga, his brother, Kallu, his father, and Musammat Prano, his mother. Two of these were mentioned in his first statement by the appellant as eye-witnesses of the attack upon himself, and it was equally objectionable from the point of view of the prosecution or of the defence that these witnesses who had been sent up by the committing Magistrate in his calendar should not have been examined. Courts are not competent when trying persons accused of criminal offences to pick and choose among the witnesses sent up by the committing Magistrate. It is their duty to examine all the witnesses, unless the Court has good and sufficient cause on the representation of the Government Pleader or other person charged with the prosecution to believe that the witness came into the Court-house with a predetermined intention of giving false evidence.

The assessors agreed with the learned Judge in finding the accused guilty of murder, the only conclusion which could rationally have been formed on the evidence by persons of ordinary honesty and intelligence. We dismiss the appeal and, affirming the conviction and sentence, we direct that the sentence be carried into effect.

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15 A. 8=12 A.W.N. (1892) 140.

[8] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

ZABADA JAN (*Defendant*) v. MUHAMMAD TAIAB AND ANOTHER (*Plaintiffs*).* [1st July, 1892.]

Civil Procedure Code, ss, 496, 588, cl. (24)—Order refusing to set aside an injunction—Appeal.

An appeal will lie under s. 588, cl. (24), of the Code of Civil Procedure from an order under s. 496 of the Code refusing to set aside an injunction. *Nabbi Buksh* v. *Chasni* (1), referred to.

IN a suit for partition of certain immoveable property between the parties to this appeal in the Court of a Subordinate Judge an injunction was obtained by the plaintiffs against the defendant to restrain the defendant from building on a portion of the land in suit which was then in her

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* First Appeal No. 23 of 1892, from an order of Babu Bepin Behari Mukerji, Subordinate Judge of Mainpuri, dated the 6th January, 1892.

(1) 6 C. 168.

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possession. The injunction was served on the defendant on the 9th of December 1891, but she neither applied to get it set aside, nor, apparently, until the intervention of an amin of the Court, did she desist from building a house which was at the time in process of construction. Subsequently on the 6th of January 1892, the defendant applied under s. 497 of the Code of Civil Procedure to the Court issuing the injunction to have the same set aside, but the Court on the same day refused to set aside the injunction. The defendant then appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—This is an appeal from an order under s. 496 of the Code of Civil Procedure refusing to discharge an injunction. For the respondent it is objected that no appeal lies, it being contended that the only orders under s. 496 which are appealable under s. 588, cl. (24), are orders discharging, varying, or setting aside an injunction. Clause (24) in our opinion gives an appeal where the order is an order discharging, varying, or setting aside an injunction, or an order refusing to discharge, vary or set [9] aside an injunction. An examination of the other clauses of s. 588 shows that when it was intended to limit an appeal to an affirmative order or to a negative order that was expressly done. Clauses (20) and (25) may be cited as examples. Further, the decision in the case of *Nubbi Buksh* v. *Chasni* (1), although not a decision on cl. (24), decides the principle which we think applies here. We hold that the order in question was appealable under s. 588, cl. (24), of the Code of Civil Procedure. As to the merits it is said on behalf of the appellants that they had pulled down the house before the order for the injunction was made. The injunction restrains them from pulling down the house or building, and it is in our opinion eminently a case in which it was proper that such an order of injunction should be made as the suit was one for partition. We dismiss the appeal with costs.

Appeal dismissed.

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15 A. 9=12 A.W.N. (1892) 115.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

NIAZ GUL KHAN (*Defendant*) *v.* DURGA PRASAD AND ANOTHER (*Plaintiffs*).* [2nd July, 1892.]

Civil Procedure Code, ss. 111 *and* 216—*Set-off—Cross claims of the nature of set-off.*

The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not of the quality contracted for. *Held* that in such a suit, the defendant might claim by way of set-off compensation for the loss which he had

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* Second Appeal No. 431 of 1889, from a decree of T.R. Redferns Esq., District Judge of Bareilly, dated the 24th December 1888, confirming a decree of Maulvi Muhammad Abdul Qaiyum, Subordinate Judge of Bareilly, dated the 20th June, 1888.

(1) 6 C. 168.

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15 A. 9 = 12 A.W.N. (1892) 115.

incurred in the re-sale of that portion of the timber, the subject of the contract, of which the plaintiffs had failed to take delivery.

S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off.

Stephen Clark v. *Ruthnavaloo Chetti* (1), *T. Kistnasamy Pillay* v *The Municipal Commissioners for the Town of Madras* (2), *Kishorchand Champalal* v. *Ma-*[10]*dhowji Visram* (3), *Pragi Lal* v. *Maxwell* (4), *Bhagbat Panda* v. *Bamdeb Panda* (5), *Chisholm* v. *Gopal Chunder Surma* (6), referred to.

[F., 27 A. 145 (147) = 1 A.L.J. 529 = A.W.N. (1904) 193; R., 85 P.R. 1908 = 130 P.L.R. 1908 = 80 P.W.R. 1908; Expl., 19 A.W.N. 143.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *D. Banerji* and Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—The plaintiffs contracted to buy from the defendant and to take delivery of certain timber. They paid a large portion of the contract price beforehand and took delivery of about two-thirds of the timber, and then wrongfully, as it is found, refused to take delivery of the balance and brought this suit to recover from the defendant the amount advanced by them in excess of the price of the timber of which they had taken delivery, and also for damages, alleging that the timber which was actually delivered was not up to contract. The defendant pleaded a set-off, alleging that there had been a fall in the market price of timber and that he had been put to considerable expense owing to the plaintiff's breach of contract and he denied the plaintiff's right to maintain the suit against him. It has been found that the timber which was delivered was according to contract and that the only breach of contract was the breach on the part of the plaintiffs in declining to further perform the contract and to take delivery of the balance of the timber. The defendant's set-off was disallowed, it having been regarded as sounding in damages. There is a series of decisions showing that in the view of the Courts in India a right to set-off may arise under circumstances under which the right would not arise in England and under circumstances under which a right to set-off under s.111 of the Code of Civil Procedure, 1882, would not arise. Some of those decisions are—*Stephen Clark* v. *Ruthnavaloo Chetti* (1), *T. Kistnasamy Pillay* v. *The Municipal Commissioners for the Town of Madras* (2), *Kishorchand Champalal* v. *Madhowji Vis-*[11]*ram* (3), *Pragi Lal* v. *Maxwell* (4), *Bhagbat Panda* v. *Bamdeb Panda* (5), and *G. Chisholm* v. *Gopal Chunder Surma* (6). Section 216 of the Code of Civil Procedure, as amended by Act No. VII of 1888, recognises that a right of set-off which would not be admissible under s. 111 of that Code might be otherwise admissible and that a defendant pleading it might be entitled to a decree on it as against the plaintiff. Under these circumstances the Court should have gone into the question of the defendant's set-off, as it arose out of the same transaction; but inasmuch as it appears to us that if the question of set-off were gone into the parties would be put to the expense of a remand with the result that the defendant would succeed in the suit, and inasmuch as Pandit *Sundar Lal* is willing to forego any claim in excess on the set-off, we have allowed him to object

(1) 2 M.H.C.R. 296. (2) 4 M.H.C.R. 120. (3) 4 B. 407.
(4) 7 A. 284. (5) 11 C. 557. (6) 16 C. 711.

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to the maintenance of the suit at all in this appeal although that point was not specifically raised. In our opinion upon the findings below the plaintiff's suit should have been dismissed. We allow this appeal, and dismiss the plaintiff's suit with costs. Pandit *Sundar Lal* on behalf of his client abandoning the set-off, the set-off is dismissed, but without costs. The defendant will have the costs of the suit in all Courts.

Appeal dismissed.

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15 A. 11 = 12 A.W.N. (1892) 141.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* BHAGWANTIA.* [9th July, 1892.]

Act XLV of 1860, ss. 191 *and* 193—*Criminal Procedure Code*, s. 161—*False evidence —Statement made to a police officer investigating a case—Mode of recording such statements.*

It is not necessary that the statement of a witness recorded under s. 161 of the Code of Criminal Procedure, 1882, should be elicited and recorded in the form of alternate question and answer. It is sufficient if such statement is substantially an answer to one or more questions addressed to the witness before the statement is made.

The provisions of s. 191 and 193 of the Indian Penal Code do apply to the case of false statements made under s. 161 of the Code of Criminal Procedure, 1882.

[12] It is not illegal, though unnecessary, for a police officer recording a statement under s. 161 of the Code of Criminal Procedure, 1882, to obtain the signatures of persons present at the time to authenticate his record of such statement.

THE facts of this case sufficiently appear from the judgment of the Court.

The Public Prosecutor (The Hon'ble Mr. *Spankie*), for the Crown.

The respondent was not represented.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—In this case an appeal has, by order of the Local Government, been presented under s. 417 of the Code of Criminal Procedure against an order in appeal of the Sessions Judge of Meerut acquitting Musammat Bhagwantia of the offence of which she had been convicted under s. 193 of the Indian Penal Code. She was tried on an alternative charge of perjury. She had made a statement to a Police Officer holding an investigation, and she was bound under s. 161 of the Code of Criminal Procedure, 1882, to answer truly all the questions relating to the case put to her by such officer. Section 193 of the Indian Penal Code applies to answers so given; because she was, within the meaning of s. 191, legally bound by an express provision of law to speak the truth to the officer. The questions were not question tending to criminate her. When examined before the Magistrate her evidence was in contradiction of the answers given by her to the Police Officer. The question, or rather series of questions, under the head of " question, " which was put to her

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* Criminal Appeal No. 257 of 1892.

[N.B.—For a similar case see Criminal Appeal No. 256 of 1892 decided by this High Court on 8th July 1892—ED.]

by the Police Officer was as follows —"What do you know in the case? Where were you on Saturday night? What did you see? Was there any one else in the house?" That series of questions or one question combining several led to her answer, the material part of which is in effect that she saw four Chamars, whom she named, strangling Musammat Sanwalia on a charpoy outside Musammat Sanwalia's door and saw them carrying her body off afterwards. When examined before the Magistrate she stated that on the Sunday morning, which was the day after that to which her previous statement referred, she saw Musammat Sanwalia going away with one Dharma, a sweeper. [13] It is perfectly obvious that these two statements are not consistent. One is distructive of the other. They cannot both be true, as she must have known. The offence charged under s. 193 of the Indian Penal Code was consequently made out, if there was satisfactory evidence that she made the first statement to the Police Officer. On that point there was the Police Officer himself, who produced his diary in which he had recorded the statement at the time. There was also the evidence of three lambardars and the son of another lambardar, *i.e.*, of four independent persons who were present when Bhagwantia was questioned by the Police Officer. All these persons spoke to the statement which was recorded and swore that that was the statement which the woman had made. Three of them further remembered, apparently without looking at the statement, that Bhagwantia had mentioned the four men referred to in the statement as the persons whom she saw strangling Musammat Sanwalia. The Sessions Judge considers that evidence not satisfactory. We confess we do not see how, on occasions such as this, a Police Officer can obtain more satisfactory evidence than was obtained here. The woman was examined in the presence of several lambardars, who apparently were respectable people, and three of those lambardars and the son of another were called to prove that she made the statement. In our opinion it is proved beyond all reasonable doubt that she made the alleged statement to the Police Officer. Sections 164 and 364 do not apply to an examination under s. 161 of the Code of Criminal Procedure, 1882. If the Police Officer were at the completion of each sentence by the person whom he was examining to stop that person and ask a fresh question, it is probable that the whole turth would not come out. The test as to whether a case comes within paragraph 2 of s. 161 of the Code of Criminal Procedure, 1882, is—was a question put to the person by the Police Officer, and was what was stated by that person stated in answer to that question? In our opinion this case fulfils that test. The Sessions Judge was of opinion that the Police Officer should have got the lambardars and other persons present to sign the record of Bhagwantia's statement as witnesses. There would be nothing illegal in Police Officers obtaining the signatures [14] of witnesses to a statement, but there is nothing to compel a witness to sign, and we very much doubt whether any of the by-standers would drag themselves into a case by signing a statement made under s. 161 of the Code of Criminal Procedure, 1882. We set aside the order of acquittal of the Sessions Judge, and we convict Musammat Bhagwantia of the offence charged under s. 193 of the Indian Penal Code, and, taking into account the fact that she has already been imprisoned for over two months, we sentence her to be rigorously imprisoned for fourteen days for the offence of which we have convicted her.

1892 JULY 9.

APPELLATE CRIMINAL.

15 A. 11 = 12 A.W.N. (1892) 141.

1892
JULY 12.

APPEL-
LATE
CIVIL.

15 A. 14=
12 A.W.N.
(1892) 152.

15 A. 14= 12 A.W.N. (1892) 152.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IN THE MATTER OF PETITION OF SITARAM KESHO AND OTHERS.*
[12th July, 1892.]

Act I of 1868, s. 3, *cl.* (1)—*Act X of* 1877, s. 599—*Civil Procedure Code*, s. 599—*Act VII of* 1888, s. 57—*Act XV of* 1877, *ss.* 2 *and* 5; *sch.* ii, *arts,* 177 *and* 178—*Application for leave to appeal to Her Majesty in Council—Limitation.*

Section 599 of Act No. XIV of 1882 was not inconsistent with article 177 of the second schedule of Act No. XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to article 177. The limitation therefore for an application for leave to appeal to Her Majesty in Council in six months from the date of the decree to appeal from which leave is sought.

The provisions of the second paragraph of s. 5 of Act No. XV of 1877 do not extend to applications for leave to appeal to Her Majesty in Council.

Fazal-un-nissa Begam v. *Mulo* (1), *Burjore* and *Bhawani Pershad* v. *Bhagana* (2), *Lakshmi* v. *Ananta Shanbaga* (3), and *Ganga Gir* v. *Balwant Gir* (4) referred to.

[F., 28 A. 391=3 A.L.J. 165=A.W.N. (1906) 55; R., 3 C.W.N. 24; Disappr., 18 M. 484 (486).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. H. S. Reid*, for the applicants.

The Hon'ble Mr. *Spankie*, for the opposite party.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—This application under ss. 598 and 600 of the Code of Civil Procedure was presented to this Court on the 19th of February 1891 by the plaintiffs in the suit, [15] who were the respondents to the appeal in this Court, in which the decree from which they desire to appeal to Her Majesty in Council was made. The decree is dated the 30th of July 1890. The application was presented twenty days after the expiration of the period of limitation prescribed, if art. 177 of the second schedule of the Indian Limitation Act, 1877, applies. If art. 178, and not art. 177, applies the application was presented within time.

Mr. *Spankie*, who appeared for the opposite party, who had notice to show cause why a certificate should not be granted, objected on the ground that the application was when presented barred by limitation. It is not disputed that if the application was not barred by limitation, it is one which should be granted. Mr. *Reid* for the applicants contended that art. 177 of the second schedule of the Indian Limitation Act, 1877 (Act No. XV of 1877), had been repealed by the Code of Civil Procedure (Act No. XIV of 1882). He also relied upon an affidavit filed with the application as showing that the applicants were under the impression that the time necessary for obtaining a copy of the judgment of this Court would be excluded in computing the time prescribed for the presentation of such an application, and further formally contended that the second paragraph of s. 5 of Act No. XV of 1877 may be applied by us in case art. 177 has

*Application No. 4 of 1891 for leave to appeal to Her Majesty in Council.

(1) 6 A. 250.
(2) 11 I.A. 7=10 C. 557.
(3) 2 M. 230.
(4) 1 A.W.N. (1881) 130.

1892 JULY 12. — APPELLATE CIVIL. — 15 A. 14 = 12 A.W.N. (1892) 152.

not been repealed, although he admitted that the construction placed by the Courts in India upon that paragraph was opposed to his contention. In support of his contention that art. 177 has been repealed Mr. *Reid* relied upon a passage in the judgment of Sir Robert Stuart, C. J., in *Fazal-un-nissa Begam* v. *Mulo* (1), upon s. 599 of Act No. XIV of 1882, and upon s. 599 of Act No. X of 1877 the first paragraph of s. 2 of, and the first schedule to, Act No. XV of 1877, as showing that the Legislature considered that art. 177 of the second schedule of Act No. XV of 1877 was inconsistent with s. 599 of Act No. XIV of 1882 and by s. 599 intended to repeal art. 177. In support of his contention that art. 178 applies, Mr. *Reid* further relied upon s. 57 of the Civil Procedure Code Amendment Act, 1888 (Act No. [16] VII of 1888) by which s. 599 of Act No. XIV of 1882 was repealed, and upon clause (1) of s. 3 of the General Clauses Act, 1868 (Act No. I of 1868). Although the course of legislation on this subject is confusing and can only be explained by an oversight on the part of the Legislature when Act No. XIV of 1882 was passed, we would not have thought that there could be any reasonable doubt that s. 599 of Act No. XIV of 1882 did not effect a repeal of art. 177 of the second schedule of Act No. XV of 1877, if it had not been for the expressed opinion of Sir Robert Stuart, C. J., upon which Mr. *Reid* relied. That opinion was merely an *obiter dictum* of that learned Chief Justice, and consequently is not binding upon us. The question before the Full Bench in *Fazal-un-nissa Begam* v. *Mulo* (1) related to the constructions of s. 602 of Act No. XIV of 1882, and was decided in accordance with the interpretation put upon the corresponding section, s. 602 of Act No. X of 1877, by their Lordships of the Privy Council in *Burjore* and *Bhawani Pershad* v. *Bhagana* (2) in which they held that s. 602 of Act No. X of 1877 which enacted that if the certificate be granted, the applicant shall within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, (*a*) give security, &c.," was directory only and not per-emptory. The Full Bench case and that decision of their Lordships of the Privy Council which was referred to by Sir Robert Stuart, do not, as it appears to us, bear upon the questions before us. It is also to be noticed that the other Judges, Straight, Oldfield, Brodhurst and Tyrrell, JJ., who took part in that Full Bench case confined themselves to holding that the question before them was concluded by the Privy Council ruling.

If s. 599 of Act No. XIV of 1882 was inconsistent with art. 177 of the second schedule of the Indian Limitation Act, 1877, and the sections of that Act which must be read in conjunction with art. 177, Mr. *Reid's* contention that art. 178 prescribes the period of limitation applicable in this case would in our opinion be sound.

[17] Section 599 of Act No. X of 1877 and s. 599 of Act No. XIV of 1882 were in precisely the same terms. They were as follows:—

"S. 599. Such application must ordinarily be made within six months from the date of such decree.

But if that period expires when the Court is closed, the application may be made on the day the Court re-opens."

The second paragraph of s. 599 was to the same effect, so far as an application of the kind is concerned, as the first paragraph of s. 5 of Act No. XV of 1877.

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(1) 6 A. 250. (2) 11 I.A. 7 = 10 C. 557.

1892 JULY 12. — APPELLATE CIVIL. — 15 A. 14 = 12 A.W.N. (1892) 152.

Article 177 of the second schedule of Act No. XV of 1877 prescribes six months from the date of the decree appealed against as the period of limitation, but art. 177 must be read as subject to the provisions contained in certain sections in the Act, as for instance s. 7, which extends in cases of legal disability the period of limitation as prescribed in the articles contained in the second schedule. Consequently, it would be correct to say that an application for the admission of an appeal to Her Majesty in Council must, in order to be within the limitation prescribed by Act No. XV of 1877, ordinarily be made within six months from the date of the decree appealed against, which is what s. 599 of Act No. XIV of 1882 said.

We see no inconsistency between s. 599 of Act No. XIV of 1882 and art. 177 of the second schedule of Act No. XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to art. 177.

It is true that s. 599 of Act No. X of 1877 was repealed by s. 2 and the first schedule of Act No. XV of 1877, that s. 599 of Act No. XIV of 1882 was in precisely the same terms as s. 599 of Act No. X of 1877, and that by s. 57 of Act No. VII of 1888, s. 599 of Act No. XIV of 1882 was repealed; but we do not infer from that peculiar course of legislation that the Legislature considered that art. 177 of the second schedule of Act No. XV of 1877 was inconsistent with s. 599 of Act No. XIV of 1882, or intended to repeal art. 177, or to limit its application, or to extend the period of limita-[18]tion for the presenting of an application for the admission of an appeal to Her Majesty in Council to three years from the date of the decree appealed against. We are consequently of opinion that art. 177 of the second schedule of Act No. XV of 1877 has not been repealed or its application limited.

Now as to the questions raised by the affidavit which was filed with the application. In that affidavit it was stated as follows :—

"1.—That your petitioners were under the impression that the time necessary for obtaining a copy of the judgment of this Honourable Court would be execluded from the period prescribed for this application.

"2.—That when your petitioners learned their mistake the period prescribed for this application had expired.

"3.—That your petitioners had been advised to make this application in the hope that under the circumstances this Honourable Court will be pleased to grant them a certificate in spite of the lapse."

That was a misleading affidavit. It implied that the applicants had, as was the fact, applied for a copy of the judgment of this Court, and that the time necessary for obtaining such copy, if allowed to them in the computation of time for the purposes of limitation, would make their application under ss. 598 and 600 of the Code of the Civil Procedure within time, it having been presented otherwise twenty days beyond time. The fact is that the applicants having on the 1st of August 1890, applied for a copy of the judgment of this Court received the copy on the 13th of August 1890. Consequently if the applicants were allowed those thirteen days their application would still have been beyond time.

As we have said, Mr. *Reid* formally contended that we had power under the second paragraph of s. 5 of Act No. XV of 1877 to admit the appeal after the expiration of the prescribed period of limitation. That paragraph relates only to appeals and applications for review of judgment, and does not relate to applications for leave to appeal, as was held on an application for leave to appeal [19] as a pauper by the Madras

High Court in *Lakshmi* v. *Ananta Shanbaga* (1) and by this Court in *Ganga Gir* v. *Balwant Gir* (2) and in subsequent cases. Further, art. 177 is in the third division of the second schedule to Act No. XV of 1877. The third division contains the articles which relate to applications.

The articles which relate to appeals, as distinguished from applications for leave to appeal, are contained in the second division of the second schedule and none of those articles apply to appeals to Her Majesty in Council.

Further, even if the second paragraph of s. 5 of Act No. XV of 1877 applied to the application in question here, no sufficient cause has been shown for the applicants not having presented this application within the prescribed period of limitation. No copy of the judgment of this Court was required as a preliminary to the presentation of this application, and, if it had been, the time actually occupied in obtaining the copy was thirteen and not twenty days.

We have no power to extend the period of limitation in this case. We must apply art. 177 of the second schedule of Act No. XV of 1877, and doing so we dismiss this application with costs.

Application rejected.

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15 A. 19=12 A.W.N. (1892) 158.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* NATHU AND OTHERS.*

[27th July, 1892.]

Act XLV of 1860, *s.* 148—"*Deadly weapon*"—*Lathi.*

The question whether or not a *lathi* is a " deadly weapon " within the meaning of s. 148 of the Indian Penal Code is a question of fact to be determined on the special circumstances of each case as it arises.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. C. Dillon* and Mr. *Roshan Lal*, for the appellants.

[20] The Public Prosecutor (The Hon'ble Mr. *Spankie*), for the Crown.

JUDGMENT.

EDGE, C. J., and TYRRELL, J.—Fatta, Taga Brahmin, aged 70 years, and Nathu, Taga Brahmin, aged 30 years, are the appellants. They have been tried and convicted of murder and abetment of murder. They have been sentenced to transportation for life; Nathu having been found guilty of murder and Fatta of abetment of that offence. Nothing has been said to us against the propriety of Nathu's conviction, and it is plain that he has been justly convicted. Full of enmity and malice of long standing he seized the chance afforded by a petty quarrel to make a murderous attack on an inoffensive man, whom he killed by at least three violent blows on the head. The sole provocation was that the unfortunate Idu was moving to the protection of Kuribhisti, whom Nathu and his party had just assaulted. On behalf of Fatta, it was contended that

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* Criminal Appeal No. 248 of 1892.

(1) 2 M. 230.

(2) 1 A.W.N. (1881) 130.

1892 JULY 27. — APPELLATE CRIMINAL. — 15 A. 19= 12 A.W.N. (1892) 158.

while his presence during the attack on Kuri and the rescue from his custody of Nathu's mare is admitted, it is not satisfactorily proved that he abetted the murder of Idu. It is proved, and it is hardly disputed, that Fatta accompanied Nathu and the other Tagas with the object common to them all of assaulting Kuri and taking Fatta's mare from him. Referring to the charge that the Tagas were provided with "deadly weapons" the Judges remarked that "a common *lathi* is not a deadly weapon within the meaning of section 148 of the Indian Penal Code." "Deadly weapons," he held, are swords, pistols, guns, spears and so forth." This is not a sound proposition.

It is a question of fact to be decided in each case whether the *lathi* used or the *lathi* with which the injury is caused, was or was not in itself a deadly weapon. One *lathi* may by reason of its weight, length, or other peculiarities be a deadly weapon : another may not. No general rule can be laid down on the subject. In the case before us it is presumable that the *lathi* which produced such deadly injuries in three blows on Idu was a deadly weapon, or was used with extreme violence. It is not said by the accused who admit being present with their *lathis* that it was not. In support of Fatta's appeal it was argued :—

[21] (1) That he was not accused in the first report at the Thana and that the report was not promptly made.

(2) That it is not proved that he cried out "*Thaur mardo.*"

(3) That he did not use any words in reference to the assault on Idu.

As to the first point we find that in the first report made by Kuri at four in the afternoon of the day of the crime, he named Fatta in connection with the cause of the assault on himself. We would hardly expect him to report, or the Police to record, the facts which might constitute the technical offence of abetment respecting Fatta. Fatta's report an hour later showed that he was present at the assault, and this has been practically admitted throughout. The first report therefore is not false or defective touching the appellant Fatta. The delay in reporting is explained. On the second point, the Judge found that "it is sworn consistently that, though Fatta did not himself use any violence in the riot, he loudly incited to the beating of Idu (deceased), the words being "*Thaur mardo,*" which the Judge interpreted to mean "kill him on the spot." The assessors thought the words meant, "beat him on the spot." But it makes little difference, as s. 111 of the Indian Penal Code would make Fatta responsible for the act of Nathu in either case. We believe that Fatta incited the slaying of some one present by the words he used—if he used them. On this point the evidence is not good or consistent. The complainant's witnesses have not only strong village animosity to the accused, but also personal spite of an aggravated character. The Judge animadverted on their manner in the witness-box, thus :—

I. Kuri—"infamous manner."

II. Jiwan—"even worse, the dry cough of the false witness between every two or three words."

III. Alyia— "not so bad."

IV. Jumna—"manner as Alyia."

V. Amir Baksh—" helplessly confused, never could name any one straight, always some one else."

[22] Of these witnesses Kuri swore that Fatta said :—"Beat Idu, I will see to the consequences." Jiwan swore that Fatta incited to the beating of Kuri; this witness would say the worst he could against

Fatta, for he was wounded by his party and he attributed his father's death to their malice. 1892 JULY 27.

Alyia was silent on this point, he apparently heard no inciting word from Fatta. APPELLATE CRIMINAL.

Jumna made Fatta cry—"*Thaur Maro,*" after Idu fell, when he and the other witnesses said the accused went on beating Idu, which the Judge disbelieved.

Amir Bakhsh deposed that "Fatta was there, but did not beat any one; he went away; he cried out to the men to beat." This is no doubt a case of grave suspicion against Fatta, but the evidence is not such as to afford a safe basis for conviction of abetment of the murder of Idu. We dismiss the appeal of Nathu. We allow in part the appeal of Fatta. We set aside the conviction and sentence of Fatta under ss. 302 and 114 of the Indian Penal Code, and we convict Fatta of the offence punishable under s. 147 of the Indian Penal Code, and we sentence Fatta to be imprisoned rigorously for two years. 15 A. 19 = 12 A.W.N. (1892) 158.

The appeals of Ram Prasad and Sarjit were not pressed and are dismissed.

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15 A. 22 = 12 A.W.N. (1892) 220.

APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS v. RAGHUNATH RAI AND OTHERS.*
[6th August, 1892.]

Act XLV of 1860, *ss.* 24, 147 *and* 391—*Dacoity—Riot—Dishonest intention a necessary ingredient of dacoity.*

Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Muhammadan, not for the purpose of causing "wrongful gain" to themselves or "wrongful loss" to the owner of the cattle, but for the purpose of preventing the killing of the cows:—

Held, that they could not properly be convicted of dacoity, but only of riot.

[Diss. 9 Cr. L.J. 389 (390) = 5 N.L.R. 17 (18); 1 Ind. Cas. 800 (801); D., 15 A. 299 (302).]

THE facts of this case sufficiently appear from the judgment of Tyrrell, J.

Mr. *A. H. S. Reid* and Mr. *C. C. Dillon*, for the appellants.

[23] The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

TYRRELL, J.—Mr. *Reid* on behalf of Raghunath Rai, who has been convicted of dacoity and sentenced to two years' rigorous imprisonment with a fine of Rs. 5-0-0, has pointed out that the Court below disbelieved all the evidence implicating Raghunath Rai in the offence for which he was tried, with the exception of the evidence of Karim-ud-din and Kutban. I have read the evidence of these two men. I have seldom heard a more unlikely, if not absurd, tale than Karim-ud-din's. He said before the Magistrate that he was badly assaulted with *lathis*, but finding himself unequal to take the cows from the so-called dacoits he returned to his house. In the Sessions Court he said that he fell

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* Criminal Appeals Nos. 458, 504 and 526 of 1892.

1892 AUG. 6. — APPELLATE CRIMINAL. — 15 A. 22= 12 A.W.N. (1892) 220.

onthe spot senseless. The witness Kutban, village chaukidar, supported the story saying he saw Karim-ud-din prostrate on the ground in consequence of his wounds. Now these wounds were the following:—

a small scratch on the small of the back;
a simple bruise and swelling on the back of the left elbow;
a very small abrasion at the back of the root of left index finger; and
a small abrasion on the inner knee.

The falsehood of the story of these two witnesses is sufficiently exemplified by this list of hurts. I do not believe anything that Karim-ud-din and Kutban said. It is admitted that Raghunath Rai was not mentioned in the first police report, and Asalat, the owner of the cattle, did not name him before the committing Magistrate. The evidence is insufficient to prove any offence against Raghunath Rai. He is acquitted and will be released, and his fine, if paid, will be restored.

Mr. *Dillon* appeared on behalf of Rup Narain and Udit, who have received the same sentences as Raghunath Rai, on conviction of dacoity. Their learned Counsel admitted that the evidence is sufficient to establish the fact that they went to Asalat's premises and joined in forcibly removing an ox and two cows, the property of Asalat. But Mr. *Dillon* contended that this offence is limited to the crime [24] of rioting punishable under s. 147 of the Indian Penal Code, and that they were wrongly convicted of dacoity. Theft is a necessary component of the offence of dacoity. If there was no element of dishonesty in the conduct of Rup Narain and Udit there would be no theft, and therefore no robbery, and therefore no dacoity. The Sessions Judge found, and no doubt rightly, that there was no intention on the part of Mr. *Dillon*'s clients to cause wrongful gain to themselves or wrongful loss to Asalat.

While it is admitted that their conduct may have resulted in wrongful loss to Asalat, though deprivation of the possession of his cattle was not the object of the appellants, they claim the benefit of a finding by the Judge that their intention was to prevent the butchery of the cattle, which their religion taught them to be a grossly outrageous act. By s. 24 of the Indian Penal Code, the word "dishonestly" which appears in s. 378 is defined thus:—"Whoever does any act with the intention of causing wrongful gain to one person or wrongful loss to another is said to do that thing dishonestly."

Now, if there was no intention to cause wrongful loss to Asalat, the fact that the removal of the cattle for a time might, in effect, cause him wrongful loss would not suffice by itself to make the appellants' conduct dishonest. Intention is essential, and it has been found below that the intention of the assailants was confined to preventing the slaughter of kine. On these findings of fact the appellants' conviction for dacoity is unmaintainable. On the facts in evidence they are guilty of the offence of rioting, and for that offence they must be sentenced. I set aside the conviction, and sentence under s. 395, and in lieu thereof I sentence Rup Narain and Udit to rigorous imprisonment for three months each. The appeal of Aklu upon the merits is dismissed, but his conviction and sentence under s. 395 are set aside and he also is sentenced under s. 147 of the Indian Penal Code to three months' rigorous imprisonment. The orders of fine will stand over in respect of Rup Narain, Aklu, and Udit.

15 A. 25=12 A.W.N. (1892) 220.

1892 AUG. 23. — REVISIONAL CRIMINAL. — 15 A. 25=12 A.W.N. (1892) 220.

[25] REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* MADHO.* [23rd August, 1892.]

Criminal Procedure Code, ss. 161 *and* 162—*Statement made by a witness to police officer making an investigation—Use of such statement to contradict witness—Use of statement against accused.*

A statement made by a witness under s. 161 of the Code of Criminal Procedure to a police officer investigating a case may be proved at the trial of such case to contradict such witness, the witness having been first cross-examined on the point in respect of which it is sought to contradict him. But where it appeared that, but for the principal witness for the defence having been discredited by means of proof of a previous inconsistent statement made by the said witness before the investigating officer, the accused would have been acquitted, it was *held* that this amounted to a using of such statement as evidence against the accused within the meaning of s. 162 of the Code of Criminal Procedure. *Queen-Empress* v. *Sitaram Vithal* (1), approved.

[F., 27 A. 469 (471)=A.W.N. (1905), 64; R., 19 A. 390=17 A.W.N. 174 (F.B.); 15 C.L.J. 621=13 Ind. Cas. 678 (681).]

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *C. C. Dillon*, for the applicant.

The Public Prosecutor (the Hon'ble Mr. *Spankie*), for the Crown.

JUDGMENT.

EDGE, C. J.—This is an application in revision. The applicant, one Madho, was convicted of the theft of some buffaloes and sentenced to a year's rigorous imprisonment under s. 379 of the Indian Penal Code by a Magistrate. He appealed, and his appeal was dismissed by the Sessions Judge. The question raised here is as to the effect of s. 162 of the Code of Criminal Procedure, 1882. The case for the defence, if true, would have shown that the buffaloes were not the buffaloes of the prosecutor. In order to make out that case certain witnesses were called, amongst others one Jahan. Jahan was confronted with a statement which he had made to the police officer in the course of the investigation relating to this theft held under Chapter XIV of the Code of Criminal Procedure, 1882. The police officer was called and contradicted Jahan as to the statement which [26] had been made and proved, apparently to the satisfaction of the Magistrate, and in appeal to that of the Sessions Judge, that Jahan had made a certain statement to him which at the trial he denied having made, and that Jahan had not made a statement to him, which he made at the trial as to how he became possessed of the buffaloes. Now, I have no doubt that a statement to which s. 162 of the Code of Criminal Procedure applies may be proved to contradict a witness called for the defence of an accused person, that witness having first been cross-examined on the point, and in that respect I agree with the case of *The Queen-Empress* v. *Sitaram Vithal* (1). The question is how far further can the evidence of what the statement either did or did not consist of be used against an accused? S. 162 is quite clear, and provides that such a statement shall not be used as evidence against the accused. A

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* Criminal Revision No. 460 of 1892.

(1) 11 B. 657.

1892
AUG. 23.

REVISIONAL CRIMINAL.

15 A. 25 = 12 A.W.N. (1892) 220.

statement, whether oral or written, if used in evidence may be used for either one of two purposes, either to show what it does actually contain, or to show what it does not contain. When a police officer to whom a statement has been made in the course of an investigation speaks to a statement having been made, and says that that statement did not contain a reference, for instance, to certain facts, that in effect is giving evidence of what the statement was, because it is showing that the statement as made did not contain a reference to those facts. It was contended by the Public Prosecutor that if a police officer on being asked "did the witness say so-and-so to you when making his statement?" should reply "he did," that piece of evidence should be excluded from consideration as against the prisoners by reason of s. 162; but if, on the contrary, the police officer should say "he did not," that piece of evidence would be admissible as against the prisoner. To my mind there is no difference; the one statement would be as necessarily excluded by reason of s. 162 as the other. The judgment of the Magistrate satisfies me that if it had not been for Jahan's having been contradicted by the statement which he had made to the police officer, the Magistrate would have acquitted the prisoner. Indeed the Magistrate says in his judgment that he did not consider the case for the prosecution [27] a very probable one, and in fact he did release the prisoner on bail though the offence was not a bailable one. I can only regard the judgment of the Magistrate as showing that if it had not been for the contradiction afforded by the statement made to the police officer who was conducting the investigation, he would have acquitted the prisoner. In that view he must have treated that statement not only as discrediting the evidence of Jahan, but as evidence showing that the whole case for the defence was false, and consequently as evidence against the accused. The learned Sessions Judge, so far as I can read his mind through his judgment, was influenced by the same considerations as the Magistrate, and it appears to me that Madho, the appellant here, would most probably never have been convicted if his witness Jahan had not been called. Under the circumstances I must accede to this application and treat this conviction as having been made upon evidence which, as against the accused, was excluded by reason of s. 162 of the Code of Criminal Procedure, 1882. I accordingly allow the petition, set aside the conviction, and acquitting the prisoner, direct that he be set at liberty.

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15 A. 27 = 12 A.W.N. (1892) 221.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* BHURE.*
[12th September, 1892.]

Act XI of 1878 (Arms Act), s. 19 (c)—"Going armed"—Presumption as to persons found carrying arms.

Where a person is found carrying arms apparently in contravention of the provisions of the Arms Act, it must be presumed, in the absence of proof to the contrary, that he is carrying such arms with the intention of using them should

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* Criminal Revision No. 501 of 1892.

an opportunity of using them arise. *Queen-Empress* v. *Alexander William* explained and approved.

[Rel., 11 Cr. L. J. 55=4 Ind. Cas. 823 (824)=U.B.R. 1909, 2nd Qr., Opium, p. 1; R, 8 Cr. L.J. 406 (407)=4 N.L.R. 146 (147); 10 Cr. L.J. 361 (362)=3 Ind. Cas. 712 (713)=5 L.B.R. 83; U.B.R. (1897-1901) Vol. I, 1 (2).]

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REVISIONAL CRIMINAL.

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THIS was a reference made by the Sessions Judge of Farakhabad in respect of an application for revision of an order of the Joint Magistrate convicting the petitioner, one Bhure, of an offence under s. 19, clause (*e*) of the Arms Act. The petitioner before the Magistrate denied possession of the weapon, possession of which was [28] charged against him, but this defence was abandoned before the Judge, and it was urged that the weapon belonged to a zamindar, and that the petitioner was merely taking it to be repaired. The Sessions Judge with reference to the case of *The Queen-Empress* v. *Alexander William* (1) was of opinion that there should have been evidence to show an intention on the part of the prisoner to use the weapon should opportunity arise, and no such evidence appearing in the record, referred the case to the High Court for orders.

On this reference the following order was passed by EDGE, C. J. :—

ORDER.

It appears to me that the decision in the case of *The Queen-Empress* v. *Alexander William*(1) has been misunderstood. In that case my brother Knox acted on the prisoner's statement that he, the prisoner, was carrying the gun for the purpose of getting it repaired. The gun did not belong to the prisoner. The prisoner in that case was no doubt carrying the gun, he was not, however, carrying it as weapon, but as a parcel, and was rightly considered not to have been going armed. In the present case the prisoner had in his possession a pistol, for the possession and carrying of which no explanation such as that in the case of *The Queen-Empress* v. *Alexander William* (1) was given, much less proved. A man who is found going about with a pistol, gun, sword or other weapon within the definition of "Arms" in s. 4 of Act No. XI of 1878 must, in the absence of proof to the contrary, be presumed to be carrying it with the intention of using it, should an opportunity for using it, arise, and, unless he is licensed to carry the weapon and is not exceeding the terms of the license, may properly be convicted under s. 19, clause (*e*) of the Act, as this man was. I see no reason to interfere. Bhure must undergo the punishment to which he has been sentenced. The record may be returned.

(1) 11 A.W.N. (1891) 208.

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[29] APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Knox.

FAZL RAB (*Applicant*) *v.* KHATUN BIBI AND OTHERS (*Opposite Parties*).*
[11th July, 1892.]

Muhammadan law—Shia sect—Act XXXV of 1858, *ss.* 2, 7, 9, 10, 23—*Guardian of lunatic—"The legal heir"—Wife of lunatic.*

One M. S., a *Shia* Muhammadan, was formally adjudged a lunatic under the provisions of Act No. XXXV of 1858. At the time of this adjudication M.S. had a wife, Z, who had had one child by him, but that child had died previously to M.S. being adjudged a lunatic; it did not however appear that there was any reason precluding the possibility of further issue of the marriage.

Held by Mahmood, J., that under the law applicable to the *Shia* sect of Muhammadans Z. was one of the "legal heirs" of M.S. within the meaning of s. 10 of Act No. XXXV of 1858, and as such was excluded by the terms of the proviso to that section from being appointed guardian of the person of her lunatic husband.

In cases under the Lunacy Act (Act No. XXXV of 1858) the High Court as a Court of appeal will not take upon itself the duty of deciding who may be the fittest person to appoint as guardian of the person or property of a person adjudged a lunatic thereunder. That duty should rest with the Courts to which it is entrusted by the Act.

Held by Knox, J., that upon the general circumstances of the case the wife was not a fit person to be appointed as guardian of the lunatic; *sed quære* whether she was within the meaning of s. 10 of Act No. XXXV of 1858, "the legal heir" of the lunatic and therefore statutorily disqualified.

[R., 2 Ind. Cas. 671 (673.)]

THE facts of this case are fully stated in the judgment of Mahmood, J.

Mr. *Hameed Ullah* and Mr. *Abdul Raoof*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

MAHMOOD, J.—Upon the preliminary facts of this case the following table showing the relative position of the parties throws light:—

KASIM ALI.

Zain-ul-Abdin. | Fazl Rab, petitioner, appellant.

(sons of Zain-ul-Abdin:) Muhammad Sadik (son). | Mst. Khatun (widow), objector, respondent.

(wife of Muhammad Sadik:) Mst. Zainab Bibi (wife), objector.

[30] The family is admitted to belong to the *Shia* sect.

The litigation from which this appeal arises was commenced by Fazl Rab, the paternal uncle of Muhammad Sadik (who has been found to be a lunatic) by an application under s. 3 of the Lunacy Act (Act No. XXXV of 1858) claiming to be appointed guardian of the person and manager of the property of the lunatic.

The application was opposed by two counter-applications, one preferred by Musammat Khatun, the mother, and the other by Musammat Zainab Bibi, the wife of the lunatic. The learned District Judge disallowed the applications of the appellant Fazl Rab and of Musammat Zainab

* First Appeal No. 15 of 1891 from an order of J.J. McLean, Esq., District Judge of Azamgarh, dated the 20th December, 1891.

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Bibi, but granted that of Musammat Khatun, the mother of the lunatic, and appointed her manager of his estate and also guardian of his person.

From that order an appeal (F. A. f. O. No. 114 of 1889) was preferred by Fazl Rab, and for the reasons stated in my judgment in that appeal the order of the District Judge was set aside and the case was remanded for re-trial under s. 562 of the Code of Civil Procedure.

The case has been tried upon the merits and the learned Judge has again rejected the application of Fazl Rab, holding that he was "an altogether unfit person to have charge of the lunatic's property," or to be appointed guardian of his person, and, moreover, that being a legal heir of the lunatic within the meaning of s. 10 of the Lunacy Act (Act No. XXXV of 1858), he could not be appointed guardian of the lunatic's person. The Judge then appointed Musammat Khatun, the mother of the lunatic, as manager of his estate, and his wife, Musammat Zainab, guardian of his person, declaring at the same time that he did not think that she was "the safest person to have charge of the property."

From this order the present appeal was preferred by Fazl Rab who impleaded Musammat Khatun and Musammat Zainab Bibi as respondents. During the pendency of the appeal Musammat Khatun died and the appellant impleaded the lunatic Muhammad Sadik himself as the legal representative of his deceased mother Musam-[31]mat Khatun. The application for such substitution of the name of Muhammad Sadik as representative of the deceased respondent was the subject of consideration by Mr. Justice Straight and myself, and for the reasons stated in our order of the 24th of February 1892 we appointed the Registrar of this Court as the guardian *ad litem* of the lunatic Muhammad Sadik.

Upon the retirement of Mr. Justice Straight the case, by order of the learned Chief Justice, was laid before my brother Knox and myself, and we by our order appointed Mr. Porter as guardian *ad litem* instead of the Registrar, and the case has thus been heard by this Bench. The contention raised in the memorandum of appeal, so far as it relates to the appointment of the deceased Musammat Khatun as manager of the lunatic's property, need no longer be considered, and Mr. *Hameed Ullah* in arguing the appeal before this Bench has confined himself to the rest of the case. The learned counsel has contended, first, that the lower Court has failed to comply with the provisions of the law in conducting the inquiry regarding the lunacy of Muhammad Sadik; secondly, that Musammat Zainab by reason of being a *parda-nashin* lady and the fact of being the wife of the lunatic, and as such one of his heirs, is unfit and legally ineligible for guardianship of the person or property of the lunatic; thirdly, that the appellant Fazl Rab is a fit and proper person to be appointed manager of the lunatic's property; and fourthly, that even if he be held to be unfit for such managership the lower Court should have appointed the Court of Wards or some other capable person as guardian and manager of the lunatic's person and property.

Upon all these points the appeal has been resisted by Mr. *Abdul Majid* on behalf of the respondent, Musammat Zainab, and by Mr. *Porter* as guardian *ad litem* of the lunatic, Muhammad Sadik, and I proceed to deal with each of these points in the order in which I have stated them.

As to the first point, which relates to the mental condition of Muhammad Sadik, the learned counsel for the appellant has failed to point out any irregularity or illegality in the conduct of the [32] inquiry by the learned District Judge, who, after taking professional medical evidence and his own personal observation of Muhammad Sadik, has adjudged him

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to be of unsound mind and incapable of managing his affairs within the meaning of ss. 2 and 9 of the Lunacy Act (Act No. XXXV of 1858). It is not shown that any evidence produced upon this point was rejected by the learned District Judge, and there is everything in the circumstances of the case to justify the conclusion at which he has arrived, a conclusion which indeed is not seriously contested by the appellant, whose petition itself proceeds upon the allegation that Muhammad Sadik is of unsound mind and incapable of managing his affairs.

The second point is by far the most important and difficult in the case. Mr. *Hameed Ullah's* contention on behalf of the appellant is that the respondent, Musammat Zainab, being the wife of the lunatic, is his legal heir, and therefore falls under the prohibition contained in the proviso to s. 10 of Act No. XXXV of 1858 which lays down "that the legal heir of the lunatic shall not in any case be appointed guardian of his person." On the other hand, Mr. *Abdul Majid*, for the respondent, contends that under the *Shia* law which governs the case, a childless wife is not entitled to inherit any share in the immoveable property of her husband, that in the present case there is no allegation or proof that the lunatic is possessed of any immoveable property, and that therefore there was no illegality in Musammat Zainab's appointment as guardian of the person of her lunatic husband. This contention is again met by the allegation that Musammat Zainab has had a child by the lunatic, Muhammad Sadik, and that she cannot therefore be called childless within the meaning of the *Shia* law of inheritance. In support of this argument Mr. *Hameed Ullah*, for the appellant, relies mainly upon the following passages of Mr. Baillie's work on the *Shia* law:—

"A wife when there is no child of the deceased, has a fourth part of his estate and an eighth if he has left a child" (*vide* page 294). "When the wife has had a child by the deceased she inherits out of all that he has left, and if there was no child she takes nothing [33] out of the deceased's land, but her share of the value of the household effects and buildings is to be given her" (*vide* page 295).

These passages purport to be translations of the original Arabic texts of the *Sharayeh-ul-Islam* which is the most authoritative work on the *Shia* law, but since the accuracy of the translation has been questioned and much depends upon the interpretation of the original Arabic text, I will, in passing, state what Mr. *Hameed Ullah* has pointed out, that another learned writer on the *Shia* law, Mr. Shama Charan Sarkar in his Tagore Law Lectures for 1874 (page 260), has rendered the same passage of the *Sharayeh-ul-Islam* in the following words:—

"When a wife or widow has had a child (born of her own womb) by the deceased, she inherits out of all that he has left. But if there is no (such) child, she takes nothing out of the deceased's) land (*arz*), but her share of the household effects (*alat*) and buildings is to be given to her."

Before considering the original Arabic texts bearing upon the subject I wish to state that both the above quoted translations were the subject of consideration in this Court by the learned Chief Justice and my brother Tyrrell in the recent case of *Husain Khan* v. *Umedi Bibi* (1) in which they observed:—

"Pandit *Sundar Lal* has very properly pointed out that the translation of Baillie was called in question in the High Court of Calcutta and

(1) 9 A.W.N. (1889) 192.

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that that Court acted upon a translation made by the Court translator under its orders, which was not questioned by the Advocate-General, who was engaged in the case. The translation is to be found in the twentieth volume of the Weekly Reporter in the case of *Musammat Asloo* v. *Musammat Umdut-oon-nissa* (1). The translation made for the Calcutta Court, which we assume to be correct, shows that the passage in Baillie is incorrectly translated, and that to entitle a widow to inherit out of the land she must have a child living to her husband at the date of his death."

Another Division Bench ruling of this Court may be cited here. In *Musammat Toonanjan* v. *Musammat Mehndee Begum* (2), Mor-[34]gan, C.J., and Spankie, J., held that according to the law of the *Shia* sect a childless widow is not entitled to share in the immoveable property left by her husband, but only in the value of the materials of the houses and buildings upon the land.

No case-law bearing upon the subject other than the three rulings above referred to has been cited, and since those rulings proceed upon contested translations I have considered it my duty to consult the original Arabic texts of authoritative works of the *Shia* law bearing upon the exact rights of inheritance from her husband to which a childless wife or widow is entitled. This investigation has been rendered necessary and important in this case on account of two reasons: the first being that I hold it to be proved that the respondent, Musammat Zainab, "*has had a child*" by her lunatic husband Muhammad Sadik, and the second reason being that in interpreting the phrase "the legal heir of the lunatic" as it occurs in the prohibitive proviso of s. 10 of Act No. XXXV of 1858, I hold that it covers and includes all persons who immediately upon death of a lunatic would be entitled to inherit from him, thus including a wife on whom the personal law of the parties confers a right of inheritance from her husband.

As to the first of these points I think it is enough to say that I believe the uncontested testimony of the witness Mohib Ali Khan, who in his deposition on oath has stated that a child was born to Musammat Zainab by her lunatic husband, Muhammad Sadik. Indeed the statement of the fact that the lady was not barren, but had given birth to a child who died about two years before these proceedings were commenced, was never contradicted either in the Court below or in this Court, and I therefore take it that she is still capable of bearing children to her husband, there being no evidence to the contrary.

The second point is simply a question of interpreting a British Indian legislative enactment as to the exact import of the phrase "the legal heir of the lunatic" as it occurs in the proviso to s. 10 of Act No. XXXV of 1858. In this connection I must confess that the English phrase "the legal heir," as it occurs in that sec-[35]tion has before now proved troublesome to me in deciding cases under that enactment. In the first place the word "heir" is of masculine gender, and since the enactment in which it occurs was passed before the General Clauses Act (Act No. I of 1868), cl. (1) of s. 2 of that enactment, which provides that "words importing the masculine gender shall be taken to include females," is unavailable for ascertaining whether a wife or mother, who under the Muhammadan law is entitled to inherit, is included in the expression "*heir*," yet the last part of s. 23 of the enactment may possibly involve

(1) 20 W.R.C.R. 297 (300). (2) 3 Agra 13.

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the necessity of a different interpretation, though the section is far from being clear upon this point. Again the peculiar use of the words "the legal" before the word "*heir*" in that proviso enhances the difficulty and leaves room for the suggestion that in drafting that enactment the Legislature was thinking more of the terminology of the English law of inheritance as to real property than the exigencies of the native personal laws of inheritance, such as the Hindu and the Muhammadan law. The word "*heir*" as a term of English law is well explained in Wharton's Law Lexicon, where the following occurs as the meaning of the term:—

"Heir (from *heire*, old Fr.; *hœres*, Lat.)—a person who succeeds by descent to an estate of inheritance. It is *nomen collectivum*, and extends to all heirs; and under-heirs, the heirs of heirs, are comprehended *in infinitum*."

Thus the proviso to s. 10 of Act No. XXXV of 1858 with which I am now dealing furnishes a good illustration of the doubts and difficulties which not unfrequently arise in interpreting British Indian Legislative enactments where technical terms and technical notions of the English law are bodily imported either by the Legislature or by the Judges in matters relating to the administration of justice among the Indian population, the vast majority of which are Hindus and Muhammadans. I have mentioned this because I wish to interpret the phrase "*the legal heir*" as it occurs in the proviso to s. 10 of Act No. XXXV of 1858 to mean any inheritor, whether male or female, who according to the personal law of the parties concerned would be entitled to inherit the estate of a person [36] immediately upon his or her death. I refrain from using the Latin phrase *hœres proximus*, which, however near it may be to my interpretation of the word "*heir*" as it occurs in the Act, is liable to create confusion. What I hold is that in administering the Lunacy Act (Act No. XXXV of 1858) to the Muhammadan population the Court by reason of s. 37 of the Civil Courts Act (Act No. XII of 1887) is bound to interpret the phrase "*the legal heir*" as it occurs in s. 10 of the former enactment, not with reference to the English law of inheritance but in reference to the Muhammadan law of inheritance, which provides rules as to who would be inheritors immediately upon the death of the owner. Indeed in this very case when it came up before me on a former occasion as First Appeal from Order No. 114 of 1889, I, in remanding the case, held that Musammat Khatun, the mother of the lunatic Muhammad Sadik, had been illegally appointed guardian of his person, because she under the Muhammadan law was one of those who would inherit immediately upon his death. And I went on to say that the prohibitive provisions of the proviso to s. 10 of the Lunacy Act (Act No. XXXV of 1858) were no doubt intended as a safeguard for the lunatic's life. To these views, which to my mind obviously explain the policy of the Legislature in framing the proviso above mentioned, I still adhere; and in this case, if it is a correct enunciation of the *Shia* law of inheritance that Musammat Zainab Bibi, notwithstanding the fact that the child which she bore to Muhammad Sadik has already died and she is now childless, is entitled to inherit from him immediately upon his death, I shall hold that the law prohibits her being appointed guardian of his person, as much as it prohibited his mother, Musammat Khatun, from being appointed as such, and as much as it prohibits the appointment of Fazl Rab (who as uncle of the lunatic is entitled to inherit from him) as guardian of the person of his lunatic nephew, Muhammad Sadik.

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Now let me ascertain what the *Shia* law is as to the rights of inheritance possessed by a childless wife in the position of Musammat Zainab, respondent. Perhaps the most convenient course is to cite the original Arabic texts of the authoritative works of *Shia* law [37] with their translations into English and then to discuss the exact rule which they establish with reference to Musammat Zainab's right of inheritance from her lunatic husband, Muhammad Sadik. The texts upon which I shall rely for my conclusions are the following:—

(1) "As to husband and wife, there are three cases. *First*, where there are children how low soever, the husband takes one-fourth and the wife one-eighth. *Secondly*, where there are no children or children's children how low soever the husband takes one-half and the wife one-fourth; and in either case there will be no *awl* (increase), for to do so is improper in our opinion. *Thirdly*, where there are no heirs at all by consanguinity or special connection, the husband takes one-half and the remainder returns to him and the wife takes one-fourth. There are three opinions as to return to the wife: *First*, that it returns to the wife: *second*, that is does not: *third*, that it returns when there is no Imam and it does not when there is one" (*Sharayeh-ul-Islam*, Calcutta edition, p. 445).

(2) "The second case is of a wife without children, in which case she takes one-fourth. If there are more wives than one they participate in the share equally, and if he has left a child the wives' share will be an eighth, and in the case of there being more than one wife the same will go equally among them, nothing being added thereto' (*Sharayeh-ul-Islam*, Calcutta edition, p. 453).

[38] (3) "The fifth case is that of a wife having children by the deceased. She inherits out of all of his property. If she has no children she shall not at all participate in land, and shall get her share out of the value of the utensils and buildings, and it is said by some that she is not debarred from anything except the houses and buildings. Murtaza gives a third report, that is, the land should be valued and her share given out of the value thereof. The first is most obvious (*i.e.*, authority)" (*Sharayeh-ul-Islam*, Calcutta edition p. 453).

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(1) وللزوج و الزوجه ثلثة احوال الاولى ان يكون فى الفريضة ولد
و ان سفل فالزوج الربع و للزوجة الثمن و الثاني ان لا يكون ولد ولا ولد ولد
و ان نزل فللزوج النصف و للزوجة الربع و لا يعال نصيبهما لان العول عندنا
باطل والثالثة ان لا يكون هناك وارث اصلا من مناسب و مسابب فالنصف
والباقي رد عليه و للزوجة الربع و هل يرد عليها فيه اقوال ثلثة احدها يرد والاخر
لا يرد والثالث يرد مع عدم الامام لا مع وجوده * (شرائع الاسلام صفحه ۴۴۵)

(2) الثانية الزوجة مع عدم الولد الربع و لو كن اكثر من واحدة كن
شركاء فيه بالسوية و لو كان له ولد كان لهن الثمن بالسوية و كذا لو كانت واحدة
لا يزدن عليه شيئا * (شرائع الاسلام صفحه ۴۵۳)

(3) الخامسة اذا كان للزوجة من الميت ولد ورثت من جميع ما ترك
و ان لم تكن ولد لم ترث من الارض شيئا و اعطيت حصتها من قيمة الالات و الا
بنية و قيل لا تمنع الا من الدور والمساكن و خرج المرتضى قولا ثالثا وهو تقويم الارض
و تسليم حصتها من القيمة و القول الاول اظهر * (شرائع الاسلام صفحه ۴۵۳)

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(4) "If the wife has no children she does not inherit anything out of the area of land, and to her is given value of utensils, houses and trees, and Murtaza says that she is debarred from the land itself and not from its value. It is said by Mufid that she is not debarred from gardens and productive farms (*Zia*), and she shall be given the price of utensils, inclosures and dwelling houses; and there is a tradition which Zarara takes from Bakir (upon whom be peace) that she is debarred from weapons and cattle; and if she has children by the deceased, the Sheikh and his followers give her inheritance out of all the property left; and this is the opinion of Saduk" (*Durus*, Book on Inheritance).

[39] (5) "If there is a wife having children and at the same time another having no childern, and we have said the latter shall particularly be deprived of inheritance, the wife with children shall get full one-eighth from the area of land without the participation of any other of the heirs of the deceased and without giving anything out of this to the second (that is wife having no child), and she (the wife with children) shall get her full share out of utensils and trees themselves, but it is incumbent upon her to give to the other, say, one-half of one-eight of the value, and this is clear" (*Jawahir-ul-Kalam*, Book on Inheritance).

(6) "There is no difference of opinions among the Musalmans that a husband shall inherit out of the whole property left by his [40] wife, be it land, house or what is besides them. In the same way there is no difference of any importance among us that a wife is not entitled to get her share out of a certain property of her deceased husband. In *Al-Intisar*

(4) لو خلت الزوجة من ولد لم ترث من رقبة الارض شيئاً و تعطي قيمة الآلات و الابنية والشجر و قال المرتضي تمنع من عين الارض لامن قيمتها و قال المفيد لاتمنع من البساتين و الضياع و تعطي قيمة الآلات و الدور و المساكن وفي صحيح زرارة عن الباقر ع منعها من السلاح والدواب و لو كان لها ولد من الميت فالشيخ و اتباعه يورثونها من جميع ماتركه و هو فتوي الصدوق * (دروس كتاب الميراث) *

(5) و لو اجتمعت ذات الولد و غيرها و قلنا باختصاص الحرمان بالثانية ورثت ذات الولد كمال الثمن من رقبة الارض من غير مشاركة احد من الورثة معها و من دون دفع شيئي الي الثانية و ورثت ايضاً كماله من اعيان الآلات والشجر لكن عليها للاخري مثلا نصف ثمن قيمتها كما هو واضح * (جواهر الكلام كتاب الميراث) *

(6) لاخلاف بين المسلمين في ان الزوج يرث من جميع ما تركته زوجته من ارض و بناء و غيرهما كما انه لا خلاف معتد به بيننا في ان الزوجة في الجملة لاترث من بعض تركة زوجها بل في الانتصار مما انفردت به الا مامية حرمان الزوجة من رباع الارض بل عن ف و تر الاجماع على حرمانها من العقار و نعم عن الاسكافي انه اذا دخل الزوج اوالزوجة على الولد و الابوين كان للزوج الربع و للزوجة الثمن من جميع التركة عقارا واثاثاً و صامتاً و رقيقا و غير ذلك و اطلاق الولد في كلامه الشامل لمن كان من الزوجة و غيرها يدل على ان مذهبه ان الزوجة مطلقا و ان لم تكن ذات ولد ترث الثمن من جميع تركة زوجها

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we find that one of the doctrines peculiar to the Imamia sect is the exclusion of a wife from sharing in the landed property of her deceased husband. Nay even in F. and Ar. (names of books) we also find that the concurrence of the learned is in excluding the wife from sharing in *iqar* (عقار). Contrary to this Iskafi says, 'when a husband or a wife intrudes upon the child and the parents, the husband shall get a fourth and the wife an eighth of the whole property of the deceased, be it land, goods, cattle or slaves. The unrestricted use of the word *walad* (ولد) (a child) which is equally applicable to a child born of this wife or that, shows that his opinion is that in general a wife, though she has no child, shall inherit her one-eighth out of the whole property of her deceased husband and her one-fourth of the same when there is no child. From Kashfur Ramuz we learn that this doctrine is obsolete. Moreover, the author of the *Ghayat-ul-Murad*, after stating that the concurrence of the learned is in excluding the wife from sharing in certain things and that Ibn-i-Junaid is the only person dissenting, says that the concurrence of the learned has preceded it. From Mahdi and the author of *Ghayat-ul-Murad* we learn the same. Notwithstanding all this it is sometimes said that all the books of *Ashab* [41] (اصحاب), such as *Muqanna* (مقنع), *Marasim* (مراسم), *Al Ijaz* (ايجاز), *Tibyan* (تبيان), *Majma-ul-bayan* (مجمع البيان), *Jami-ul-Jawami* (جامع الجوامع), and *Al Fara'z* (الفرائض) expressly mentioned a wife's share to be in general a fourth or an eighth, but are silent on this point, which supports the view held by Iskafi (اسكافى). The silence of Ali, son of Babawiya (بابويه) and of Ibn-i-Aqil (ابن عقيل) seems to be for

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من دون تخصيص و لزمه ارثها من جميع ربع الاملاك ان لم يكن للزوج ولد و في المحكي عن كشف الرموز انه قول متروك بل عن غاية المراد بعد ان حكي اجماع اهل البيت على حرمان الزوجة من شيئي ما و انه لم يخالف فيه الا ابن الجنيد قال و قد سبقه الاجماع و تاخر عنه و نحو ذلك عن المهدي و غاية المرام لكن و مع ذلك قد يقال ان خلو جملة من كتب الاصحاب على ما قيل كالمقنع و المراسم و الايجاز و التبيان و مجمع البيان و جوامع الجوامع و الفرائض النصيريه عن هذه المسئلة مع وقوع التصريح في جميعها بكون ارث لزوجة ربع التركة و ثمنها ايضاً في العموم ربما يؤذن بموافقة الاسكافي بل لعل الظاهر عدم تعرض علي بن بابوية و ابن ابي عقيل لذلك ايضاً و الا لنقل بل لعل خلو الفقه الرضوي الذي هو اصل الاول منهما و معتمده مما يؤيد موافقته ايضاً بل لعل جميع رواة الصحيح الذي هو مسند ابن الجنيد بعد عموم الكتاب و السنة عن ابي عبدالله مذهبهم ذلك لان مذهب الرواة يعرف بروايتهم و قد رواه ابن ابي يعفور و ابان و الفضل بن عبدالملک قال سالته عن الرجل هل يرث من دار امراته شيئاً او ارضها من التربة شيئاً او يكون في ذلك بمنزلة المراة فلا يرث من ذلک شيئاً قال يرثها و ترثه من كل شيئي ترک و تركت فدعوى سبقه بالاجماع و لحوقه به لا تخلو من نظر بل من دعائم الاسلام ان اجماع الامة و الائمة على قول ابن الجنيد *
(جواهر الكلام - كتاب الميراث)

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this very reason, otherwise their objection would have been mentioned. *Fikah-i-Razwi* (فقه رضوی) which is the basis of the work of the former is also silent upon this point, which again leads to the same. All those who report from Abdullah the tradition, which, according the Ibn-i-Junaid (ابن جنید), is next to the *Kitab* (کتاب *i.e., Al Kuran*) and *Sunnat* (سنت *i.e.,* acts of the Prophet) to be relied upon, seem to maintain the same opinion, because the opinion of a *rawi* (راوی *i.e.,* traditionist) is to be inferred from the tradition which he reports. Verily it is reported by Ibn-i-Ali Ghafur, and Aban and Alfazl, son of Abdul Malik. He (Alfazl الفضل), says, 'I asked him (Abdullah), does a husband inherit anything out of the house or land left by his deceased wife, or is he in this respect like a wife, not entitled to inherit anything out of these? The reply was that each of them shall inherit out of everything left by the other.' Therefore to say that the concurrence has preceded it is not free from objection, but on the contrary we find in the *Daaim-ul-Islam* (دعائم الاسلام) that the concurrence of the *Ummat* (امت) and the learned is with Ibn-i-Junaid (ابن جنید)." *Jawahir-ul-Kalam*, Book on Inheritance).

(7) "The substance of what may be deduced from the *Nusus* (authorities) is this that there is no consanguinity between her and [42] the other heirs, and she is no more than an intruder upon them, that is, a mere stranger. It may happen that she afterwards marries a stranger who is an enemy and adversary of her husband and she makes the stranger live in his house and allows him possession of his *iqar* (عقار) and thus causes great grief and sorrow to the other heirs, therefore the Almighty God has provided that she should be debarred from the dwelling houses and *iqar* (عقار) and should be compelled to receive the price thereof, which is equivalent to the things themselves. This obviates or minimises the harm which might have been done . . . . . These authorities show that there is no difference between a wife having children and one having no children for the reason applies equally to both." (*Musalik-ul-Afham*, Book on Inheritance.)

(8). "The wife having or not having children does not inherit land, whether the land be vacant or site of a building, garden, &c., nor does she inherit water appertaining to the land, but she is entitled to the value of

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(7) و محصل مادلت علیه النصوص منها ان الزوجة لانسب بینها و بین الورثة و انما هی دخیل علیهم فربما تزوجت بعدالمیت بغیره مما کان ینافیه و یحسده فیسکنه في مساکنه و تسلطه علی عقاره فیحصل علی الورثة بذلک غصاصة عظیمته فاقتضت الحکمة الالهیة منعها من ذلک و اعطائها القیمة جبرالها فهي في قوةالعین و الضرر بها منفي او قلیل محتمل...... في هذالاخبار ایضا دلالة علی عدم الفرق بین ذات الولد و غیرها لقیام العلة في الجمیع * (مسالک الافهام کتاب المیراث)

(8) زوجه خواه ذات ولد و خواه غیر ذات ولد از زمین میراث نمي برد و خواه زمین ساده باشد یا محل عمارت و باغ وغیرها و همچنین از ابیکه تابع زمین است و اما از اصل ابنیه و عمارات و اشجار مثمره و غیر مثمره مستحق

the buildings, houses and trees bearing and not bearing fruits to the extent of her share; she is not entitled to share in the things themselves. But if the heir says: 'take your share out of the things themselves and we decline to give you the price.' It is fully clear that they can do so." (*Jami-ush-shattat*, Book on Inheritance.)

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(9) "The husband inherits all sorts of property of the woman; similarly she gets her share out of all properties excepting *iqar* (عقار) [43] she does not however get the things themselves. There is a consensus of opinion on this point. Iskafi differs as to inheritance by her out of this, but this is rare and was expressed after the consensus of opinion, * * * * and she inherits out of the price of the utensils and buildings * * *. It is mentioned in traditions that a woman does not inherit anything out of *iqar* (عقار) and she gets the price of the buildings trees, and plants. By building (*bina*) (بناء) is meant a house, and by the word woman (*nisa*) (نساء) is meant wife . . . . . . and it is to be observed that in this text and in others wherever the word *zaujah* (زوجة) occurs as an unrestricted, it shows that there is no distinction between one who has a child and one who has not." (*Sharah Kabir*, Vol. II, Book on Inheritance.)

(10) "Where the wife has no child by her husband she does not get a share in any of these things—in *iqar* (عقار) houses, weapons [44] and

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قیمت انہا است بقدرالحصہ نہ عین آنہا و لکن ہرگاہ وارث بگوید کہ حق خود را از اعیان بگیر و ما قیمت نمیدهند اظهر این است کہ می توانند گفت * (جامع الشتات. کتاب المیراث)

(9) ویرث الزوج من جمیع ماترکته المراة و کذالمراة من جمیع ماترکه عدا العقار فلا ترث منه عینا اجماعا و خلاف الاسکافی بارثها منه شاذ مسبوق بالاجماع ... ... و ترث من قیمة الالات و الابنیة ... ...

ففي الصحیح لا یرثن النساء من العقار شیئا و لهن قیمة البناء والشجر والنخل یعني بالبناء الدور و انما یعني من النساء الزوجة ... ... و اعلم ان مقتضی اطلاق العبارة و غیرها من عبائر الجماعة مما اطلق فیه الزوجة عدم الفرق فیها بین کونها ذات ولد من زوجها ام لا وهو الاقوی وفاقا لکثیر من اصحابنا — (شرح کبیر جلد دوم کتاب المیراث) *

(10) ان الزوجة اذالم یکن لها منه ولد لا ترث من العقار و الدور والسلاح والدواب شیئا ولها من قیمة ماعدا الارض من الجذوع والابواب والنقض والقصب والخشب والطوب والبناء والشجر والنخل و لن البنات یرثن من کل شیئ ... ... لان المراة لیس لها نسب ترث به و انما هي دخیل علیهم انما صار هذا کیلا تتزوج المراة فیجیئي زوجها او ولدها من قوم آخرین فیزاحم قوما آخرین في عقارهم ... ... ان الزوج یرث من کل ما ترکت زوجته و کذا جمیع الوارث و کذا الزوجة التي لها

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cattle: she will get (a share) out of the price of all things, excepting land, *viz.*, timber, gate-ways, *naqz* (نقض) (material of fallen house, caves, wood, bricks, houses, trees, palm-trees); but the daughters get inheritance out of all things. * * * The woman has no consanguinity with the heirs that she should inherit by reason thereof. She is a stranger among them, and the reason for her not inheriting a share from everything is this that she might not marry another, for if she does so her husband or her children who belong to another class will be introduced and there will be dispute with the other regarding *iqar* (عقار). * * * * The husband inherits out of all things left by his wife, and so do all the heirs, and so does the wife who has children by her husband. * * * Muhammad, son of Ahmad, son of Yahya, says that he learnt from Yakub, son of Yazid, who derived his information from Ibn-i-Ali Umar, who in his turn got the information from Ibn-i-Adina, that as regards females having children they get from the landed property and Saduk traces this tradition up to Muhammad, son of Ali-Umar, quoting his authorities." (*Wasael-ul-shia*, Book on Inheritance.)

I have been at pains not only to quote these numerous texts from the *Shia* law, but also to take care that they are properly translated into English. It is obvious from these texts, and it would simply involve my judgment being a volume of a book instead of what I want it to be, a simple statement of what the law is, if I were to show that those texts leave absolutely no doubt in my mind that the Imamia law, commonly called the *Shia* law, namely, the law which governs the present case, shows one undeniable fact, that the wife, be she childful or be she childless, is one of the heirs of her husband. The history of Muhammadan Jurisprudence explains why, whilst among the *Sunni* Muhammadans absolutely no distinction is made between a childful wife and childless wife, a great distinction is made in the *Shia* creed in this respect. I do not intend to go into the history of how the difference between the *Sunni* and *Shia* creed has arisen, but it is simple enough for every one who reads the history of Muhammadan Jurisprudence to show that because [45] Ayesha the childless widow of the prophet, was childless and never had a child, therefore the dissensions which arose upon the death of the prophet created difficulties with which we have to deal here.

Be it as it may, one thing is certain that a *Shia* childless wife is an heir of her husband. Whether she is entitled to take a share in his zamindari or landed estate or not is a matter of detail. But these texts show that she is an heir in his personal estate, that is to say, in such property as he leaves which in our British Indian law is called moveable property. No one who reads the texts which I have quoted can doubt this point. Nor can he doubt that even in immoveable property a childess wife is entitled to get a share not of a house, nor of a grove, but to get compensation for the value of all that her share would represent, namely, the value of the materials of the house, the value of standing timber, the value of utensils, the value of anything which falls short of being called land.

This being my view of the *Shia* law, the next question to consider is

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منه ولد ... ... عن محمد بن احمد بن يحيى عن يعقوب بن يزيد عن ابن ابي عمر عن ابن اذينه في النساء اذا كان لهن ولد اعطين من الرباع و رواه الصدوق باسناده عن محمد بن ابي عمر * (وسائل الشيعه كتاب الميراث) *

also a matter of importance, namely, the question what is the exact period at which, for the purposes of administering the *Shia* law, we ought to decide that a young woman, such as Musammat Zainab is, should be declared to be barren or childless. I hold it true upon the very authorities which I have quoted that there is absoluted no authority in the *Shia* law to declare that a woman in the position of Musammat Zainab, respondent, is totally devoid of any right of inheritance from her unfortunate lunatic husband, Muhammad Sadik. Absolutely no such authority exists, nor can the *Shia* law contemplate such a thing, because if it did it would be contradicting itself. What it does contemplate is that for the purpose of considering whether or not a widow or wife who is childless is entitled to take part or share in the estate of her deceased husband, one has to see whether she gave birth to a child and if she did, if the child is alive at the time when the husband dies. This is the *Shia* law, and it is consistent with the principle upon which it proceeds. The inheritance to the estate of a *Shia*, as well as a *Sunni*, opens upon the death of the *propositus*, namely, the person whose estate is in question. In this case the childless wife of her husband, [46] Musammat Zainab, being still alive it is impossible to say whether or not she is childless in the sense of being childless at the time when her husband Muhammad Sadik may die. It is impossible legally for Muhammad Sadik to know whether or not by cohabitation with her, offspring may be born and whether or not his wife would be an inheritor not only of his personal or moveable estate but also of his real estate. Nobody knows this without the help of prophecy, but I have to consider the matter as it now stands, and I have no doubt that under the *Shia* law upon the texts which I have quoted Musammat Zainab, respondent, is one of the heirs of her lunatic husband, Muhammad Sadik, with whom we are concerned.

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This being so, what explanation I have given of my interpretation of the provisions of s. 10 of the Lunacy Act (Act No. XXXV of 1858) answers what I mean. And it means this, that Musammat Zainab Bibi is one of the legal heirs of her lunatic husband Muhammed Sadik, and as such the law prohibits her from being eligible for the office of being the guardian of the unfortunate lunatic's person.

It is therefore clear that the order of the learned District Judge appointing Musammat Zainab Bibi to be the guardian of the person of Muhammad Sadik is wholly illegal, opposed, as it must be regarded, to the express prohibition contained in the proviso of s. 10 of the Lunacy Act (Act No. XXXV of 1858).

The next point then is whether the appellant, Fazl Rab, is a fit and proper person to be appointed manager of the lunatic's property. Upon this point I entirely agree, upon the evidence which has been taken in the case, with the conclusions at which the learned District Judge has arrived, that the petitioner, appellant, Fazl Rab, is not fit to be so appointed as manager of the lunatic's property, for during a number of years there have been disputes between him and the father of the lunatic, and it is amply shown that Fazl Rab is not acting as a loving uncle for the benefit of his unfortunate nephew, Muhammed Sadik, but that his object is to get hold of the lunatic's property and to deal with it as best as he likes; so that upon this point I have no doubt that the learned District Judge [47] was right, and I agree with him, and regard Fazl Rab as an unfit person to be appointed as the guardian of the person or property of the lunatic, Muhammad Sadik.

Now the last point urged on behalf of the appellant is that even if the appellant, Fazl Rab, be regarded as unfit the proper order in the case

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should be that the Court of Wards or some other capable person should undertake the guardianship of the person and property of the lunatic.

I am of opinion that, whatever value may be attached to the suggestion, one thing is certain, that this Court as a Court of appeal is not the Court to decide whether a particular person is the best person to be so appointed. The jurisdiction in regard to minors is conferred upon the Civil Courts by Act No. XL of 1858 and in regard to lunatics by Act No. XXXV of 1858, and therefore the Civil Courts thus invested with authority are bound by the principle contained in s. 26 of Act No. VI of 1871, which has been reproduced in s. 37 of Act No. XII of 1887, and to act according to the Hindu or the Muhammadan law as the parties may belong to. Now if it were necessary to refer to the Hindu law it would be easy to show that it is the duty of the Sovereign in cases of insanity to be the guardian of the lunatics. Be it as it may, I am dealing with the case of a *Shia* Muhammadan who has been found to be a lunatic, and the question is what is the duty of this Court in respect of such a person.

I have no doubt under the *Shia* law that under the conditions in which Muhammad Sadik is situated it is the duty of the British Government which protects him, of the Government which realizes revenue from his estate, of the Government which can pass any order as to his life or death or to his welfare to abide in cases of this character by the *Shia* law which governs this case. The original Arabic authoritative text of that law together with its translation is the following :—

"The fourth rule is that the guardianship in regard to the property of a minor or a lunatic belongs to the father or the paternal [48] grandfather, but when they do not exist then to their executor, and if even he does not exist then it belongs to the ruling authority. (*Sharayeh-ul Islam*, Book on Legal Disability, p. 194).*

Be it as it may, the learned District Judge in dealing with the case has not so dealt with it. He evidently did not know that Musammat Zainab Bibi was one of the legal heirs under the *Shia* law of inheritance and therefore he passed the order which he did appointing her guardian of her lunatic husband, Muhammad Sadik.

For these reasons I would decree the appeal, and setting aside the order of the lower Court remand the case to that Court to act in the best manner under the circumstances and the facts of the case, and to appoint a fit guardian of the person of the lunatic, Muhammad Sadik, and manager of his estate, or to act under such other powers as the Lunacy Act (Act No. XXXV of 1858) confers upon the learned District Judge. As to costs I would direct that they abide the result, according to the conclusions at which the learned District Judge arrives.

KNOX, J.—I agree in the order proposed by my brother Mahmood, I feel with him that Musammat Zainab Bibi, who apparently is still a young woman and without any experience of the world, is not the fittest person to be the guardian of the unfortunate Muhammad Sadik. The death of Musammat Khatun Bibi makes her position a still more difficult one, and I think it probable a more fitting guardian can be found.

I confess to considerable doubt as to what interpretation should be put upon the words "the legal heir" in s. 10 of Act No. XXXV of 1858. In that year no enactment corresponding to Act No. I of 1868 was in force in India. The only aid to be obtained in interpreting the words of

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* الرابعة الولاية في مال الطفل والمجنون للاب والجد للاب فان لم يكونا فللوصي فان لم يكن فالحاكم — (شرايع الاسلام. كتاب الحجر صفحه ١٩٤) *

the Act is what can be derived from the provisions contained in s. 23. Act No. XXXV received the assent of the Governor-General on the 14th day of September 1858, and on the same day Act No. XXXIV was placed upon the statute [49] book. This last-mentioned Act also contains a section devoted to interpretation of the language contained in it, *viz.*, s. 32. Now s. 32 of Act No. XXXIV and s. 23 of Act No. XXXV are almost word for word the same, with one striking exception. In s. 32 is to be found this sentence "words importing the singular number shall include the plural number, and words importing the plural number shall include the singular." This sentence is absent from s. 23 of Act No. XXXV, and I am unable to consider the omission an accidental one. Under these circumstances I am unable to interpret the word " the legal heir " as including the plural number. As however I agree in the order proposed, it is unnecessary for me to consider the question further.

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Appeal decreed.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Blair.

PHEKU (*Judgment-debtor*) *v.* PIRTHI PAL SINGH AND OTHERS (*Decree-holders*).* [2nd November, 1892.]

Civil Procedure Code, s. 158—Act VI of 1892, s. 4—Execution of decree—Application for execution struck off in consequence of non-payment of talbana—Subsequent application for execution.

An application for execution of a decree by attachment of immoveable property having been presented by a decree-holder, the Court executing the decree ordered that the costs of such attachment should be deposited by the decree-holder on or before a certain specified date. The costs of attachment were not deposited by the day named in the order above referred to and the Court thereupon passed the following order:—" This case came on for hearing to-day ; as the decree-holder has not deposited the costs of attachment, &c., therefore it is ordered that the case be struck off for default."

Held, that whether this second order was an order under s. 158 of the Code of Civil Procedure deciding the application for attachment, or whether its effect was merely to remove the application from the file of pending applications without deciding it, in either case no fresh application (being of a precisely similar nature) was entertainable, though in the latter case, possibly the former application might be renewed.

[R., 15 A. 84 (101) (F.B.) ; 16 A. 26 (27).]

THIS appeal originally came before a Bench consisting of Straight and Tyrrell, JJ., who, in view of certain difficulties as to the effect of an order under s. 158 of the Code of Civil Procedure, desired that [50] the case might be laid before a Bench consisting of the Chief Justice and themselves. The facts of the case are very fully stated in the referring order, which is as follows :—

STRAIGHT and TYRRELL, JJ.—This is an appeal on the execution side and the judgment-debtor is the appellant. The decree obtained by the decree-holder, respondent, was dated the 7th of July 1884, and was passed upon a mortgage-bond of the year 1870, executed by Musammat Resham Bibi, the wife of the appellant, in respect of a zemindari share of her's, which she had acquired from her father. The decree ordered sale of the hypothecated property. The first application for execution was

* First Appeal No. 7 of 1891, from a decree of Maulvi Shah Ahmud-ullah, Subordinate Judge of Allahabad, dated the 23rd November 1890.

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made upon the 11th of June 1887, and, the decree then being more than one year old, notice was issued to the judgment-debtor to show cause as required by law. On the 29th of June 1887, that being the date fixed for the judgment-debtor to appear and show cause, the following order was passed :—"To-day the case came on for hearing and the judgment-debtor being called did not appear, and the service of process being proved by the report of the Nazir, ordered that the decree-holder do pay the costs of attachment, &c., by the 6th of July 1887, and let the pleader be informed." To this order there is attached the signature of the decree-holder's pleader. Upon the 6th of July 1887, that being the date fixed by which *talbana* was to be paid in, the following order was passed :—"This case came on for hearing to-day; as the decree-holder has not deposited the costs of attachment, &c., therefore it is ordered that the case be struck off for default."

The second application for execution out of which this appeal before us arises was made upon the 20th of March 1890, and it was refused by the Munsif upon the 19th of July 1890, in the following terms :—

"In reference to the observations of Sir John Edge, C. J., reported in page 119 of the *Weekly Notes*, for 1890, I cannot but hold that this application for execution cannot be allowed. The order was to file *talbana* within a specified time, and when it was not filed the case was struck off. That order for filing the *talbana* bears the [51] decree-holders' pleader's signature. Application for execution refused without costs."

In appeal to the Subordinate Judge he was of opinion that the Munsif's decision was wrong, and he expresses himself in the following terms :—

"The Munsif by the High Court's decision alluded to in his judgment probably understands that the procedure under s. 158 of the Civil Procedure Code is applicable to the first rejected application: but in my opinion this is a mistake. The procedure under the said section would have been applicable had the decree-holders on their application been granted time for further proceeding, but such was not done in the present case. On the former application of the decree-holders a notice was issued to the judgment-debtors, and after the service of this notice the Court itself gave the decree-holders in their absence further time for depositing the costs of attachment, &c., but on proof of their failure to do this, the said application was rejected. The aforesaid proceeding therefore was not one under s. 158 of the Civil Procedure Code. I have taken this meaning of the said section in accordance with the view expressed by the Madras High Court in their decision published on page 41 of I.L.R. Vol. VII."

The Subordinate Judge therefore reversed the decision of the Munsif and remanded the execution-proceedings to the Munsif for restoration to the file of pending proceedings. It is this order of remand that is subject of this first appeal to this Court. It is strenuously contended by Mr. *Srish Chandra* on behalf of the judgment-debtor appellant that the portion of the learned Chief Justice's judgment to which reference is made by the Munsif in his decision is directly applicable to the circumstances of this case, and that this Bench is bound by that Full Bench decision. Mr. *Srish Chandra* has also urged that assuming the decision of the 6th of July 1887 in the execution-application to have been given under s. 158 of the Code of Civil Procedure that makes not only the present application one barred by the former decision, but precluded the decree-holder from making any subsequent application for execution of his decree. [52] As at present advised we are disposed to hold that the decision of the 6th of July 1887 was

a decision under s. 158, Civil Procedure Code. By the order of the 29th of June 1887, time had been given to the decree-holder, notice of which had reached his pleader, to perform an act necessary to the further progress of the application towards an order for attachment, if necessary, or for sale, by deposit of *talbana*, that is to say, the necessary expenses incidental to such attachment or sale, and that having failed to do this act for which time had been given him, the decree-holder was in default in the sense of s. 158 which, by s. 647 of the Code, is made applicable to proceedings in execution. We see nothing in the section to justify the view taken by the learned Subordinate Judge that it was essential that the order of the 29th of June 1887 should have been made upon the application of the decree-holder or his pleader. It is in our opinion enough that it was made and that it was brought to the knowledge of the decree-holder's pleader, and that there was default in the sense of s. 158 of the Code. Our minds however are not without difficulty as to the precise effect of the order passed under s. 158, *viz.*, as to whether it can be regarded as a bar to all subsequent applications. As the question involved is one that more or less arises out of an expression used in the course of the judgment of the learned Chief Justice in the Full Bench case, we both feel that it is desirable we should have the benefit of his assistance in disposing of this appeal, and we therefore refer the hearing and disposal of this appeal to a Bench consisting of the learned Chief Justice and ourselves.

The reference came on for hearing before a Bench consisting of Edge, C.J., and Tyrrell and Blair, JJ., and the following judgments were delivered :—

Mr. *J. Simeon*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

JUDGMENTS.

EDGE, C.J.—The appellant here is the judgment-debtor. The decree-holders applied for execution of their decree. Notice was served upon the judgment-debtor, and on the 29th of June 1887 [53] the Munsif passed an order giving the decree-holders time up to the 6th of July 1887, to pay into Court the costs of the attachment. On the 6th of July 1887 the Munsif passed an order striking off the application for attachment on the ground that the decree-holders had not paid into Court the costs of the attachment. On the 20th of March 1890, the application out of which this appeal has arisen was made. It was a substantive application for execution of the decree and did not purport to be, and was not, an application for revival of the previous proceedings. The Munsif dismissed the application relying on some observations of mine in my judgment in *Radha Charan* v. *Man Singh* (1). On appeal the Subordinate Judge set aside the order of the Munsif and made an order of remand relying on the case of *Sri Raja Venkataramaya Apparau Bahadur* v. *Anumukonda Rangaya Nayudu* (2). In my opinion the Madras case is absolutely inapplicable to the present. That was a case in which s. 158 of the Code of Civil Procedure could not apply on the facts as stated therein. The judgment-debtor appealed against the order of the Subordinate Judge. Now it has been argued that the Munsif proceeded under s. 98 of the Code of Civil Procedure when he passed his order of the 6th of July 1887. That argument cannot be supported. The 6th of July 1887 was not a date fixed

(1) 12 A. 392=10 A.W.N. (1890) 119. (2) 7 M. 41.

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for the defendant to appear and answer, nor was this a case in which neither party appeared on a subsequent date to which the hearing of the application had been adjourned, nor was the absence of the parties, or either of them, the cause of the Court's action. The cause of the Court's action was the non-payment by the decree-holders by the date fixed for that purpose of the costs of the attachment. It was a case to which in my opinion s. 158 of the Code of Civil Procedure would apply. It is not necessary to express an opinion as to whether what the Munsif did was a deciding of the application or merely a putting of the application aside from the list of pending applications leaving it undecided. Probably the Munsif by his order intended to express a dismissal of the application. If the order of the 6th of July operated as a dismissal [54] of the application it was a decision under s. 158 of the Code, and whether erroneously made or not, it was a bar, so long as it existed, to a precisely similar application, as this was, on behalf of the same parties. If the order of the 6th of July did not operate as a decision of the application, then all that can be said is that in that event there having been no decision of the application, the application is as yet undisposed of. Now it is quite clear from s. 4 of Act No. VI of 1892 that applications for execution of decrees are proceedings in suits, and I can find nothing to suggest that two precisely similar proceedings by the same party against the same party in respect of the same matter can be co-existent in a suit. The existence of the first proceeding undisposed of in my opinion precludes the entertainment of the second precisely similar proceeding: I mean by 'precisely similar,' similar in parties, similar in object, and similar in subject-matter; so that whether the order of the 6th of July 1887 is to be regarded as an order deciding the first application for execution of the decree, or whether it is to be regarded as an order merely removing that application from the list of pending applications and not deciding it, the present application is not one which can be entertained. I would allow this appeal and I would set aside the order of the Subordinate Judge and reinstate the order of the Munsif with costs in all Courts.

TYRRELL, J.—I entirely concur and will only add a word with reference to a decision of the learned Chief Justice and myself in *Bijai Singh* v. *Haiyat Begam* (1). The head-note in that case is somewhat misleading. It is to the effect that:—"Where an application for execution of decree is struck off the file on an adverse decision on law or on the merits, the order, if not set aside on review or appeal, will operate as *res judicata*. But where the application is struck off merely because *talbana* has not been paid or some other step is not taken, the order does not bar a further application." In fact our decree in that case was based on the following grounds:—"It is said that the striking off the application of the 3rd of November, 1887, must be treated as analogous to the decision of a [55] suit under s. 158 of the Civil Procedure Code. So we understand the argument. The application of the 3rd of November 1887 was struck off because the Court thought it was long enough on the file. It did this although *talbana* had been paid." It is clear that that was not a case falling under s. 158 of the Code of Civil Procedure, and that it does not in any way clash with the views which have been enunciated to-day in the appeal before us.

BLAIR, J., I concur.

Appeal decreed.

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(1) 9 A.W.N. (1889) 163.

15 A. 55 = 12 A.W.N. (1892) 222.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAGHUNATH SINGH (*Petitioner*) *v.* RAGHUBIR SAHAI (*Opposite Party*).* [2nd November, 1892.]

Application for restoration of an appeal dismissed for default—Vakalatnama.

Where a vakil had been duly empowered by a *vakalatnama* drawn in the customary form to file and conduct an appeal in the High Court, and that appeal had been dismissed for default :—*Held* that such vakil was competent without filing a fresh *vakalatnama* to present an application for the restoration of the said appeal to the list of pending appeals.

THIS was an application to restore to the list of pending appeals a Second Appeal (No. 709 of 1891) filed by the petitioner which had been dismissed for default by an order of Straight, J., on the 24th of March, 1892. The circumstances under which the said appeal was dismissed appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the applicant.

Babu *Rajendro Nath Mukerji*, for the opposite party.

JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This is an application to set aside a decree passed in default of appearance dismissing an appeal. We are satisfied that the non-appearance of the vakil to represent the appellant at the hearing was caused by the accidental omission of the vakil's name from the printed cause-list. The gentleman in question in our experience invariably attends to his clients' cases and follows the practice of the Court with regularity. We consider that this is a case in which the decree should be set aside and the appeal [56] reinstated. There is, however, a further objection raised, namely, that no special *vakalatnama* has been filed authorizing the vakils, or either of them, especially to make this application, and it has been contended that the *vakalatnama* which authorized these vakils to file the appeal and to conduct the proceedings in it, and which was rightly filed, lapsed and determined the moment the decree dismissing the appeal was passed. That contention cannot in our opinion be supported. Under the *vakalatnama* authorizing the vakils to conduct the proceedings in the appeal they were authorized to conduct proceedings in execution subsequent to decree, whether those proceedings in execution were by or against their clients. It is also manifest that if we set aside the decree of dismissal and reinstate the appeal it will not be a fresh appeal, but will be an appeal to which the *vakalatnama* already filed applies, and it would seem strange if under these circumstances it were necessary to file a special *vakalatnama* for the simple purpose of enabling the appellant to have, not a new appeal entered, but his original appeal reinstated and proceeded with. In our opinion no fresh *vakalatnama* was necessary. We accordingly set aside the decree of dismissal and reinstate the appeal on the list of pending appeals in this Court. We make no order as to costs.

* Miscellaneous Application No. 64 of 1892 in Second Appeal No. 709 of 1891.

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APPEL-
LATE
CIVIL.

15 A. 56=
12 A.W.N.
(1892) 234.

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APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

BISHAMBAR NATH (*Plaintiff*) *v.* NAND KISHORE AND OTHERS (*Defendants*).* [9th November, 1892.]

Acknowledgment of debt—Stamp—Act I of 1879, *sch. I, art.* 1—*Act XV of* 1877, *s.* 19.

The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of art. 1, sch. I of the Indian Stamp Act, 1879, is a question in each case of the intention of the writer. Hence, where such a letter, written *ante litem motam*, before limitation in respect of the debt had expired, and at a time when other evidence of the debt was subsisting, was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation under the provisions of s. 19 of the Indian Limitation [57] Act, 1877. *Held* that the said letter was not inadmissible in evidence by reason of its not having been stamped.

[R., 19 A. 255 ; 21 B. 201 (205) ; 30 C. 687.]

[N.B.—This is stated as Second Appeal No. 444 of 1892 in 12 A.W.N. (1892) 234 ; *Ed.*]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, Pandit *Sundar Lal* and Kunwar *Parmanand*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

KNOX, J.—This was a suit brought by one Chaube Bishambar Nath, who is appellant before us, to recover money, principal and interest, which he alleged to be due to him from certain defendants, who are in this Court respondents. The lower appellate Court has found that the moneys which the appellant claims as advanced by, and therefore due to him, were so advanced, and it has further found that the letter bearing date the 17th of April, 1886, purporting to have been written by the respondents is a genuine letter and was so written by them. We have not before us any certain date as to when the moneys now claimed were advanced by the appellant to the respondents, but it is alleged by the respondents, and not denied by the appellant, that the moneys, or the main part of them at any rate, were advanced at a time about the year 1884. The present suit was filed on the 17th of January, 1889, and it follows as a natural consequence that the claim of the appellant would stand barred by the statute of limitation, unless it can be shown that it is aided by any special section. The letter of the 17th of April, 1886, becomes therefore a piece of most important evidence to the appellant, inasmuch as he claims that upon its terms the respondents have executed within the period of three years from the date the moneys were advanced, an acknowledgment of their liability to pay those moneys within the meaning of s. 19 of the Indian Limitation Act (Act No. XV of 1877). The lower appellate Court had this document before it, but deemed itself precluded from treating it as evidence, because in its opinion the document required a stamp under art. 1, sch. i of the Indian Stamp Act, 1879, and it had not been stamped at the time of execution.

* Second Appeal, No. 444 of 1890, from a decree of Pandit Rai Indar Narain, Additional Subordinate Judge of Aligarh, dated the 6th January, 1890, confirming a decree of Maulvi Syed Amjad-ullah, Munsif of Haveli, dated the 21st June, 1889.

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The learned Counsel for the appellant urges that this view of the lower appellate Court is erro-[58]neous and that the letter was not one which the law required should be stamped. We have had the letter read, and in it the respondents, after setting out that certain moneys had been advanced by the appellant's agent in connection with the land in suit in which they were interested, go on to say that they regret that the suit had been decided against them, that the sum of Rs. 340 had been expended in connection with it and that this money they will have to pay. The letter is a long one, and the respondents go on to ask the appellant to be so good as to advance moneys in order that the suit may be appealed; as otherwise they will be ruined and have to leave the village. Taking advantage of the terms of the letter the learned Pandit contends that it was an ordinary letter written in the course of correspondence between the parties and not executed with the express intention of supplying evidence of a debt exceeding Rs. 20 in amount. This being so, he would have us hold that the document was one which did not require to be stamped under the provisions of art. 1, sch. i of the Indian Stamp Act (Act No. I of 1879). We are of opinion that whether a document of this kind amounts to an acknowledgment within the terms of art. 1, sch. i of the aforesaid Stamp Act is a fact which depends in each case upon the intention of the writer. That intention may well be ascertained by looking to the surrounding circumstances of the case and what was taking place when the document was written. We also bear in mind that Acts of the nature of the Indian Stamp Act should, when there is a doubt as to what construction should be placed upon their terms, be construed in favour of the subject. We are not satisfied from the letter that it was written with the intention of supplying evidence of a debt. It was a letter written at some time before the period of limitation would expire. Evidence as to the existence and amount of the original debt at the time was at hand and readily available and there is nothing in the terms of the letter, beyond the casual expression that the respondents would have to pay the money, from which we could infer an acknowledgment of liability within the meaning of the article and schedule which we have quoted above. We therefore hold that the document was one which did not require to be stamped, and that it [59] was admissible in evidence and wrongly excluded by the learned Judge. This being the case, we set aside the judgment and decree of the lower appellate Court and decree the appeal. As regards the interest claimed by the appellant we find no evidence, and have not been referred to any, of any intention to pay interest. The appellant's claim therefore, so far as regards the principal, will stand decreed and as regards interest, it will stand dismissed with proportionate costs.

BLAIR, J.— I agree entirely.

Appeal partly decreed and partly dismissed.

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15 A. 59=12 A.W.N. (1892) 235.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Blair.

GIRDHARI (*Defendant*) *v.* KANHAIYA LAL (*Plaintiff*).*
[11th November, 1892.]

Civil Procedure Code, s. 52—Plaint, form of verification of.

In order to constitute a proper verification of a plaint within the meaning of s. 52 of the Code of Civil Procedure, it is necessary for the person verifying, if all the facts are within his knowledge, to state distinctly that they are to his knowledge true; and if he has knowledge as to some and only information and belief as to others, to state to which he speaks from his knowledge and to which from his information and belief. A verification in the form;—"To the limit (or extent) of my knowledge the purport of this is true." is not such a verification as satisfies the requirements of s. 52 of the Code. In the matter of *Upendro Lal Bose* (1), referred to.

[F., 1 Ind. Cas. 677 (681); R., 18 A. 396 (398); 16 A.W.N. 75 (76); 10 C.L.J. 91 (100).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. *T. Conlan* and the Hon'ble Mr. *Colvin*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J., TYRRELL and BLAIR, JJ.—Objection is taken here, and seems to have been taken in the two Courts below, that the plaint was not signed as required by s. 51 of the Code of Civil Procedure. It is alleged on behalf of the defendant-appellant that at the time when the plaintiff signed the sheet of paper which at present forms the second sheet of the plaint, the plaint had not been written, [60] in other words, that what purports now to be the signature to the plaint was a signature made before the plaint came into existence. We have no doubt that what is required by s. 51 is that the plaint must be in existence before the signature is put to it. Our attention has been drawn to the evidence of the plaintiff's mukhtar or karinda and of the plaintiff himself. It is somewhat doubtful what the true interpretation of the mukhtar's evidence is on this point. That apparently was the only evidence which was looked at by the Subordinate Judge. To our minds the plaintiff's evidence makes the matter more clear. However, we are sitting here in second appeal, and it is not for us to find issues of facts. We remand this case to the Court of the Subordinate Judge for a finding as to whether the plaint was written partly on a stamped paper and partly on an unstamped paper, but was or was not wholly written before what purports to be the plaintiff's signature was put to the unstamped paper.

Another objection has been taken as to the nature of the verification. The verification which was made was as follows:—"To the limit of my knowledge the purport of this is true." That is not the verification which is required strictly under s. 52. The verification under that section must

* Second Appeal No. 630 of 1889 from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 8th March 1889, confirming a decree of Maulvi Muhammad Ismail, Munsif of Mathura, dated the 10th June, 1888.

(1) 6 C. 675.

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be, if all the facts are to the knowledge of the deponent, a distinct verification that they are to his knowledge true. If he has knowledge as to some, and only information and belief as to others, the verification should show as to which he speaks from his knowledge and as to which he speaks from his information and belief. This matter was discussed in "In the matter of *Upendro Lal Bose* (1)" and we agree in the view there expressed as to what the practice should be as stated in the first paragraph of p. 678 of the report. The verification in this case appears to follow or be to the effect of s. 52 of the Code as translated into Hindustani in the authorized venacular translation of the Code. How it came to be mistranslated in the authorized version we do not know, probably the translator may have followed some previous precedents based originally on s. 27 of Act VIII of 1859, which required a very different verification from that which [61] is required by s. 52 of the present Code. Although the verification is a matter of great importance, we do not attach much weight to the error in verification in the present instance, as the party making it may have been misled by the authorized translation of the Code. Ten days will be allowed for objection on the return to the remand.

Cause remanded.

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15 A. 61=12 A.W.N. (1892) 242.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

MEHDI HASAN (*Applicant*) *v.* TOTA RAM (*OppositeParty*).*
[19th November, 1892.]

Criminal Procedure Code, ss. 195, 404, 439—Sanction to prosecute—Appeal—Revision.

The proceeding under s. 195 of the Code of Criminal Procedure by which an order granting or refusing to grant sanction to prosecute may be set aside is a proceeding in revi sion and not by wayof appeal.

[**F.**, 23 B. 50 (52); **Appr.**, 40 C. 239 (244)=13 Cr.L.J. 599 (601)=17 C.W.N. 91 (93) =16 Ind. Cas. 167 (169); **R.**, 35 A 90 (91)=11 A.L.J. 11=14 Cr.L.J. 47=18 Ind.Cas. 271; **Disc.**, 26 A. 244 (248)=A.W.N. (1904), 10.]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of KNOX, J.

Mr. *Wallach*, for the applicant.

Babu *Sital Prasad Chatterji*, for the opposite party.

JUDGMENT.

KNOX, J.—This case is represented as an appeal under s. 195 of the Code of Criminal Procedure from an order of the Sessions Judge of Mainpuri granting sanction for a criminal prosecution under section 193 of the Indian Penal Code.

A preliminary objection has been urged to the effect that no appeal lies from orders passed under s. 195 of the Criminal Procedure Code and I have been referred to s. 404 in support of the contention. Section 404 provides in express terms that, except as provided by this Code, no appeal shall lie from any order of a Criminal Court. No direct provision of the

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* Criminal Revision No. 665 of 1892.
(1) 6 C. 675.

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Code has been pointed out to me as sanctioning an appeal from orders passed under s. 195. It has, however, been contended by Mr. *Wallach*, who appears for the appellant, that the words contained in s. 439 of the Code of Criminal Procedure do recognise the power of revoking a sanction [62] given or granting a sanction when refused as one of the powers inherent in a Court of appeal.

I have also been referred to the case of *Gulab Singh* v. *Surat Ram and others* (1), and it has been argued that this is an authority for the view that appeals lie from orders under s. 195 of the Code of Criminal Procedure. The case is not on all fours with the case before me. In that case the Court was dealing with an application for a revision of an order of a Magistrate of the first class refusing sanction, and all that is expressly laid down in that ruling of this Court is that inasmuch as the law provided for an appeal against an order refusing sanction, no application for revision would lie to this Court unless the prior remedy provided by the Code had been exhausted.

So far, moreover, as my experience goes, and Counsel has not been able to show me to the contrary, the usual practice of this Court have been to entertain application of this kind as applications for revision. I do not find either in s. 439 or s. 195 any express provision made for an appeal. Section 195 only contains the word "appeal" as a convenient mode of designating a particular Court which the law directs shall deal with the revoking or granting of sanctions under s. 195, and as regards s. 439 I am of opinion that the word Court there used is again used to designate a particular Court and cannot be construed in face of the precise wording of s. 404 into a word granting an appeal. Had the Legislature intended an appeal to lie, the natural place for so enacting would have been in Chapter XXXI of the Code. For these reasons I hold that the preliminary objection must prevail and that no appeal lies.

However, under the circumstances, and exercising my powers as a Court of revision, I direct the record to be laid before me with a view of satisfying myself how far any contention can be urged of the correctness of the order passed.

Upon this case coming up in revision, Mr. *Chatterji* who appears for Tota Ram, called the attention of the Court to the fact that Mehdi Hasan had on a previous occasion applied to have the order [63] for sanction in this case reviewed and that application was rejected. Under these circumstances I hold that as regards Mehdi Hassan I cannot entertain this application.

Application rejected.

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(1) 4 A.W.N. (1884) 293.

15. A. 63=12 A.W.N. (1892) 240.

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APPELLATE CIVIL.

15 A. 63=12 A.W.N. (1892) 240.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

RAM RAJ TEWARI (*Plaintiff*) v. GIRNANDAN BHAGAT AND OTHERS (*Defendants*).* [30th November, 1892.]

Act VII of 1870, s. 7, para. 5—Act VII of 1887, s. 8—Court-fee—Jurisdiction—Suit to eject a tenant at fixed rates—Valuation of suit.

A suit to eject a tenant at fixed rates is a suit for the possession of land within the meaning of paragraph 5, s. 7 of the Court-fees Act, 1870, and the valuation of such suit for the purposes of Court-fees and of jurisdiction is the value of the subject-matter of the suit, that is to say, of the tenant-right, not of the land itself nor of merely one year' rent.

[N.F., 1 L.B.R. 303 (307); R., 15 A. 363 (365); 27 P.R. 1910=30 P.L.R. 1910=5 Ind. Cas. 910; U.B.R. (1902—1903), Vol. II. Court-fees, p.1; D., 32 A. 19 (23)=6 A.L.J. 905 (910)=3 Ind. Cas. 562=6 M.L.T. 311.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jwala Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

EDGE, C.J. and AIKMAN, J.—In the suit out of which this appeal has arisen the plaintiff sued to eject certain tenants at fixed rates on account of acts alledged to have been done by them inconsistent with the purposes for which the land was let. The suit was one which came under cl. (*b*) of s. 93 of Act No. XII of 1881. The case went in appeal to the Court of the District Judge, and a question arose before him as to whether the case was appealable under s. 189 of Act No. XII of 1881. The annual rent was Rs. 81-5-0, and the plaintiff, who was the appellant in the Court of the District Judge, had valued his suit for the purposes of the Court-fee at Rs. 81-5-0. The learned District Judge considered that the valuation put by the plaintiff upon his suit was the valuation which [64] determined the right of appeal in the case and dismissed the appeal, holding that it did not lie. So far as this case is concerned, s. 189 of Act No. XII of 1881 gave a right of appeal if the value of the subject-matter exceeded Rs. 100. Having regard to s. 8 of Act No. VII of 1887, we have to see whether the suit was one of those referred to in paragraphs 5, 6, 9 or 10, cl. (*d*) of the Court-fees Act, 1870. As the Court-fees Act, 1870, was undoubtedly enacted with the object of specifying the Court-fees to be paid in every class of suit, we must, if we can, so read it as to make it include the suit in question here. This suit undoubtedly was one for the possession of land. It was a suit by a landlord to eject his tenants and to recover from them that possession of the land which they were entitled to as tenants at fixed rates. We have carefully gone through the Court-fees Act of 1870, and we are unable to find, either in the body of the Act or in the schedules, any povision which would apply to a suit of this kind, unless it is to be found in the opening portions of paragraph 5 of s. 7. Paragraph 5 begins thus:—"In suits for the possession of

* Second Appeal No. 914 of 1890, from a decree of H.W. Reynolds, Esq., District Judge of Ghazipur, dated the 16th June 1890, confirming a decree of Maulvi Muhammad Wasi, Assistant Collector of Ballia, dated the 16th September, 1889.

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land, houses and gardens—according to the value of the subject-matter." What follows these words applies to cases of which this is not one, and provides for the ascertainment of value by means which would not be applicable here. We are accordingly of opinion that we must apply the words which we have just quoted from paragraph 5 to this case in preference to holding that the Court-fees Act makes no provisions for Court-fees in suits of this kind. The result is that in suits under s. 93, cl. (*b*), the value for the purposes of Court-fees and the value for purposes of jurisdiction have to be computed in the same way, namely, by ascertaining the value of the subject-matter. The subject-matter here cannot be treated as the land itself, as the landlord, plaintiff, has, through his tenants, proprietary possession, and what is really sought is to free the land from the possession of the tenants holding as tenants at fixed rates, that is, to get rid of the tenants and their tenant-rights and that is a relief the value of which is easily ascertainable. The question of jurisdiction was not decided on these lines. We set aside the decree of the Court below, and remand this case under s. 562 of the Code of Civil Procedure for the appeal to be [65] disposed of according to law. It may of course be found that the value of what we may call the tenant-right, in this case does not exceed Rs. 100, in which case the appeal to the Court below would not lie. That is a matter which must be gone into. The costs of this appeal will abide the result.

Cause remanded.

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15 A. 65 = 13 A.W.N. (1893) 29.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Burkitt and Mr. Justice Aikman.

JAINTI PRASAD (*Plaintiff*) *v.* BACHU SINGH AND OTHERS (*Defendants*).*
[10th January, 1893.]

Civil Procedure Code, s. 54—*Act No. VII of* 1870, *s.* 28—*Act No.* XV *of* 1877, *s.* 4—*Plaint insufficiently stamped—Power of Court to grant time for making good the deficiency—Limitation.*

When a Court fixes a time under cl. (*a*) or cl. (*b*) of s. 54 of the Code of Civil Procedure it must be a time within limitation. Section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. *Moti Sahu* v. *Chhatri Das* (1) and *Yakut-un-nissa Bibee* v. *Kishoree Mohun Roy* (2) discussed.

[N.F., 27 B. 330 = 5 Bom.L R. 198; L.B.R. (1893-1900) 33; 74 P.R. 1903 = 173 P.L.R. 1903; 123 P. R. 1907 = 82 P.W.R. 1907 = 3 M L.T. 63; F., 23 A. 423 (426); 24 A. 218 (220); R., 17 A. 288 (291); 18 A. 206 (210); 20 A. 11 (13); 20 M. 319 (323); 32 M. 305 = 1 Ind. Cas. 507 = 4 Ind. Cas. 503 (504) = 6 M.L.T. 129 (132); 24 A.W. N. 133; D., 27 A. 197 (199) = 1 A.L.J. 641; 29 A. 749 (765) = 4 A.L.J. 636 = A.W.N. 1907, 253; 24 M. 331 (334); 25 M. 380.]

[N B.—This is referred to as Second Appeal No. 1152 of 1892 in 13 A.W.N. (1893) 29.—Ed.]

THIS case was referred along with others to a Bench of three Judges as to the question of limitation raised therein and with referrence to the

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* Second Appeal No. 1152 of 1891 from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farakhabad, dated the 26th June 1891, confirming a decree of Maulvi Hamid Hasan, Munsif of Chibramau, dated the 16th March 1891.

(1) 19 C. 780. (2) 19 C. 747.

effect, if any, of the bill which subsequently became Act No. VI of 1892. The facts of the case are fully stated in the judgment of the Court. **1893 JAN. 10.**

Munshi *Kashi Prasad*, for the appellant.

Mr. *Niblett*, for the respondent.

APPELLATE CIVIL.

15 A. 65 = 13 A.W.N. (1892) 29.

JUDGMENT.

EDGE, C. J., BURKITT and AIKMAN, JJ.—The question before us in this appeal is one of some difficulty. It had come before the Court in the case of *Dharam Narain Lal* v. *Jagmohan Pande* (1), but had not been actually decided. The question shortly is whether a Court, acting under s. 54 of the Code of Civil Procedure in a case falling under cl. (*a*) or cl. (*b*) of that section, has power to extend the period of limitation within which a suit may be brought; that is to say, whether a Court has power under the Code of Civil Pro-**[66]** cedure to give a plaintiff time beyond limitation within which to correct the valuation of his relief or to supply requisite stamped paper where the plaint was written on paper insufficiently stamped. The question before us has no reference to the duties imposed upon a Court by s. 10 or 11 of the Court Fees Act. The facts of this case, so far as it is necessary to refer to them, are shortly as follows:—The suit was for possession of *sir* lands which were alleged to have been purchased by the predecessor-in-title of the plaintiff on the 20th of December 1878. That alleged predecessor was said to have sold his interest to the plaintiff on the 21st of April 1890. The plaintiff presented his plaint in the Court of the Munsif of Chibramau at a quarter to 4 o'clock on the afternoon of the 20th of December 1890, *i.e.*, at a quarter to 4 o'clock on the 365th day of the twelfth year of limitation. The plaintiff presented his plaint claiming possession of land held by the defendants. Upon the presentation of the plaint the Munsarim, to whom in that Court plaints could be presented, made the following report:—"In the suit the time expires to-day. The suit has been filed just now at 3-45 p.m. A Court fees stamp of the value of as. 12 is affixed. As the claim relates to *sir* land forming part of a *mahal* and five times (the revenue) of it is Rs. 45-12-2, there is a deficiency of Rs. 3 under cl. (5,) s. 7 of the Court Fees Act, 1870. Unless a sufficient stamp is affixed the suit cannot be registered. The account of Court fees has been closed and the time for the Court to rise has approached. I submit this for your information. Dated the 20th of December 1890." Upon that the Munsif made the following order:—"This petition came on with the report of the Munsarim. Reckoning from the date of the cause of action, the period it appears, extends up to this day. The pleader was asked to make up the deficiency in the Court fee, but he said that stamps could not be had now; that the 21st of December was a Sunday; and that he would make up the deficiency in two days. Ordered that this be returned to the pleader, that he may present it with a petition within three days after making up the deficiency in the Court fee, and then it will be registered." From the report and the order which we have quoted it is obvious that this was not a case in which the Munsif could have made an **[67]** order under the second paragraph of s. 28 of the Court Fees Act. It would appear that this case is a case in which, if the plaintiff's pleader's statement was true, it was impossible for him, as he had not procured a proper stamp in time, to satisfy at a quarter to 4 o'clock on that afternoon the requirements of the Court Fees Act. The presentation of the plaint

(1) 11 A.W.N. (1891) 166.

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had been delayed until the office from which the stamp could have been obtained had been closed for the day. The plaintiff had valued the *sir* lands at one year's rental, a valuation quite preposterous and one which could not have been accepted, and which the plaintiff and his advisers must have known would not be accepted, by any Court; and on that valuation he chose, almost at the last moment of the Court's sitting of, the last day of the 12 years' limitation, to present his plaint in the Court. The deficiency was made good within the time mentioned by the Munsif, but after the expiration of the 12 years' limitation, and the suit, which had been instituted, so far as a suit on an insufficiently stamped plaint can be said to be instituted under s. 48, was registered under s. 58 of the Code of Civil Procedure as having been admitted. It is to be kept in mind in considering this case and all similar cases where the question of limitation arises as to a suit or as to an appeal that there is a difference between the presentation of the plaint or memorandum of appeal and the admission of the suit or appeal. That distinction is recognised by ss. 58 and 59 with regard to suits and by s. 548 in the case of appeals. Again, another matter has to be borne in mind, and that is the distinction in result between the rejection of a plaint under s. 54 of the Code of Civil Procedure and the dismissal of a suit on the ground of limitation in accordance with s. 4 of the Indian Limitation Act, 1887. The dismissal of a suit on the ground of limitation would be a final bar, unless removed on appeal, to the presentation of any fresh suit on the same cause of action. The rejection of a plaint under s. 54 of the Code of Civil Procedure would not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. That appears from s. 56 of the Code of Civil Procedure. Ordinarily the procedure provided by s. 54 of the Code of Civil Procedure would be applied before a plaint was admitted and the suit regis-[68] tered, but that s. 54 is not restricted to a proceeding prior to admission and registration appears from cl. (*d*) of s. 54 read in conjunction with cl. (*b*) of s. 53. In *Kishore Singh* v. *Sobdal Singh and another*(1), it was held by this Court that s. 54 might be applied at any stage of a suit. In the case of *Kishore Singh* v. *Sabdal Singh and another* no question of limitation was considered by the Court. When a plaint has been returned under s. 53, except probably on the ground of its being wrongly framed by reason of non-joinder of parties necessitating the joinder of a person not previously a party to the suit, it is difficult to see how any rule of limitation would be violated, as by s. 53 it is "provided that a plaint cannot be altered so as to convert a suit of one character into a suit of another and different character." S. 22 of the Indian Limitation Act, 1877, provides for the case of a person being added as a party after the institution of the suit. A casual reading of cl. (*c*) of s. 54 with s. 56 might lead to the conclusion that ss. 54 and 56 taken together were in conflict with s. 4 of the Indian Limitation Act, 1877. There is however no such conflict; cl. (*c*) of s. 54 undoubtedly would apply to a case in which it appeared "from the statement in the plaint" that the suit was barred by limitation, a statement which might be erroneous, but it would not apply to a case in which after the admission of the suit it was judicially decided on evidence as to facts and dates that the suit was barred by limitation, in which latter case it would be the duty of the Court under s. 4 of the Indian Limitation Act, 1877, to dismiss the suit and not merely to reject it. A judicial decision on evidence that a suit was barred by

(1) 12 A. 553 = 9 A.W.N. (1889), 185.

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limitation would operate under s. 13 of the Code of Civil Procedure, as a bar to a fresh suit for the same cause of action.

Section 54 of the Code of Civil Procedure is not expressly at variance with any provision of the Indian Limitation Act, 1877, and we fail to see that it is by implication from anything contained in it at variance with any provision of that Act.

There is in the Limitation Act no power given to a Court to exercise discretion as to extending the period of limitation except [69] such as is contained in the second paragraph of s. 5, and that paragraph does not relate to suits. The other sections of the Limitation Act which have the effect of extending the ordinary periods of limitation for suits or appeals are sections which provide in themselves for the extension of limitation, on certain facts being proved, such, for instance, as the section relating to fraud, that relating to minority, that relating to a plaintiff who has *bona fide* prosecuted his remedy in a Court which had not jurisdiction and that relating to a defendant who has been absent from the jurisdiction of the Indian Courts. Consequently, except under s. 5, a Court is given by the very Act which provides for limitation, no power to extend limitation with regard to either suits, appeals or applications. We are, however, asked to read s. 54 of the Code of Civil Procedure as giving a Court a power to extend limitation which that Court would not have under the Indian Limitation Act. It is one of the primary rules of construction to be applied to statutes that if statutes of the Legislature can be read so as to reconcile them they are so to be read, and they are not to be read as in conflict unless it is manifest and apparent that there is a conflict between them. Now if we were to construe s. 54 as giving a Court power to extend limitation we should be giving to that section a construction at variance with the plain wording of s. 4 of the Indian Limitation Act, 1877, and with the clear intention of the Legislature as evidenced by the Indian Limitation Act, 1877, that a suit should not be entertained unless it was instituted within the periods of limitation prescribed by that Act. According to the explanation contained in s. 4 of the Indian Limitation Act, 1877, "a suit is instituted in ordinary cases when the plaint is presented to the proper officer." It is enacted by s. 48 of the Code of Civil Procedure that "every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf." It is enacted by s. 4 of the Indian Limitation Act, 1877, that "subject to the provisions contained in ss. 5 to 25 (inclusive) every suit instituted, appeal presented and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." It was decided by this [70] Court in the case of *Balkaran Rai* v. *Gobind Nath Tiwari* (1) that effect must be given to the Court Fees Act, and particularly to the prohibitive provisions of that Act contained in s. 28. A plaint is a document within the meaning of the Court Fees Act and within the meaning of s. 28, and as a suit can only be instituted by the presentation of a plaint, the presentation of an insufficiently stamped document, which if sufficiently stamped could be treated as a plaint, cannot be regarded in law as the institution of a suit within the meaning of the explanation to s. 4 of the Indian Limitation Act, 1877, or of s. 48 of the Code of Civil Procedure. Section 28 of the Court Fees Act prohibits the Court from regarding any document which ought to be stamped under that Act as of any validity unless and until it is properly stamped. The result is that

(1) 12 A. 129.

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on the 20th of December, 1890 there was no plaint before the Court which could be considered as of any validity as a plaint, and no plaint the presentation of which could be considered as the institution of a suit. Section 4 of the Indian Limitation Act, 1877, where it says that "a suit in ordinary cases is instituted when the plaint is presented to the proper officer," must, having regard to s. 28 of the Court Fees Act, be taken to refer to a plaint which is sufficiently stamped according to the Court Fees Act. If we were to hold otherwise we should be holding that a document to which the first paragraph of s. 28 of the Court Fees Act applied, and which was insufficiently stamped, and which was never stamped under the second paragraph of that section, was, in a Court of Justice which was bound to administer the Court Fees Act, valid as a plaint when it was insufficiently stamped.

We have been pressed with two decisions on behalf of the plaintiff, appellant here. One is that of the High Court at Calcutta in the case of *Moti Sahu* v. *Chhatri Das* (1) in which it was held that in a case in which a suit was presented on an insufficiently stamped plaint and the deficiency was made good after limitation under an order which was treated as having been made under s. 54 of the Code of Civil Procedure, " the date of the institution of the suit [71] should be reckoned from the date of the presentation of the plaint and not from that on which the requisite Court fee was subsequently put in so as to make it admissible as a plaint." The learned Judges in that case apparently conceived that a Court acting under s. 54 of the Code of Civil Procedure would also be acting under the second paragraph of s. 28 of the Court Fees Act. In the case to which we are referring it appeared that on the presentation of the plaint a report was made that it was on insufficiently stamped paper and thereupon the Court ordered the plaintiff to pay the proper Court fees within a time fixed by the Court. With the utmost deference to the learned Judges who decided that case, it is difficult to conceive how the Court could in that case have acted under the second paragraph of s. 28 of the Court Fees Act. Before the plaint there was received, filed, or used within the meaning of s. 28, the insufficiency of the stamp was brought to the attention of the Court.

Further, with record to that case it is apparently in conflict in principle with another decision of the same High Court in *Yakut-un-nissa Bibee* v. *Kishoree Mohun Roy* (2). The only apparent distinction between the two cases is that in the case reported at page 747, it was a memorandum of appeal in the Court of a District Judge which was written upon insufficiently stamped paper, whereas in the case reported at page 780, it was a plaint in a Court of first instance subordinate to the High Court. If the later decision is correct it appears to us that the prior decision must have been incorrect, because having regard to s. 582 of the Code of Civil Procedure, which makes applicable to appeals the provisions of Chapter V which contains s. 54, a Court of appeal would have the same powers and would have to perform the same duties with regard to a memorandum of appeal as a Court of first instance has to perform with regard to a plaint. The other case with which we have been pressed is one relied upon by the learned Judges in the case reported in I.L.R., 19 Calc., p. 780, and it is the case of *Skinner* v. *Orde* (3). Those learned Judges rely upon the decision [72] of their Lordships of the Privy Council in *Skinner* v. *Orde* as having decided that the date of the institution of the suit in that case should be

(1) 19 C. 780. (2) 19 C. 747. (3) 6 I.A. 126=2 A. 241.

1893 JAN. 10. —— APPELLATE CIVIL. —— 15 A. 65 = 13 A.W.N. (1893) 29.

reckoned from the date of the presentation of the plaint (p. 783). The decision of their Lordships in the case of *Skinner* v. *Orde*, so far as it has any bearing on this subject, was fully considered by this Court in *Balkaran Rai* v. *Gobind Nath Tiwari* (1). In the case of *Skinner* v. *Orde* the document which was originally presented in the Court was an application for leave to sue as a pauper. It was presented under Act VIII of 1859, and it was apparently, we infer, in compliance with s. 300 of that Act which required that such application should contain all that it was requisite for a plaint to contain and should be subscribed and verified in the manner prescribed for the subscription and verification of plaints. That application before a sufficient stamp at the time it was presented, *i.e.*, it bore the stamp required by law for an application for leave to sue as a pauper, and the law required no further stamp if the application was granted. Under s. 308 of Act VIII of 1859, if the application had been granted, it would have been numbered and registered and by virtue of s. 308 would have been deemed to be the plaint in the suit. It was, at any rate, for the purpose for which and at the time when it was presented, a sufficiently stamped document. Their Lordships of the Privy Council held that there was no provision in the Act meeting the particular case before them, namely, a case in which the application of the petitioner who applied to sue as a pauper was not granted under s. 308 and was not refused under s. 310, but their Lordships were of opinion that the case approached more nearly the state of things contemplated by s. 308 than that contemplated by s. 310 of Act VIII of 1859. The part of the judgment in *Skinner* v. *Orde* which has been especially pressed upon us and which apparently was in the contemplation of the High Court at Calcutta in the case of *Moti Sahu* was as follows:—" The petition of plaint was placed upon the file and numbered on the 19th of July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not [73] at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time, but remains with its original date on the file of the Court and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it." Now, where the insufficiency of the stamp is brought to the attention of the Court before the plaint is admitted, the plaint is not brought upon the file unless a lawful order made under s. 54 of the Code of Civil Procedure has been complied with. No doubt cases do occur in which after the plaint has been admitted and has been brought upon the file, which we understand to mean registered, it is discovered that the stamp is not sufficient and that the plaint has been received and filed through inadvertence or mistake on insufficiently stamped paper. In the latter case, upon the plaint being properly stamped in accordance with an order of the Court under s. 28 of the Court-fees Act, the plaint would be as valid as if it had been properly stamped in the first instance, and consequently would remain with its original date on the file of the Court. That probably was the class of case to which their Lordships of the Privy Council were referring at page 250 of the Report in I.L.R., 2 Allahabad. The case of *Mussamat Begee Begum* v. *Syud Yusuf Ali* (2) was also relied on on behalf of the appellant here. Although all the proceedings in that case took place after the coming into force of the Court Fees Act (Act No.

(1) 12 A. 129 at pp. 144-5.

(2) N.W.P.H.C.R. 1874, p. 139.

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VII of 1870), the provisions of that Act were not taken into consideration by the learned Judges who decided that case, and consequently on this point we do not consider it as an authority.

There is a further reason why we cannot construe s. 54 of the Code of Civil Procedure as conferring on a Court a power to extent the ordinary periods of limitation for the institution of suits. It is this. If that section is to be construed as conferring such a power upon a Court, there does not appear to be any provision contained in the Code of Civil Procedure limiting the power of a Court to extend [74] limitation, and a defendant would apparently be left without a remedy by appeal or otherwise against an order under cl. (*a*) or cl. (*b*) of s. 54 fixing a time which might have the effect of extending limitation by one, ten or twenty years. Such an order would not be a decree as decree is defined in s. 2 of the Code, nor would it be an order appealable under s. 588. Clause (6) of s. 588 would not apply to such an order, as that clause relates only to orders returning plaints for amendments (as to which see s. 53) and to orders returning plaints to be presented to the proper Court (as to which see s. 57). If a Court had power under s. 54 to extend limitation, its order having the effect of extending limitation by one, ten or twenty years could not be questioned under s. 591 as, there being nothing to limit the discretion of the court in that event there would not be "any error, defect or irregularity" within the meaning of that section in the order, nor would a High Court have in such event any jurisdiction under s. 622 to interfere with such an order. The power of a Court to act under the second paragraph of s. 5 of the Indian Limitation Act, 1877, is, on the other hand, limited by the appellant or applicant showing sufficient cause for not having presented the appeal or having made the application for a review of judgment within the prescribed period, and consequently a defendant could in appeal by the plea that the appeal or application was barred by limitation, raise the question as to whether sufficient cause had been shown to justify the Court's action under s. 5. We cannot conceive that it was the intention of the Legislature to give by s. 54 of the Code of Civil Procedure a power to a Court to extend the period of limitation as against a defendant who would ordinarily have no opportunity of being heard before an order under cl. (*a*) or cl. (*b*) of s. 54 fixing a time was made, and who would have no means of correcting by appeal or in revision an unreasonable exercise of such a power, if it existed.

We have come to the conclusion that when a Court fixes a time under cl. (*a*) or cl. (*b*) of s. 54 of the Code of Civil Procedure, it must be a time within limitation, and that that section does not give a Court any power to extend the ordinarily prescribed period of [75] limitation for suits. The plaintiff, appellant here has only himself to thank if he had any merits in this suit. He brought his suit at the last moment of a twelve years' limitation. He inserted a ridiculous valuation which no Court would accept. He delayed presenting his plaint in the Court of the Munsif until that Court was about to rise for the day and until the office from which he could have obtained stamped paper had closed for the day. We hold that his suit was barred by limitation, and we dismiss his appeal and affirm the decree of the Court below with costs.

Appeal dismissed.

15 A. 75 (F.B.)=13 A.W.N. (1893) 52.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

1893 FEB. 8.

FULL BENCH.

15 A. 75 (F.B.) = 13 A.W.N. (1893) 52.

BADRI PRASAD AND ANOTHER (*Plaintiffs*) v. MADAN LAL AND OTHERS (*Defendants*).* [8th February, 1893.]

Hindu Law—Joint Hindu family—Liability of sons during their father's lifetime for his antecedent debts.

Held by the Full Bench that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the sons were born which purported to mortgage the joint family property, the consideration having been, with a trifling exception, money advances antecedently made by the mortgagee to him not as manager of the family or with the authority of the sons or for family purposes, but not for purposes of immorality or for purposes which if the father was dead would exonerate the sons from the pious obligation of paying such debts of the father.

Held also that the decree in such a suit should be a decree for sale of the mortgaged property under s. 88 of Act No. IV of 1882.

[N.F., 7 C.L.J. 195; F., 21 A. 238 (240); 21 A. 281 (284); 24 A. 459 (460); R., 16 A. 449 (457); 17 A. 537 (572); 19 A. 26 (32); 23 A. 206 (208); 28 A 504=3 A.L J. 274=A.W.N. (1906) 117; 29 A. 544=4 A.L.J. 424=A W.N. 1907, 159; 31 A. 176 (233)=1 Ind. Cas. 479=6 A.L J. 263 (F.B.); 34 C. 735 (747)=5 C. L.J. 569=11 C.W.N. 613; 8 A L.J. 649 (651)=11 Ind. Cas. 930 (931); 21 A. W N. 57; 9 Ind. Cas. 406 (411); 1 O.C. 53 (61); 1 O.C. 112 (114); 53 P.R. 1901.]

THIS was a reference to the Full Bench made under an order of Edge, C. J., and Tyrrell, J., dated the 7th of November 1892. The facts of the case are fully stated in the judgment of Edge, C. J.

Mr. *A. Strachey*, Munshi *Jwala Prasad*, Munshi *Ram Prasad*, Munshi *Madho Prasad* and *Babu Becha Ram*, for the appellants.

[76] Babu *Jogindro Nath Chaudhri*, Pandit *Baldeo Ram* and Munshi *Jokhu Lal*, for the respondents.

JUDGMENT.

EDGE, C.J.—This second appeal which has been referred to a Full Bench of all the Judges of the Court raises two very important questions affecting Hindus. One is—can the sons in a joint Hindu family be sued along with their father upon a mortgage bond given by the father alone after the sons were born which purported to mortgage the joint family property, the consideration having been, with a trifling exception, money advances antecedently made by the mortagee to him not as manager of the family or with the authority of the sons or for family purposes, but not for purposes of immorality or for purposes which if the father was dead would exonerate the sons from the pious obligation of paying such debts of the father?

The second question is—if the suit is maintainable, what is the decree which can be given to the representatives of the mortgagee, who are the plaintiffs?

The facts of the case, as admitted or found by the lower appellate Court, so far as they are material, are as follows:—

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* Second Appeal, No. 20 of 1890, from a decree of F.E. Elliot, Esq., District Judge of Allahabad, dated the 7th December 1889, confirming a decree of Pandit Bansidhar, Subordinate Judge of Allahabad, dated the 6th September 1888.

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On the 30th of December 1884, Madan Lal executed in favour of Lala Ram Kishan a bond by which he purported to mortgage the immoveable property in suit. The consideration for the bond was Rs. 1,457-3-0, due by Madan Lal to Lala Ram Kishan under a prior mortgage bond, of the 7th of October 1881, Rs. 181-4-0 interest due by Madan Lal to Lala Ram Kishan under the first mortgage bond and a then present advance of Rs. 11 9-0 made by Lala Ram Kishan to Madan Lal on the execution of the bond in suit. By the mortgage in suit Madan Lal agreed to pay the principal moneys, amounting to Rs. 1,650, with interest thereon at the rate of one per centum per mensem, in a year from the 30th of December 1884. The property included in the mortgage of the 30th of December 1884 was the whole of the ancestral joint family property of the family of Madan Lal. Lala Ram Kishan died prior to the institution of the suit, which was brought upon the mortgage bond of the 30th of December 1884, by his heirs against Madan Lal and his sons, Kunji Lal, Muni Lal, Kandhai Lal and Shankar Lal. In the plaint [77] it was alleged that Madan Lal was the head and manager of the family, and in his capacity of manager and for family purposes gave the bond in suit to Lala Ram Kishan. The prayer of the plaint was in effect for a decree under s. 88 of the Transfer of Property Act, 1882, and if the nett proceeds of the sale of the mortgaged property should be found insufficient to pay the amount due on the mortgage, the prayer in effect further asked for a decree under s. 90 of that Act against the other property of Madan Lal. It was not sought by the plaint to make the sons of Madan Lal personally liable. Madan Lal did not defend the suit. He admitted the validity of the claim. The defendants Kandhai Lal and Shankar Lal are minors. The defendants other than Madan Lal have defended the suit. They have denied that Madan Lal was the head and manager of the family, and have alleged that the moneys were not lent to Madan Lal as the manager or for the purposes of the family, and that the bond in suit was given without their consent and without any valid necessity, and that Madan Lal borrowed the money for and spent it in immorality, and that they have not received any benefit from the loans. The plaintiffs' suit was dismissed with costs by Pandit Bansidhar, the Subordinate Judge of Allahabad, and their appeal was dismissed with costs by the District Judge. From the decree of the District Judge this appeal has been brought.

It has been found that the property included in the bond was the whole ancestral property possessed by the family. It has also been found that Madan Lal paid no attention to the family or their interests, and did not, as a matter of fact, act as the managing head of the family; that the defendants Kunji Lal and Muni Lal discharged his functions as head and manager of the family, and were not only of full age when the bond was executed, but had carried on business on their own account for some six years previous to its execution; that there were no ancestral debts, and that the debts in respect of which the bond was given were all personal to Madan Lal, and that the money from first to last was received by Madan Lal for his own personal use, and that the plaintiffs could not but [78] have been aware of those facts. From the judgments of the two Courts I think the District Judge was referring to Lala Ram Kishan as well as to his sons when he found that the plaintiffs could not but have been aware of the facts. It was also found that Madan Lal had grossly neglected his duty to his sons, but that it was not shown that the debts were tainted with immorality. The bond in suit was given on the 13th

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day of Sudi Pus, Sambat 1941, and the Subordinate Judge found, and the District Judge did not dissent from the finding, that 'the answering defendants have proved that since the latter part of Sambat 1935, or the beginning of Sambat 1936, the said defendants have not stood in need of being looked after or cared for by their father. In the first place, the defendant No. 1, *i.e.*, the principal debtor (Madan Lal), does not seem to have ever attended to his family necessities. Since his father's death he has passed a life of luxury, and in this state of his inattention his family passed its days ill or well as fell to their lot. But from the time above mentioned his elder son, and, from a short time after, his other son took to business themselves, and thus they, their minor brothers and their mother supported themselves. The parties do not only belong to a brotherhood, but are collaterally related also. Their houses also are close to each other. It is somewhat hard to believe that the plaintiffs may have remained unaware of the conduct and manners of the defendant No. 1 their debtor."

From the findings to which I have referred it appears that at no time did Madan Lal ever act as the manager of the family; that he never fulfilled the duties of the head of a Hindu family; and that since a time prior to the giving of the bond of the 7th of October 1881 the sons, Kunji Lal and Munni Lal, performed the duties which their father ought to have performed for the family, and by their exertions in business supported themselves, their mother and their minor brothers, the other two defendants. As I read the judgments of the Courts below, Lala Ram Kishan and his heirs, the plaintiffs in this suit, must have been well aware of the circumstances of the family, I confess that my sympathies are entirely with the defendants, the sons of Madan Lal.

[79] Mr. *Strachey*, on behalf of the plaintiffs-appellants, has contended that they are entitled on the findings and on the authority of decisions of their Lordships of the Privy Council, to the decree which they seek by the prayer in their plaint. Mr. *Chaudhri*, on the other hand, on behalf of the sons of Madan Lal, has contended that the pious duty of a Hindu son to pay debts contracted by the father does not arise except when the father is dead, is abroad, or is immersed in difficulties, and in support of that contention he cited texts and passages to be found at page 205 of Mandlik's Hindu Law. "The Vyavahara Mayukha, &c, &c.," edition of 1880, at pages 42 and 263 of the Sacred Books of the East, Volume 33, and verses 27, 28 and 29 of the translation of the Mitakshara, at page 255 of MacNaghten's Mitakshara, edition of 1870. Our attention was also drawn to pages 642, 643, 644, and 645 of West and Buhler's Hindu Law, 3rd edition, and Mr *Chaudhri* contended that this suit, so far as it related to the interests of sons of Madan Lal in the family property, was premature. He also contended that the debts in respect of which the bond of the 30th December 1884 was given were not antecedent debt; within the meaning of the expression "antecedent debt" as used in the decision of their Lordships of the Privy Council in *Mussammat Nanomi Babuasin and others* v. *Modun Mohun and others* (1), the argument being that by "antecedent debt" was meant a prior debt due by the father to a person other than the person to whom he subsequently alienated family property in order to obtain money with which to discharge such prior debt; and the debts not having been contracted by Madan Lal as manager of the family or for family purposes and without the consent of his sons, and the sons having derived no benefit from the advances, Madan Lal

(1) 13 I.A. 1 = 13 C. 21.

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had no power to mortgage the family property, and the mortgage could not be enforced in this suit. In support of that contention Mr. *Chaudhri* cited a judgment of a Full Bench of the High Court at Calcutta in *Modhoo Dyal Singh* v. *Golbur Singh and others* (1).

Whatever may have been the rule of Hindu Law, I agree with the opinion of Pontifex and McDonell, JJ., expressed in their judg-[80]ment in *Laljee Sahoy* v. *Fakeer Chand and others* (2) in respect of a son governed by the rules of the Mitakshara. "But by the decisions of the Privy Council it has now been established that it is the pious duty of the son to pay his father's debts out of the ancestral estate even in the father's life time." In speaking of the "father's debts" those learned Judges were not referring to debts tainted with immorality.

The expressions "antecedent debts" and "antecedent debt" are expressions which, unless there is something to restrict their meaning, would undoubtedly include a prior debt due by the father to the person to whom he mortgaged or conveyed family property. I assume that when their Lordships of the Privy Council, on the 18th of December 1886, in *Mussamat Nanomi Babuasin and others* v. *Modun Mohun and others* (3) at page 18 of the report in L. R., 13 I. A., said, "the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality," they used the expression "antecedent debt" as it had been used by their Lordships of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prashad Singh and others* (4) when, in referring to the decisions in *Girdharee Lall* v. *Kantoo Lall* (5) their Lordships at page 106 of the report say: "This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions: 1st.—That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted. . . ." That passage in my opinion shows that the expression "antecedent debt" is not to be restricted [81] to a prior debt due to a person other than the purchaser or mortgagee, as their Lordships put as cases of antecedent debts the case of an antecedent debt being the consideration for the conveyance, and the case of the consideration for the conveyance being money raised by the sale in order to pay off an antecedent debt. Pontifex and McDonell, JJ., in their judgment in *Laljee Sahoy* v. *Fakeer Chand and others* (2), referred to prior debts of the father to the mortgagee as "antecedent debts." In *Hanuman Kamat* v. *Dowlat Mundar and others* (6), Tottenham and Norris, JJ., held that the purchase money itself, which was the consideration for the conveyance, could not be said to be an antecedent debt. I know of no other restriction of the expression "antecedent debt."

It would in my opinion be useless to discuss what may have been, or may have been considered to have been, the law in India affecting the power of a father in a joint Hindu family, governed by the law of the Mitakshara, to convey or mortgage joint family immoveable property in

(1) 9 W. R. C. R. 511. (2) 6 C 135 139. (3) 13 I.A. 1=13 C. 21,
(4) 6 I.A. 88. (5) 14 B.L.R. 187=1 I.A. 321.
(6) 10 C. 528.

satisfaction of an antecedent debt, or in order to raise money to discharge an antecedent debt, not tainted with immorality, as I consider the question has been concluded by the decisions of their Lordships of the Privy Council, which are binding on this Court. In *Musammat Nanomi Babuasin and others* v. *Modun Mohun and others*, their Lordships (at page 17 of L. R. 13 I. A., and at page 35 of I. L. R. 13 Calc.) said: "There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakhara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case.

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"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety [82] of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

The debts in the present case were, with the exception of Rs. 11-9-0, antecedent debts. I regard the finding of the Court below, which was arrived at after hearing evidence on both sides, as a finding that no portion of the consideration, including the some of Rs. 11-9.0, was tainted with immorality, and I am of opinion that the plaintiffs' remedy on this bond can be obtained and enforced in this suit. In the view of the law, as pronounced by their Lordships of the Privy Coucil, the false averment in the plaint that Madan Lal executed the bond in his capacity of manager and for family purposes is on the findings of fact immaterial.

The next question to be considered is the nature of the decree to which the plaintiffs are entitled. On that point we have been pressed with the decision of a Full Bench of the Calcutta High Court in *Luchman Dass* v. *Giridhur Chowdhry* (1). That case arose and was decided before the Transfer of Property Act, 1882 (Act No. IV of 1882), came into force. The plaintiffs in this case are undoubtedly mortgagees within the meaning of s. 99 of that Act. By reason of s. 99 the plaintiffs could not bring the mortgaged property to sale except by instituting a suit, as they have done here, under s. 67 of that Act. In that suit, as they sought a decree for sale against not only Madan Lal's interest in the mortgaged property but against the interest of his sons, they having notice that the sons had an interest in the mortgaged property, properly and in accordance with s. 85 of that Act joined the sons as parties to the [83] suit. If the plaintiffs in this suit, which was commenced after the Transwer of Property Act, 1882, came into force, having notice that the sons had an interest in the property had omitted to join them, they could have obtained a decree against the father's interest only, and could

(1) 5 C. 855.

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not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property. When a mortgagee is entitled to succeed in a suit brought under s. 67 of the Transfer of Property Act, 1882, he has "a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold."

I would give the plaintiffs a decree under s. 88 of the Transfer of Property Act, 1882, for sale of the mortgaged property, or a sufficient part thereof, if the defendants make default in paying to the plaintiffs or into Court within six months from the date of notice to them that the account has been prepared in the office of this Court, the principal money of Rs. 1,650 and the agreed interest thereon of one per centum per mensem for twelve months from the date of the bond, the 30th of December 1884, and damages by way of interest at the rate of six rupees per centum per annum from the due date of the bond, *viz.*, the 30th of December 1885, up to the date of the decree of this Court. Having regard to the false averment contained in the plaint, the consideration of which occupied much time in the Courts below, I would not allow the plaintiffs any costs either in this Court or in the Courts below. To the above extent I would allow this appeal. The application for a decree under s. 90 of the Transfer of Property Act, 1882 is premature.

TYRRELL, KNOX, BLAIR, BURKITT and AIKMAN, JJ.—We fully concur in this judgment and in the decree as proposed by the learned Chief Justice.

Appeal decreed.

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15 A. 84 (F.B.) = 13 A. W. N. (1893) 36.

[84] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt, and Mr. Justice Aikman.

DHONKAL SINGH (*Decree-holder*) *v.* PHAKKAR SINGH AND OTHERS (*Judgment-debtors*).* [9th February, 1893.]

Civil Procedure Code, Chapters VII and XIII, and s. 647—Act No. VI of 1892, s. 4—Execution of decree—Procedure applicable to execution proceedings—Act No. XV of 1877, Sch. ii, Art. 179 (5)—Limitation.

The issuing of a notice under s. 248 of the Code of Civil Procedure gives a fresh starting point for limitation under art. 179, cl. (5) of sch. ii of the Indian Limitation Act, 1877, whether such notice is issued on a valid or an invalid application for execution.

Chapters VII and XIII of the Code of Civil Procedure cannot, in view of s. 4 of Act No. VI of 1892, be applied to proceedings in execution of decrees.

But a Court has power inherent, if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application.

Similarly, a Court has inherent power, if such power is not conferred upon it by statute, to proceed forthwith to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application and that act has not been done.

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* First Appeal, No. 175 of 1891, from a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 20th June, 1891.

When an order is made striking an execution case off the file of pending cases, or dismissing it on grounds other than a distinct finding that the decree is incapable of execution, that the decree-holder's right to get the decree executed is barred by limitation, or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word "dismissed" for the words "struck off the file," or any other similar words have been used in the order, the decree-holder is not barred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree.

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[F., 15 A. 198 (205); 25 C. 594 (599); 18 M. 131 (133); 6 A L.J. 944 = 3 Ind. Cas. 817; 13 O.C. 303 (307) = 8 Ind. Cas. 377 (378); 76 P.R. 1903 = 170 P.L R. 1903; 22 P. R. 1905 = 57 P.L.R. 1905; 116 P.R. 1907 = 143 P.W.R 1907; Rel. on, 10 Ind. Cas. 411 (412); Appl., 17 A. 243 (244); Appr., 20 A. 428 (430); R, 16 A. 26 (27); 16 A. 390 (391); 24 A. 282 (287); 18 B. 429 (431); 19 B. 276 (280); 3 C.L J. 276 (279); 10 C.L.J. 91 (100); 14 C.W.N. 114 (119) = 3 Ind. Cas. 47 (49); 11 Ind. Cas. 385 (386) = 13 C.L.J. 532 (534); 9 O.C. 288; 20 P.L.R. 1903 = 90 P.R. 1902; 139 P.L.R. 1905; 125 P.L.R. 1908 = 95 P.W.R. 1908; 1 S.L.R. 86.]

THIS was a reference to the Full Bench made by an order of Edge, C.J., and Burkitt and Aikman, JJ., of the 12th of December 1892. The facts of the case are fully stated in the judgment of Edge, C. J.

Pandit *Sundar Lal*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

[85] EDGE, C. J.—This is an appeal from an order of the Subordinate Judge of Cawnpore disallowing an application for the execution of a decree. The decree in question was passed on the 14th of January 1887, and was, so far as is material, one for an ascertained amount of money and for mesne profits to be ascertained. On the 21st of February 1888 the decree-holder applied to have the decree executed by attachment and sale of property which had been of the judgment-debtors in their lifetime. No inventory of the property sought to be attached was annexed to the application, nor did the application contain any description of the property sufficient to indentify it.

On the 25th of February 1888 the Subordinate Judge ordered a notice, under section 248 of the Code of Civil Procedure, to issue to the legal representatives of the deceased judgment-debtors, and on the same day a notice under that section was, in accordance with the order of the Subordinate Judge, issued, fixing the 24th of March 1888 as the day on which the legal representatives of the deceased judgment-debtors should show cause why the decree should not be executed against them. That notice was served on the 11th of March, 1888.

On the 24th of March 1888, the pleader for the decree-holder asked the Court for a week's time to enable him to file a list of the property sought to be attached. The Court on the 24th of March 1888 allowed time for filing the list until the 3rd of April 1888, and fixed the 3rd of April 1888, for proceeding with the hearing of the application for execution.

On the 3rd of April 1888, no list of the property sought to be attached having been filed, the Subordinate Judge passed an order that the application for execution "be struck off the file of pending cases."

On the 11th of February 1891, the decree-holder presented to the Court of the Subordinate Judge the application for execution, the dismissal of which is the subject of this appeal.

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The particulars which were inserted in the column of the application relating to the mode in which the assistance of the Court was required, were as follows:—

[86] "Rupees 20,019-11-1½ are due to the decree-holder on account of the decree-money, costs, mesne profits and interest, out of that Rs.15,000 have been realized. The necessary inquiry relating to the amount of mesne profits may be made, and the amount which may be found correct may be awarded by the attachment and sale of the judgment-debtors' property. Pahâlwan Singh and Khaman Singh, judgment-debtors, are dead. The execution proceedings may be taken against the heirs of the said judgment-debtors. The inventory of the property will be filed hereafter."

It will be noticed that no inventory or description of the property sought to be attached was given, and yet if the case were one, as apparently it was, in which some at least of the property sought to be attached was moveable property which had been of the judgment-debtors in their life-time, s. 236 of the Code of Civil Procedure applied and required that such an inventory should be annexed to the application for execution; and if some of the property sought to be attached was immoveable property, s. 237 applied and required that the application should "contain a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant and so far as he has been able to ascertain the same." If those sections or either of them applied, neither the application of the 21st of February 1888 nor that of the 11th of February 1891 was in accordance with law. Possibly also s. 238 may have applied to the application. The Acts and Codes of the Legislature have been passed to be observed and not to be treated as dead letters. It is almost inconceivable that the negligence of the decree-holder or his pleader which led to the application of the 21st of February 1888 being struck off the file of pending cases should have been repeated when the application of the 11th of February 1891 was made. My experience of the neglect of parties or their pleaders to observe the procedure provided by the Legislature would induce the belief that they considered that such procedure might be treated with contempt, and that they were entitled to conduct their litigation in Civil Courts in the dilatory, negligent [87] and slipshod fashion most suited to their inclinations and their idleness. In my opinion, when such negligence results in an application being dismissed or a hearing adjourned, the opposite party should be allowed his costs, if any have been incurred by him.

On the 2nd of March 1891 a notice under s. 248 of the Code of Civil Procedue fixing the 11th of April, 1891, for the persons against whom execution was applied for to show cause was issued in pursuance of an order of the Court of that date.

There is on the record a judgment, dated the 9th of June 1891, signed by the Subordinate Judge. That judgment is, so far as is material, as follows: "On inspection of the record of execution case it is clear that the decree-holder obtained one week's time for filing an inventory on 24th March 1888, but he did not do so, and the case could not proceed further and was struck off on the 3rd April, 1888. Therefore under the ruling of Radha Charan, this application is barred by s. 158, Act XIV of 1882. A fresh application cannot be made. This application is therefore disallowed.

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The order under appeal is signed by the Subordinate Judge, and is dated the 22nd of July, 1891. So far as that order is material it is as follows:—

"Application for determining the amount of mesne profits valued at Rs. 5,019-3-1½.

"Upon the hearing of this case on the 20th day of June 1891, by Sayyid Akbar Hussain Khan, Subordinate Judge, the preciding Judge of this Court in the presence of Lala Gursahai Lal, the pleader for the petitioner, and Lala Dargahi Lal, Rai Bahadur, and Munshi Sham Lal, the pleaders for the opposite parties—

It is ordered that the application be disallowed."

The order should have been dated as of the date when the judgment was pronounced. The date of the order does not correspond with the date mentioned in the body of it, nor does either of those dates correspond with the date at the foot of the judgment. What may be the explanation of this discrepancy in dates I am not aware. [88] It is from the last-mentioned order of the Subordinate Judge that this appeal has been brought.

It is obvious from the judgment of the Subordinate Judge, dated the 9th of June, 1891, that he was of opinion that the order of the 3rd of April 1888 was an order dismissing the application for execution of the 21st of February 1888, and was an order deciding that application, and that it was passed by the Court under circumstances which entitled the Court on the 3rd of April 1888 to proceed by analogy under s. 158 of the Code of Civil Procedure to decide forthwith the application of the 21st of February 1888 for execution of the decree and the right of the decree-holder to have his decree executed.

The only ground stated in the memorandum of appeal is entirely inapplicable to the facts. It was based on the mistaken assumption that the Subordinate Judge passed the order now under appeal on the view that the application of the 21st February, 1888 had been withdrawn under s. 373 of the Code of Civil Procedure. There had been in fact no withdrawal of the application of the 21st of February, 1888.

On behalf of the appellant it has been contended by Pandit *Sundar Lal* that Chapter XIII of the Code of Civil Procedure, which contains s. 158, does not apply to applications or proceedings for the execution of decrees, and that no procedure is provided by the Legislature under which the order of the 3rd of April 1888 could have been passed. On behalf of the respondents, who are the legal representatives of the deceased judgment-debtors, it has been contended by Munshi *Ram Prasad* that the application of the 11th of February 1891 was barred by limitation as it was made more than three years after the date of the decree; that the application of the 21st of February 1888 was not an application "in accordance with law" within the meaning of art. 179, of the second schedule of the Indian Limitation Act, 1877, as not having been in compliance with s. 236 or s. 237 of the Code of Civil Procedure; and that the issuing of the order under s. 248 of the Code of Civil Procedure on the 25th of February 1888, was on an application which [89] was not in accordance with law, and consequently was not such an order as was contemplated by art. 179. We can dispose of this contention at once. That order, whether or not it ought to have been made or issued, was in fact an order under s. 248 of the Code of Civil Procedure, and kept the decree alive for the purpose of execution. Munshi *Ram Prasad* also contended that Chapter XIII of the Code of Civil Procedure does apply

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to applications or proceedings for the execution of decrees, and that the order of the 3rd of April 1888 was an order dismissing the application of the 21st of February 1888, and determining finally the right of the decree-holder to have his decree executed, and that Court on the 3rd of April 1888 had proceeded under s. 158 of the Code to decide forthwith the application of the 21st of February 1888. Munshi *Ram Prasad* contended from a passage in the judgment of their Lordships of the Privy Council in the case of *Maharajah Dheeraj Mahtab Chund, Bahadoor* v. *Bulram Singh* (1) that the order of the 3rd April, 1888 was capable of being considered as a final order determining the decree-holder's right to get his decree executed. Munshi *Ram Prasad* further contended that having regard to the order of the 3rd of April 1888 the decree-holder could not now maintain an application for the execution of his decree, and that the order of the 3rd of April1888 was of as much an effect in determining the decree-holder's right to get his decree executed as was the order of Mr.Probyn in the execution proceedings in the case of *Ram Kirpal Shukul* v. *Musammat Rup Kuari* (2), in determining what was the construction of the decree in that case, as to which their Lordships of the Privy Council are reported to have said at page 41 of L.R. 11 I.A., that "the matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the [90] judgment into execution. The binding force of such a judgment depends not upon s. 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation. The judgment or order of Mr. Probyn was an interlocutory judgment; he merely held that according to the proper construction of the decree of the Sadder Court, mesne profits were awarded by it."

Munshi *Ram Prasad* also relied upon a judgment of this Court in the case of *Pheku* v. *Pirthi Pal Singh and others* (3).

That it is absolutely necessary in the interests of the public, any one of whom may be a party at sometime or other to proceedings in execution of a decree, that a Civil Court should have some power by which to compel parties to put the Court in a position to proceed to a determination of applications and proceedings in execution of decrees by producing their evidence, causing the attendance of their witnesses, when evidence is necessary, or by performing any other act necessary to the further progress of the proceeding in execution, and, in case of default, to finally decide the application and the proceedings in accordance with the materials upon the record cannot, I imagine, be questioned. It is not consistent with sound principles of jurisprudence or with the interests of the public that a decree-holder should be entitled to harass his judgment-debtor and to encumber the files of a Court with applications for the execution of his decree which he takes no steps to proceed with, and which he never intended to proceed with, and which in many cases are made with the sole object of preventing the execution of the decree becoming barred by limitation, or of saddling the judgment-debtor with additional costs and harassing him. It has come to my notice that cases

(1) 13 M.I.A. 479 = 14 W.R. 21, P.C. (2) 11 I.A. 37 = 6 A. 269.
(3) 12 A.W.N (1892) 222.

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have occurred where a decree-holder or his pleader for his own purposes or to suit his own convenience has withdrawn an application for the execution of a decree, and the judgment-debtor was left by the order of the Court to bear his own costs incurred in the application. It has also come to my notice that, when an application for the execution of a decree has been struck off the file of pending cases in consequence of the decree-holder failing to proceed with his application [91] or failing to take some step necessary for the further progress of the application or proceeding in execution, the judgment-debtor, who was in no way responsible for the laches of the decree-holder, has had to pay the decree-holder's costs of the application. I may say that in such cases as those to which I have referred the Court should, in my opinion, have awarded the judgment-debtor his costs to be paid by the decree-holder. The fact remains that such cases do occur, and I attribute their occurrence mainly to the uncertainty in which Courts are left as to the procedure to be followed. It has also, I regret to say, come to my notice that some Subordinate Judges and Munsifs, in abuse of their powers and in order to make their returns show a small file of pending cases and a large disposal of applications for the execution of decrees, have not hesitated to strike off their files of pending cases applications for the execution of decrees which had not been decided or judicially disposed of.

All such cases as those to which I have been alluding afford examples of the danger of allowing Courts to invent a procedure for themselves, or leaving them in uncertainty as to the procedure to be followed.

It appears to me that in this case we have to ascertain if possible whether the Court, when making its order of the 3rd of April 1888, was acting under what, having regard to Act No. VI of 1892, we can consider as a procedure authorised by the Legislature; or if not, under what procedure it acted; and further we must ascertain what was the effect, if any of the order of the 3rd of April 1888 on the rights of the decree-holder and of the legal representatives of the judgment-debtors, respectively.

An application for the execution of a decree is an application in the suit in which the decree was obtained. That was decided by their Lordships of the Privy Council in the case of *Mungul Pershad Dichit and another* v. *Grija Kant Lahiri Chowdhry* (1). Similarly an appeal from a decree obtained in a suit is an appeal in the suit. In that sense the word "suit" is used generically as including all the stages of the litigation, from the presentation of a plaint to the final execu-[92]tion of the ultimate decree. The word "suit" has sometimes, as for example in some of the sections of the Code of Civil Procedure, been used in a more restricted sense. For instance, in s. 647 of the Code of Civil Procedure, as it stood before Act No. VI of 1892 was passed, the word "suits" was used not as inclusive of an appeal but in contradistinction to an appeal and to express a stage of litigation prior to an appeal; or at any rate, as distinguished from the stage of litigation included in the term "appeals." Again, for example, in Chapter XIII of the Code of Civil Procedure the word "suit" is used to express and refer to a stage of litigation prior to an appeal from a decree in the suit. No lawyer would understand the words "adjourn the hearing of the suit," which are in s. 156, of the Code of Civil Procedure, as referring to the hearing of an appeal from a decree in the suit. That the Legislature did not understand that the procedure provided by, for instance, Chapter XIII for suits applied of itself, or by reason of any section contained in the

(1) 8 I. A. 123.

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chapters of the Code expressly relating to procedure in suits to appeals from decrees in suits is obvious from a consideration of Chapter XL of the Code, and particularly from s. 582. Chapter XXIII, and s. 583 of the Code of Civil Procedure, contain examples of the use of the words "suit" and "suits" in the restricted sense.

This Court, reading the word "suits" in s. 647 of the Code of Civil Procedure in its restricted sense, as it appears to have been there used, had held that s. 647 made the procedure prescribed by the Code for suits applicable, so far as it could be made applicable, to proceedings in execution of a decree, and treated s. 647 as having an effect, in proceedings in execution of decrees, analogous to the effect of s. 582 in appeals from original decrees, and to the effect of s. 587 in appeals from appellate decrees. As far back as the 14th of February 1884 McDonell and Field, JJ. in *Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (1) held that s. 647 of the Code of Civil Procedure made s. 108 applicable to proceedings in the execution of decrees. Referring to s. 108 they said : "This section applies to regular suits, but under the [93] provisions of s. 647 it is equally applicable to all proceedings other than suits and appeals." If that view of the law was correct, and if Act No. VI of 1892 had not passed, Chapter XIII could, by reason of s. 647, be applied to applications and proceedings for the execution of decrees.

By reason of s. 4 of Act No. VI of 1892, s. 647 of the Code of Civil Procedure can no longer be held to make applicable to proceedings for the execution of decrees the procedure provided for suits at the hearing stage, as s. 4 of Act No. VI of 1892 enacts : "To s. 647 of the said Code the following explanation shall be added, namely :—

"*Explanation.*—This section does not apply to applications for the execution of decrees, which are proceedings in suits."

It is not material to inquire whether in s. 4 of Act No. VI of 1892 the word "suits" is used in the restricted sense in which it is used in the first paragraph of s. 647 and other sections of the Code of Civil Procedure, or in its wider and generic sense. Whichever be the sense the effect of s. 4 of Act No. VI of 1892 is the same. It has, by making s. 647 of the Code of Civil Procedure inapplicable in proceedings for the execution of decrees, deprived the Civil Courts of the power to apply by analogy to proceedings for the execution of decrees the procedure specifically prescribed for proceedings in suits at a stage prior to decree, and has limited the procedure which can be applied under the Code of Civil Procedure in proceedings for the execution of decrees to the procedure which is expressly, as in Chapter XIX of the Code, or by implication, prescribed for proceedings for the execution of decrees or for proceedings at the execution of decree stage of a suit.

The procedure prescribed in Chapter XIII of the Code is not expressly or by implication prescribed for applications or proceedings for the execution of decrees, although such applications are declared by the explanation to s. 647 (Act No. VI of 1892, s. 4) to be proceedings in suits. The procedure prescribed by Chapter XIII is prescribed for that stage of a suit when the suit is still at hearing and before the passing of the decree. Section 156 enables a Court, [94] in the event therein mentioned, from time to time to adjourn the hearing of the suit and to fix a day for the further hearing of the suit." Section 157 enables the Court to proceed to dispose of the suit in one of

(1) 10 C. 416 at p. (422).

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the modes directed in that behalf by Chapter VII, or to make such other order as it thinks fit if on "any day to which the hearing of the suit is adjourned the parties or any of them fail to appear." Section 158 enables the Court "to proceed to decide the suit forthwith" in case of a default of any party to the suit to whom time has been granted "to produce his evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed." There is nothing in Chapter XIII to suggest that the procedure therein contained or any of it is to be applied or can be applied except whilst the suit is still at hearing, or that it is to be applied or may be applied after the hearing of the suit, within the meaning of Chapter XIII, has determined by the making of the decree.

The application of s. 647 of the Code of Civil Procedure having been prohibited to applications for the execution of decrees, there is nothing in the Code of Civil Procedure, as amended by s. 4 of Act No. VI of 1892, which authorises a Court to apply at the stage of the execution of a decree any of the procedure enacted in Chapter VII of the Code.

Chapter XIX of the Code of Civil Procedure, obviously to any one who has read that chapter and is conversant with proceedings for the execution of decrees, does not contain anything like a complete procedure for the proceedings for the execution of decrees, and with the exception of s. 250, does not suggest what procedure should be adopted in cases analogous to those which may occur during the hearing of a suit and which are provided for by Chapter XIII. In cases to which s. 250 applies a Court might no doubt suspend the issue of its warrant for the execution of the decree, but that course if adopted would not dispose of the application for execution, which would still remain undisposed of on the register of pending cases. In my opinion, there are only two ways in which an application to a Court can be judicially disposed of by the Court, and they are by an [95] order granting in whole or in part the prayer of the applicant, and by an order dismissing in whole or in part the prayer of the applicant; of course the order might be partly one or partly the other.

Although I am most reluctant to decide questions of procedure on the basis of Courts having inherent power to invent procedure for themselves, yet when I find that the Legislature has provided no procedure to be followed in cases which must and do arise, I am compelled to hold in such cases that such inherent power does exist in the Courts, for otherwise the work of Courts could not be disposed of, and the Courts would have no power to bring litigation in such cases to a close.

In my opinion it is as necessary that Courts should, in proceedings for the execution of a decree, have power to dispose of applications for the execution of decrees when on the day fixed for the hearing, or on the day to which that hearing has been adjourned, the parties or any of them fail to appear, or when a party to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the application for which time has been allowed, as it is that Courts should have in suits at the hearing stage the powers conferred upon them by Chapter VII and Chapter XIII of the Code of Civil Procedure. A Court must have power inherent, if not conferred by statute, to dismiss an application when the applicant fails through his own laches to put the Court in a position to proceed with his application, as for instance by failing to pay the Court fees for service of a notice under s. 248 on the judgment-debtor. Similarly, I consider that a Court must have inherent power, if such power is not

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conferred upon it by statute, to proceed forthwith to decide an application for the execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application and that act has not been done. In such cases, had it not been for s. 4 of Act No. VI of 1892, the procedure provided in Chapters VII and XIII of the Code of Civil Procedure could be applied by analogy [96] under s. 647 of the Code in proceedings upon applications for the execution of decrees.

Although I think that under the circumstances to which I have referred a Court in a proceeding upon an application for the execution of a decree must be held to have inherent power to dismiss the application or otherwise to decide it, I strongly doubt that a Court can have any inherent power to set aside its own order, except possibly on a review of judgment. I am of opinion that a Court has no inherent power after it has passed an order of dismissal on the merits to entertain a fresh application between the same parties, in the same rights, seeking the same or a similar remedy, and dealing with the same subject-matter.

In the present case the order of the 3rd of April, 1888, was, that the application be " struck off the file of pending cases. " It has been contended that an order " striking off " an application for the execution of a decree cannot in any case be considered as an order dismissing the application. In my opinion that contention goes too far.

With reference to Act No. X of 1877, White, J., in *Baroda Sundari Dabia* v. *Fergusson* (1), ruled that " striking off is not in accordance with any provision in the Code of Civil Procedure, " and McDonell and Field, JJ., in *Biswa Sonan Chundar Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (2) held that "there is no provision in the Code of Civil Procedure for striking off a case." No provision has been introduced into Act No. XIV of 1882 enabling a Court to strike off a suit, appeal or application.

In the case of *Ram Kirpal Shukul* v. *Mussammat Rup Kuari* (3), their Lordships of the Privy Council, referring to certain orders subsequent to the order of Mr. Probyn of the 20th of December, 1867 and prior to the application for execution out of which the appeal to Her Majesty in Council arose, are reported at page 42 of the report to have said : " In the course of these proceedings the case was, for various reasons, several times " struck off " that is to [97] say, struck off the file of the business pending in the Court of the Subordinate Judge ; but the application for execution, upon which Mr. Probyn's judgment was pronounced, was not dismissed or finally disposed of. Mr. Probyn's judgment and the order passed thereon was not reversed or set aside. It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final ; if an appeal die lie and none was preferred the judgment was equally final and binding upon the parties and those claiming under them." I do not know what were the reasons for those orders striking off the execution case, but I think it may be assumed that none of those orders striking off the case were made on a judgment finally deciding that the applicant for execution was not entitled to get the decree executed. In the case of *Syam Singh and others* v. *Baidyanath Rai and others* (4), in which the execution case was, in accordance with a petition presented to the Court, struck off the file, the attachment being maintained, Prinsep

(1) 11 C. L. R. 17.
(2) 10 C. 416.
(3) 11 I. A. 37.
(4) 13 C. 176.

and O'Kinealy, JJ., held : "This striking off could not possibly affect the proceedings between the parties relating to the continuance of the attachment, and it can at most be regarded as an order passed for the purposes of administrative business." In that case the petition embodied an agreement for postponement of the proceedings in execution which had been made by the applicants for the execution of the decree, and the judgment-debtors other than Kartick Singh, who subsequently objected that execution of the decree was barred.

In the case of *Rajah Muhesh Narain Sing* v. *Kishanund Misr and Rughobur Dyal Sing* (1) their Lordships of the Privy Council are reported at page 341 of the report to have said : "It would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when, for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit."

[98] In the case of *the Delhi and London Bank, Limited* v. *Melmoth A. D. Orchard* (2) their Lordships of the Privy Council held that an order of the 10th December 1869, that the petition for the execution of a decree should " be sent to the record-room " on the ground that it was not within the power of the Court to execute the decree was not an adjudication which barred a subsequent application for the execution of the decree.

Their Lordships did not give their reasons for holding that the order of the10th of December 1869 was not an adjudication which would bar a subsequent application for execution. It is to be observed that they did not suggest that if the order had concluded by expressly *dismissing* the petition instead of by ordering it "to be sent to the record room" the result would have been different, and I conclude that in holding that the order was not an adjudication which would bar a subsequent application for the execution of the decree, their Lordships were considering the reasons stated in the order for directing the petition "to be sent to the record-room," and that if those reasons had shown an adjudication on the merits they would have held that the order had barred the subsequent application notwithstanding the informal conclusion directing the petition "to be sent to the record-room" having been used instead of a formal conclusion in legal language *dismissing* it.

The decision of their Lordships of the Privy Council in *The Delhi and London Bank, Limited* v. *Orchard* (2), was considered by White and Field, JJ., in *Hurrosoondary Dassee and another* v. *Jugobundhoo Dutt and others* (3), and in reference to it they said at page 205 of the report : "The precise ground upon which their Lordships' decision proceeded is not stated. Possibly it may have been that the refusal of the application was not to be considered as an adjudication on the point." It is obvious that White and Field, JJ., were of opinion that the order directing the petition "to be sent to the record-room" was to be considered as an order refusing the application. That decision of their Lordships of the Privy Council was also considered by Sir M. Westropp, C.J., and Melvill, J., in **[99]** *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (4), and after quoting the exact words of the order of the 10th of December 1869, the effect of which had been considered by their Lordships of the Privy Council,

(1) 9 M. I. A. 324 (328).
(2) 4 I.A. 127=3C. 47.
(3) 6 C. 203.
(4) 6 B. 54.

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those learned Judges, at page 60 of the report, said: "It appears to us that the above order was not in the nature of an adjudication at all, and that the description of it in the head-note to the report in the Indian Appeals, and still more the description in the head-note to the Calcutta Report, is incorrect and gives an erroneous idea of the meaning of the Judicial Committee's observations. The Deputy Commissioner did not, in fact, decide that the application was time-barred, nor did he decide anything. He simply said that, as he could not execute the decree without the Commissioner's sanction, and as the Commissioner had not given the sanction which had been applied for, nor made any other order, it was not within his power to execute the decree, and therefore the application must go to the record-room. The Judicial Committee might well say that this was not an adjudication within the rule of *res judicata* or within s. 2 of Act VIII of 1859. We do not think that the question, whether a decision that an application is time-barred is *res judicata*, is in any way concluded by the observation of the Privy Council in *The Delhi and London Bank* v. *Orchard* (1), but we think that it is concluded by necessary inference from the judgment of the same tribunal in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (2)." It will be noticed that Sir M. Westropp, C.J., and Melvill, J., in giving that explanation of the decision of their Lordships of the Privy Council, sought for the explanation in the reasons given by the Deputy Commissioner for ordering the petition to "be sent to the record-room," and did not lay any stress upon the words used having been "be sent to the record-room" instead of the words "be dismissed." I think the explanation given by Sir M. Westropp and Melvill, J., of the views which may have influenced their Lordships of the Privy Council is probably correct, and if it be, it follows that in considering the effect of an order passed [100] by a Court in a proceeding for the execution of a decree we must be guided by the reason stated for making the order and not by the mere phraseology employed in the formal direction which concludes the order. In other words, that we must in such cases ascertain whether an order that an application "be dismissed," "be struck of," "be shelved" or "be sent to the record-room" was based on a judicial adjudication that the applicant's right to have his decree executed at all was gone by reason of limitation or some other ground, which, if it existed, would disentitle him to have execution of the decree on any application which he might make, or was made on some ground which did not go to the merits and to his right to execute his decree, as for instance, his application not having been made in compliance with s. 235 or s. 236 or s. 237 of the Code of Civil Procedure, or his having failed to deposit talbana, or to procure the attendance of his witnesses, or to perform any other act necessary to the further progress of the application. Even in the three latter cases there might possibly be in my opinion an adjudication on the merits on the materials before the Court which might finally decide the rights of the parties so far as any question relating to the execution of the decree was concerned.

When such an order in proceedings for the execution of a decree is based on an adjudication, whether erroneous or not, on the merits, whether the phraseology employed is "be dismissed," "be struck off" or "be shelved" it is, in my opinion, until it is reversed or set aside, a bar to any subsequent application for the same purpose, but when it is not based on an adjudication on the merits, it is not to be considered as a bar.

(1) 4 I.A. 127 = 3 C. 47. (2) 8 I.A. 123.

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Although there is no provision in the Code of Civil Procedure authorizing the form of the order of the 3rd of April 1888, *i.e.*, an order that a case be struck off the file of pending cases, and although I am strongly of opinion that Courts should not use ambiguous and unauthorized words in their judicial orders, we must ascertain what the intention of the Court was when it made the order of the 3rd of April 1888. Having regard to the position in which Courts are left by not being able to apply the procedure of, for **[101]** example, s. 99 or s. 108 of the Code of Civil Procedure, to cases arising under applications for the execution of decrees, and further having regard to the results which may follow in some cases from the erroneous procedure of passing orders striking execution cases off the files of pending cases followed in some Courts in these Provinces, and apparently in Courts elsewhere, I feell bound to hold as I now do that in the case of orders striking execution cases off the files of pending cases, or dismissing them on grounds other than a distinct finding that the decree is incapable of execution, that the decree-holder's right to get the decree executed is barred by limitation, or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word "dismissed" or the words "struck off the file," or any other similar words have been used in the order, the decree-holder is not barred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree.

I had not present to my mind the full effect of section 4 of Act No. VI of 1892 when I delivered my judgment in *Pheku* v. *Pirthi Pal Singh and others* (1).

Now, to apply the opinion which I have above expressed to this case it is necessary to see if the order of the 3rd of April 1888 was one by which the Court on the merits dismissed the application for execution.

That application was dismissed not on any finding that the decree could not be executed, or that the decree-holder, by limitation or otherwise, had lost his right to have his decree executed, but on a ground which did not go to the merits, *i.e.*, to the right of the decree-holder to have his decree executed at all.

The application was "struck off," the order should have said "dismissed," on the ground that the applicant had not filed within the time granted to him for that purpose an inventory, which apparently should in law have been annexed to the application at the time it was presented, assuming as I do that s. 236 of the Code of Civil Procedure applied to the application. Consequently, **[102]** according to the opinion which I now entertain, the decree-holder, appellant here, was not by the order of the 3rd of April 1888 barred from presenting and prosecuting the application out of which this appeal has arisen. I would allow this appeal, but without costs, and direct the Court below to proceed to hear and dispose of the application of the 11th of February, 1891. It may be that that application must also be dismissed as not being in compliance with ss. 236 and 237, or one of them, of the Code of Civil Procedure, if they or either of them apply. That, however, is a matter for the Court below to deal with, as the materials are not before us which would enable us to say whether or not both or either of those sections apply. The reason why I would not allow the appellant his costs of this appeal is that I consider that the application out of which this appeal has arisen would not have been necessary if it had

(1) 12 A.W.N. (1892) 222.

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not been for the negligence of the appellant or the pleader who acted for him in making the application of the 21st of February, 1888.

TYRRELL, J.—I fully concur in the judgment and decretal order of the learned Chief Justice.

KNOX, J.—I have had the opportunity of seeing the judgment of the learned Chief Justice and I fully concur in the judgment and decretal order proposed by him.

BLAIR, J.—I entirely concur in the judgment and decretal order of the Chief Justice.

BURKITT, J.—I fully concur in the exhaustive judgment just pronounced by the learned Chief Justice and in the reasons given by him for the conclusions at which he has arrived. I desire to add a few words only. The "striking off" or "shelving" of an execution application is an order which may admit off different interpretations according to the circumstances under which it has been passed. (*Hurronath Bhunjo* v. *Chunni Lal Ghose*) (1).

If such an order be passed on the merits of the application (*e.g.*, by a finding that the decree has already been fully satisfied or that the execution is barred by limitation or by some previous order which [103] would operate as a *res judicata*) then, so far as the Court executing the decree is concerned, the application must be held to have been finally disposed of in a manner adverse to applicant's right to have the decree executed and no further application for execution of the same decree can be entertained unless in pursuance of a successful appeal to a superior Court.

But if such order has been passed in consequence of some default of applicant's not going to the merits of his right to have satisfaction of his decree (*e.g.*, default in appearance, failure to pay process-fees or to put in copies of papers called for, &c., &c.) in such cases, though the order may put an end to the particular application in which it was passed, it does not bar a subsequent application for execution if the latter be made within the time allowed by the Indian Limitation Act (Act No. XV of 1877).

I entirely concur with the learned Chief Justice in holding that the matter to be inquired into respecting such an order is whether or not the Court which passed it intended to and did judicially decide that the decree holder's right to have satisfaction of his decree was barred by some rule of law. If the Court did so decide, then the decree-holder's only remedy is by appeal, a fresh application for execution being barred. But in other cases another application for execution is admissible, subject always to the law of limitation. The rule laid down in the judgment of the learned Chief Justice is a reasonable and an intelligible rule. I am glad that it has been unanimously adopted by this Court.

AIKMAN, J.—I fully concur in the conclusions arrived at in the judgment of the learned Chief Justice and also in the observations made by my brother Burkitt.

In each case the effect of the Court's order by which an application for execution is disposed of has to be considered. The order may have the effect merely of killing the particular application without any adjudication on the merits; on the other hand, the effect of the order may be to render the decree dead and incapable of execution. In the former case there is nothing to prevent the decree-[104] holder putting in a fresh application within the period allowed by

(1) 4 C. 877.

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the law of limitation: in the latter case, the order, if allowed to become final, puts an end to the decree-holder's rights under his decree.

For instance, in the case before us, I have no hesitation in holding that the order of the 3rd of April 1888, by which the application of the 21st of February 1888 was struck off the file of pending cases owing to the failure of the decree-holder to file a list of the property to be attached, merely put an end to that particular application and decided nothing on the merits.

But the order of the 9th of June 1891 was of different nature. It held that the effect of the order of the 3rd of April 1888 was to bar any subsequent application to execute. Had this order of the 9th of June 1891 been allowed to become final instead of being impugned, as it now is, in appeal, it would have been fatal to any rights the decree-holder had under his decree.

Appeal decreed.

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15 A. 104=12 A.W.N. (1892) 240.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

ABDUL RAHIM KHAN (*Plaintiff*) *v.* KHARAG SINGH AND ANOTHER (*Defendants*).* [7th December, 1892.]

Pre-emption—Muhammadan law—Vicinage—Separate mahals.

Where an estate, originally one, has been divided into two separate *mahals*, no right of pre-emption under the Muhammadan law will subsist on behalf of one of such *mahals* in respect of the other merely by reason of vicinage: nor will any right of pre-emption arise from the fact that certain appurtenances to the original *mahal* are still enjoyed in common by the owners of the separated *mahals*.

[R., 33 A. 28 (34)=7 A.L.J. 879 (885)=7 Ind. Cas. 404.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Sunder Lal*, for the respondents.

JUDGMENT.

[105] KNOX and BURKITT, JJ.—In the suit out of which the second appeal arises the appellant before us was the plaintiff, and the respondents, defendants. The plaintiff brought a claim to pre-empt a certain amount of land, and the claim was based both upon the *wajib ul-arz* and also upon the general principles of the Muhammadan law. In order to understand the case it will be necessary to go into the following facts. The appellant and Musammat Sabira Bibi, who is one of the respondents, were brother and sister. They were children to and successors of one Ghulam Rasul Khan, who was the original and sole owner of the village Bahramand Nagar. In connection with that village a *wajib-ul-arz* had

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* Second Appeal, No. 949 of 1892, from a decree of A.M. Markham, Esq., District Judge of Meerut, dated the 12th August 1890, confirming a decree of Rai Piari Lal, Subordinate Judge, of Meerut, dated the 29th August 1889.

[N.B.—In 12 A.W.N (1892) 240 this case is reported as Second Appeal No. 949 of 1890. The judgment is alleged to have been delivered on 1-12-1892.—ED].

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been prepared, and in that paper there were set out certain statements with reference to the question of pre-emption, should it ever arise. We had the extract bearing upon pre-emption read out to us, and we find that, so far from its being a recital of any existing custom of pre-emption, it contained merely a general expression of the wishes of Ghulam Rasul Khan in the event of the village being hereafter divided amongst his heirs. Ghulam Rasul Khan being the sole owner, there could of course be no special contract with reference to the custom. After Ghulam Rasul Khan's death the estate passed into the hands of Abdul Rahim Khan, the son, and his sister, Musammat Sahira Bibi. After it had devolved upon these two persons a partition took place. It was contended that we must look upon this partition as one which, though perfect, yet suffered certain portions of the original estate to remain in the common enjoyment of Abdul Rahim Khan and Musammat Sahira Bibi or their representatives. On looking further, however, into the papers it appears that the alleged community extended only to a common burying ground and a *chaupal.* We are not here concerned with the fact whether these two appendages to the estate were or were not divided. It is clear to us that perfect partition of the original estate did take place and that two separate *mahals* as known to the Revenue law were created therefrom. For each of these separate *mahals* a separate *wajib-ul-arz* was prepared. So far as the new papers relate to pre-emption both the parties are agreed that they are a *verbatim* repetition of the so-called conditions which had originally been entered when the whole estate [106] remained one and undivided. As already pointed out, these so-called conditions were nothing more than an expression of the wishes of Ghulam Rasul Khan put into the mouths of his descendants, and it is both curious and disappointing to find that a paper to which such importance has been attached by law should have been prepared in this perfunctory way. Musmmat Sahari Bibi parted with a portion of her estate to the father of Kharag Singh, who is now the respondent before us, and on her doing so, the appellant before us instituted the present claim for pre-emption. Both the Courts below have found, and found most properly, that the claim, so far as it rested on the *wajib-ul-arz*, could not prevail. As regards the claim based upon the Muhammadan law the Court of first instance, following the ruling in *Chatternath Jha* (1), disallowed the claim. The learned District Judge in appeal held that the ruling in *Chatternath Jha* (1) had been misunderstood by the Court of first instance, but dismissed the claim on the ground that the preliminaries required by the Muhammadan law had not been observed. In appeal before us an attempt was made at first to contend that the appellant's claim was good both on the basis of the *wajib-ul-arz* and of the Muhammadan law. The former basis was, however, abandoned and the only serious contention before us was that under the Muhammadan law the claim for pre-emption was in the present case a good one. The learned counsel for the appellant was compelled to admit that under the Muhammadan law vicinage would give no right of pre-emption whereby the proprietor of one separate *mahal* could claim to pre-empt property sold by the proprietor of another and adjoning *mahal.* But he attempted to maintain the proposition that where two *mahals* had certain appurtenances in common, the fact of both the proprietors having common appurtenances would give to one of them as against the other a right of pre-emption. In support of his contention

(1) 6 B.L.R. 41, (F.B.)

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he referred us to *Mahtab Singh* v. *Ram Tahal Misser* (1) and *Jahangheer Buksh* v. *Bhickaree Lall* (2). We have examined both these cases, but in both these cases the parties concerned were not owners of separate *mahals* but owners of separate *pattis*. [107] We were also referred to *Shaikh Karrim Buksh* v. *Kamr-ud-deen Ahmad* (3). The precedent upon which the Court of first instance originally decided the case seems to us directly in point and conclusive, upon the question. The head-note there runs as follows:— "According to the Muhammadan law a partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such right on the ground of vicinage." We have examined the judgment and find that it fully bears out the head-note cited to us. In the present instance the appellant was really no more than neighbour, and we have not been referred to, nor have we ourselves found, any authority in the Muhammadan law which gives such a neighbour a right of pre-emption in a distinct and adjoining *mahal* solely on the ground of vicinage. Under these circumstances it is unnecessary for us to consider whether or not the preliminaries of the Muhammadan law were observed. We dismiss the appeal with costs.

Appeal dismissed.

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15 A. 107 = 12 A.W.N. (892) 243.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell and Mr. Justice Blair.

JAWALA PRASAD (*Decree-holder*) *v.* RAMNARAIN (*Judgment-debtor*).*
[2nd December, 1892.]

Act I of 1879, s. 46; sch i, art. 16—Stamp—Sale Certificate—Sale subject to incumbrance.

Where property subject to an incumbrance is sold by auction in execution of a decree, the sale certificate should by stamped according to the amount of the purchase money, and not according to the amount of the purchase money together with the incumbrance.

THIS was a reference to the High Court by the Board of Revenue, under s. 46 of the Indian Stamp Act, 1879.

In this case in execution of a decree between the above-named parties a house was sold by public auction for Rs. 550, subject to a lien of Rs. 3,909. The sale having been confirmed, a certificate was granted to the purchaser on a stamp of Rs. 6 calculated on the amount of the actual purchase-money. This document was [108] impounded by the Sub-Registrar of the Agra Municipality under s. 33 of the Stamp Act, he holding that it was liable to a duty of Rs. 45 calculated on Rs. 550, the purchase-money, plus the amount of the incumbrance, namely Rs. 3,909. The Sub-Registrar in due course submitted the document to the Collector, and that officer being in doubt as to the correct stamp, owing to the existence of several conflicting rulings of other High Courts on the point, referred the question to the Board of Revenue. The Board of Revenue thereupon referred the case to the High Court, calling attention to certain rulings on the point in question, *viz.*, *Meer*

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* Miscellaneous Application No. 135 of 1892 being a reference by the Board of Revenue under the Indian Stamp Act, 1879.

(1) 10 W.R. 314. (2) 11 W.R. 71. (3) 6 N.W.P.H.C.R. 377.

1892 DEC. 2. —— APPELLATE CIVIL. —— 15 A. 107= 12 A.W.N. (1892) 243.

Kaisur Khan Murad Khan v. *Ebrahim Khan Musa Khan* (1), *In the matter of a reference to the Board of Revenue* (2), and *Reference under Stamp Act*, s. 46 (3), (4).

On this reference the following opinion was pronounced :—

OPINION.

EDGE, C.J., TYRRELL and BLAIR, JJ.—In this case the property was sold at an auction sale, subject to an incumbrance. The simple question is whether the stamp on the sale-certificate should be calculated on the amount of the purchase money or on the amount of the purchase money plus the amount of the incumbrance. We have not the slightest doubt that the stamp must be calculated on the amount of the purchase money. The incumbrance constituted no part of the consideration. The interest which was represented by the incumbrance, that is, the mortgagee's interest, did not pass by the sale.

Let the Board of Revenue be informed that this is our opinion.

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15 A. 108=12 A.W.N. (1892) 246.

APPELLATE CIVIL.

Before Mr. Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman,

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NIAZ-ULLAH KHAN (*Defendant*) v. NAZIR BEGAM (*Plaintiff*).*
[7th December, 1892.]

Civil Procedure Code, s. 13—Res Judicata.—

One Musammat Nazir Begam brought a suit against a lambardar for her share in the profits of a certain *mahal*, her claim being based upon an assignment executed [109] in her favour on the 29th of July 1889 by one Musammat Basti Begam as heir to one Musammat Moti Begam, deceased. Prior to that assignment, namely on the 3rd of June 1887, a suit had been commenced by the lambardar against Basti Begam and one Khwajah Bakhsh for possession of other property alleged to have been of Moti Begam in her life-time, and in this suit it was ultimately found, but subsequently to the above-mentioned assignment in favour of Nazir Begam, that Khwajah Bakhsh, and not Basti Begam, was the heir to Moti Begam. *Held* that the suit commenced on the 3rd of June 1887 did not operate as *res judicata* in respect of the present plaintiff's (Nazir Begam's) claim under her assignment from Basti Begam. *Foster* v. *The Earl of Derby* (5) referred to.

[F., 35 B. 297 (300)=13 Bom. L. R. 268=10 Ind. Cas. 890 ; Rel., 36 B. 189 (198)=14 Bom. L. R. 9=13 Ind. Cas. 849 (850).]

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *D. Banerji*, for the respondent.

JUDGMENT.

EDGE, C.J.—The suit out of which this second appeal has arisen was one brought against a lambardar for a share of profits in a *mahal*

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* Second Appeal, No. 974 of 1890, from a decree of Munshi Mata Prasad, Subordinate Judge of Bareilly, dated the 5th August 1890, modifying a decree of Maulvi Siraj-uddin, Munsif of Bareilly, dated the 9th November 1889.

(1) 15 B. 532. (2) 10 C. 92. (3) 5 M. 15.
(4) 7 M. 421. (5) I. A. and E. 790.

which accrued for the years 1293 and 1294 Fasli. The plaintiff claimed under an assignment executed in her favour on the 29th of July 1889, by one Basti Begam, whom the plaintiff alleged to have been the heir to one Moti Begam deceased. Moti Begam during her life-time was a co-sharer and was recorded as such for the shares in respect of which the profits claimed accrued. Moti Begam died after the profits for 1293 Fasli had accrued due and before the profits for 1294 Fasli had become due and divisible.

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The suit was resisted on two grounds, one, which went to the whole suit, was that one Khwajah Bakhsh and not Basti Begam was the heir of Moti Begam. The other ground was that as to the profits claimed in respect of 1293 Falsi, they were profits due from the lambardar to Moti Begam deceased, and no certificate, probate or letters of administration within the meaning of s. 4 of Act No. VII of 1889 had been produced, although this suit was commenced after the coming into force of that Act. We shall dispose of the last point first. Act No. VII of 1889 applying, not only at the time when the suit was commenced, but also at the times when the decree in the first Court and the decree in appeal were passed, s. 4 precluded any of the Courts from giving a decree in the plain-[110]tiff's favour for the profits of 1293 Fasli, no matter what her title may have been. So far the appeal succeeds with proportionate costs.

The other ground of defence raises a more difficult question. It has been found on the evidence in the lower appellate Court that Basti Begam and not Khwajah Bakhsh was the heir of Moti Begam. It is contended, however, that a decree in another suit in which the present defendant-appellant was the plaintiff and in which Basti Begam and Khwajah Bakhsh were defendants amongst others, and in which it was decided that Khwajah Bakhsh and not Basti Begam was the heir of Moti Begam, renders s. 13 of the Code of Civil Procedure applicable. The other suit to which we refer was instituted on the 3rd of June 1887, and was in respect of a house claimed by the present defendant-appellant, the then plaintiff, he claiming his title by assigment from Khwajah Bakhsh as heir to Moti Begam. In that suit the first Court on the 18th of November 1887, dismissed the suit on the finding that Basti Begam and not Khwajah Bakhsh was the heir of Moti Begam. The case went up on appeal, and the first appellate Court on the 19th of May 1890, reversed the decree of the first Court, finding that Khwajah Bakhsh and not Basti Begam was the heir of Moti Begam. That decree was affirmed by this Court on appeal on the 22nd of November 1892.

There are two points to be kept in mind in considering how far, if at all, the litigation in the former suit affects the rights of the parties in this one. One is that the plaintiff here claimed by an assignment from Basti Begam, dated the 29th of July 1889, *i.e.*, an assignment executed subsequently to the commencement of the other suit and prior to the final decree in that suit. The second point is that the subject-matter of the present suit was not in any sense the subject-matter of the former suit. There is no doubt that if the subject-matter of this suit had been any part of the subject-matter of the former suit, the doctrine of *lis pendens* would apply; and there is equally no doubt that if the assignment to the plaintiff here, who was no party to the former suit, had been made [111] subsequently to the final decree in the former suit, the principle of estoppel would apply. There appears to be, so far as we are aware, no decision of the Courts in India bearing upon the precise point which we have got to decide. A similar question arose in the

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English Courts as far back as 1834, in the case of *Doe dem Foster* v. *The Earl of Derby* (1). In that case it was contended on the authority of a passage in Comyns' Digest (Title Evidence A. 5), that a verdict in another suit against a party through whom one of the parties claimed was admissible in evidence, although such verdict was subsequent to the creation of title in the party against whom it was proposed to give it in evidence. The passage in Comyns' Digest relied upon was:—"A verdict in another action for the same cause shall be allowed in evidence between the same parties, so it shall be evidence where the verdict was for one under whom any of the first parties claim." That passage is explained in the judgment of Mr. Justice Littledale at p. 790 of the Report thus:—"But that must mean a claim acquired through such party subsequently to the verdict. If, as has been now argued, the rule could be extended to parties claiming other lands under the same title previously to the verdict, the effect of such verdict might the carried back for a hundred years. None of the cases supports such a proposition." That ruling is treated as correct at the present day by the learned editors of Smith's Leading Cases (7th edition, Vol. II, p. 846), and the same distinction is recognised in Bigelow on Estoppels (p. 98). There are sound reasons of common sense why persons in the position of the plaintiff here should not be estopped by a final decree deciding the title of the person through whom the plaintiff claims, but deciding it in a suit to which the plaintiff was not a party, and deciding it after the date of assignment to the plaintiff, and deciding it in a suit in which the subject-matter of the present suit was not involved. As the plaintiff here was not interested by assignment or otherwise in any portion of the subject-matter of the prior suit she could not have availed herself of the provisions of s. 372 of the Code of Civil Procedure, and have got herself made a party to the prior suit in order to defend her interests [112] which were not involved in that suit, but which she had subsequently to the commencement of that suit and before final decree in that suit acquired.

We are therefore of opinion that the final decree in the other suit does not affect the position of the plaintiff here, and it having been found in this suit in the lower appellate Court on evidence as a fact that her assignor, Basti Begam, was the heir of Moti Begam, she is entitled to maintain the decree which she obtained in the Court below so far as the profits for the year 1294 Fasli are concerned. The appeal succeeds in respect of the claim for the profits of 1293 Fasli, and the plaintiff's suit to that extent will be dismissed with proportionate costs, and the decree obtained below by the plaintiff will consequently be reduced by Rs. 242-0-3. Otherwise the appeal is dismissed with proportionate costs, and the decree below in respect of the profits of the year, 1294 Fasli is affirmed with proportionate costs.

AIKMAN, J.—I concur.

Decree modified.

(1) I.A. and E. 790.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

BUJHAWAN RAI AND OTHERS (*Defendants*) *v.* MAKUND LAL (*Plaintiff*).*
[7th December, 1892.]

Court-fee—Appeal—Ground of appeal going to the whole of the respondent's decree.

Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case, and which, if successful, would deprive the respondent of his decree as a whole, and not merely of his interest in it *quoad* the particular appellant, the appellate Court is justified in refusing to hear such appellant on such ground as aforesaid unless he pays a Court fee sufficient to cover the whole relief obtainable on such ground of appeal.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jwala Prasad*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

[113] EDGE, C.J., and AIKMAN, J.—The appellants here are the second set of defendants. The suit is brought by the plaintiff on a mortgage of the 18th of December 1884, executed by the first set of defendants in favour of the plaintiff. The mortgage was of 37 bighas 13 biswas 10 dhurs. In 1880 a money decree had been passed against the first set of defendants or their predecessors-in-title in favour of the second set of defendants. For the purpose of executing that decree immoveable property of the first set of defendants was attached on the 3rd of December 1883. Some litigation ensued between the first set of defendants and the second, the first set of defendants claiming to have the sale under the money decree of 1880 postponed. That litigation went against the first set of defendants, and the 15 bighas 2 biswas of the immoveable property, as it was found, which was attached on the 3rd of December 1883, was brought to sale on the 20th of March 1888, in executoin of the money decree of 1880, and was purchased by the second set of defendants. The second set of defendants contend that the property purchased by them in execution of the decree of 1880, having been attached on the 3rd of December 1883, the mortgage of the 18th of December 1884, upon which the plaintiff has brought his suit, is void, under s. 276 of the Code of Civil Procedure as against them *qua* the 15 bighas 2 biswas. On behalf of the plaintiff it is contended that at the date of the mortgage, namely, the 18th of December 1884, the property was not under attachment. Now there is on the record no order releasing the property from attachment. The decree in the execution of which the property was attached in December 1883 was unsatisfied on the 18th of December 1884, and the plaintiff's sole ground in support of his contention is that the second set of defendants in 1887 applied for a fresh attachment and got an order for attachment on their application. He relies upon the ruling of this Court in *Gobind Singh* v. *Zalim Singh* (1). It appears to us that his contention is unsound, and that the ruling in question does not apply. The second set of defendants

* Second Appeal, No. 1018 of 1890, from a decree of H.F.D. Pennington, Esq., District Judge of Ghazipur, dated the 4th August 1890, modifying a decree of Pandit Bansi Dhar, Subordinate Judge of Ghazipur, dated the 15th April 1890.

(1) 6 A. 33.

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here did not of their own motion apply for a fresh attachment; on the contrary, they did so under the protest that the attachment of 1883 [114] was still in force. They made their application on the suggestion of the Munsif, and obviously not intending to admit that the previous attachment was not in force or intending to waive any rights which they had under it. In the case of *Gobind Singh* v. *Zalim Singh* (1) referred to, it appears to have been assumed that because the decree-holder there had of his own motion applied for a fresh attachment, the previous attachment must have expired. Whether the inference drawn there on the facts was sound or not it is not necessary for us here to inquire; the facts, at any rate, are not the same. There is nothing on the face of this record to make out the issue which lay upon the plaintiff, namely, that at the date when the property was sold, *i.e.*, the 20th of March 1888, the attachment of the 3rd of December 1883 no longer subsisted. That issue was upon the plaintiff and became an issue for him to make out when once it was either proved or found that the property had been attached in execution of the decree in execution of which it was ultimately sold. It was contended on behalf of the plaintiff, however, that the principle of s. 13 of the Code of Civil Procedure applied, and that it was not open to the second set of defendants to show that the attachment of December 1883 was in force. An order had been passed striking off some execution proceedings which did not remove the attachment in our opinion, and did not profess to remove it or to release the property from attachment, and the direction or recommendation of the Munsif to the second set of defendants to put in a fresh application for attachment was not a decision on any point between the parties under cl. (*c*) of s. 244 of the Code. Consequently we hold that the plaintiff's claim, so far as it relates to the 15 bighas 2 biswas fails, by reason of s. 276 of the Code of Civil Procedure.

Another question in this appeal relates to the plaintiff's claim in respect of 6 bighas 8 biswas 15 dhurs. The appellants here were appellants in the Court below, and the ground of appeal upon which, it is stated here, they relied in the Court below to make out their case as to these 6 bighas odd, was their first ground of appeal, at least so far as this Court is concerned. Now in that first ground [115] of appeal below these appellants challenged the mortgage-deed of the plaintiffs as a whole, alleging that it was collusive and had been executed without consideration, and that it was not enforceable as against the appellants' land. The appellants here did not pay Court fee sufficient to cover that ground of appeal with reference to the whole deed. If they had made out that first ground of appeal it would have gone to the root of the whole case of the plaintiff and might have deprived the plaintiff of a decree based on that deed, not only as against these appellants' land, but as against the property of the other defendants.

The Court below declined to hear the appellants here, who were appellants there, in support of that ground of appeal, unless they paid up the Court fees on that ground of appeal, taking it as a challenge to the whole deed. In our opinion the Court below properly applied the Court Fees Act. Parties who come into Court, either as plaintiffs in a suit or as appellants in an appeal, must, if they wish to limit the Court fees to the actual remedy with which they are concerned, make a corresponding limit in their prayers for relief in the plaint or in their grounds of appeal. The result is that the appellants' appeal, so far as it relates to the 6 bighas

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(1) 6 A. 33.

odd, is dismissed with costs, and so far as it relates to the 15 bighas odd, it is decreed with costs in proportion, and the decree of the first Court is reinstated. The costs of the lower Court will be in proportion to the success and failure of the parties in this Court. *Decree modified.*

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

SAKINA BIBI AND OTHERS (*Plaintiffs*) *v.* SWARATH RAI (*Defendant*).*
[9th December, 1892.]

Civil and Revenue Courts, jurisdiction of—Act XII of 1881, *s.* 95—*Suit involving the determination of status of tenant.*

A Civil Court has no jurisdiction to entertain a suit, the decision of which necessarily involves the determination of the class of tenancy of one or other of the parties to it. *Mahesh Rai* v. *Chundar Rai* (1) referred to.

[R., 18 A. 270 (F.B.); D., 16 A. 325, 328.]

[116] THE plaintiff in the case were zemindars of the village of Tari in the Ghazipur district. The defendants named in the plaint, namely, Swarath Rai, and Musammat Kadma Kuar, the latter of whom appears to have died during the pendency of the suit, were respectively cousin and widow of one Ram Jiawan Rai, deceased, a cultivator of Tari. The plaintiffs sued for cancellation of a deed of gift of certain land in the village executed by Musammat Kadma Kuar, deceased, and for a declaration of their rights in respect of the said land, on the following grounds:—(1) that the land was an occupancy-holding, and the donee was not a partner in the cultivation, and (2) that Musammat Kadma Kuar was a childless widow and therefore incapable of alienating more than a life-interest in the land. The defendant, Swarath Rai, in his written statement, pleaded, amongst other things, that the suit was not cognizable by a Civil Court, and denied specifically that the land in suit was an occupancy-holding. He also pleaded that he was in any case a partner in the cultivation of the said land, and further that he was next in succession to Musammat Kadma Kuar, the deceased widow. The Court of first instance (the Subordinate Judge) found upon every issue in the case in favour of the defendant, and dismissed the plaintiffs' suit accordingly. The plaintiffs appealed to the District Judge, who, considering the finding that the position of the defendant's donor had been that of a tenant at fixed rates sufficient to dispose of the appeal, dismissed it. The plaintiffs then appealed to the High Court.

Mr. *T. Conlan*, and Mr. D. *Banerji*, for the appellants.

Mr. *A. Strachey*, and Mr. *Abdul Raoof*, for the respondent.

JUDGMENT.

EDGE, C.J., and AIKMAN, J.—The ruling in *Mahesh Rai and others* v. *Chandar Rai and others* (1) applies. The Civil Court had no jurisdiction to entertain this suit, which could only be decided on the trial of the issue as to the status of a tenant, a matter excluded by s. 95 of Act No. XII of 1881, from the jurisdiction of Civil Courts. The appeal is dismissed with costs. *Appeal dismissed.*

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* Second Appeal, No. 1022 of 1890, from a decree of H. F. D. Pennington, Esq., District Judge of Ghazipur, dated the 11th July 1890, confirming a decree of Babu Lalta Prasad, Subordinate Judge of Ghazipur, dated the 19th March, 1890.

(1) 13 A. 17.

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[117] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt and Mr. Justice Aikman.

BADRI PRASAD (*Plaintiff*) *v.* KUNDAN LAL (*Defendant*).*
[17th December, 1892.]

Act VII of 1870, *s.* 5—*Act VI of* 1892, *s.* 3—*Court fee—Finality of decision of taxing officer.*

Where an appellant whose memorandum of appeal had been declared by the taxing officer of the Court to be insufficiently stamped applied for relief under s. 3 of Act No. VI of 1892, and it was found that the report of the taxing officer was erroneous and that the correct stamp had as a matter of fact been put on the memorandum of appeal, *held*, that the appellant was entitled to the relief sought notwithstanding the provisions of s. 5 of Act No. VII of 1870.

[F., 6 A.L.J. 972 (975)=4 Ind. Cas. 123 ; R., 6 O.C. 372 (377).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C.J., BURKITT and AIKMAN, JJ.—The question here arises as to whether the defendant, who is appellant here, is entitled to the relief provided by s. 3 of Act No. VI of 1892. The facts of the case are simple. One Kundan Lal applied under s. 108 of Act No. XIX of 1873 for perfect partition of his share in a mahal. Badri Prasad, who is defendant here, objected on a question of title. That question was decided by the Assistant Collector acting as a Civil Court under s. 113 of the above mentioned Act, and he passed an order declaring that Kundan Lal was entitled to have partition made of the share which he claimed and disallowed the objection of Badri Prasad. Regarding it for the moment as a purely civil suit, the Court fee would be a 10-rupee fee for a declaration of title, which was the only relief which, under s. 113 of Act No. XIX of 1873, a Collector or Assistant Collector acting as a Civil Court could grant. Badri Prasad appealed to the District Judge under s. 114 of the same Act. His appeal there was simply one against the order of the Assistant Collector. That appeal would require merely a 10-rupee Court fee stamp. His appeal was dimissed by the District Judge and thereupon he brought the present appeal in this Court [118] under s. 114 of the Act. By that appeal he merely sought to have the decree of the lower appellate Court reversed. His memorandum of appeal in this Court was presented on stamped paper of the value of Rs. 10. His memorandum of appeal went before the officer of this Court whose duty it is to see that the fees are paid under Chapter II of the Court Fees Act, and he was of opinion that the fee of Rs. 10 was insufficient and that the memorandum of appeal was not properly stamped and required an extra *ad volorem* fee of Rs 90. The appellant's vakil did not agree with that officer's opinion and the question of fee went under s. 5 before the then taxing officer of this Court. By his decision the memorandum of appeal was

* Second Appeal, No. 1044 of 1889, from a decree of H. F. Evans, Esq., District Judge of Moradabad, dated the 1st August 1889, confirming a decree of Maulvi Muhammad Ali Husain Khan, Assistant Collector of Bijnor, dated the 6th April 1889.

insufficiently stamped and required an additional fee of Rs. 90. That deficiency was made good after the period for the presenting of a properly stamped memorandum of appeal had expired. The peculiarity of this case is that by s. 5 of the Court Fees Act the decision of the taxing officer as to the requisite stamp was final and for purposes of this nature must be taken as final. However, what we have got to see is whether the insufficiency of the stamp on the memorandum of appeal was caused by a mistake on the part of the appellant as to the amount of the requisite stamp. As a matter of fact, the memorandum of appeal was sufficiently stamped with a 10-rupee stamp, but the requisite stamp in this case, by reason of the Court Fees Act making the decision of the taxing officer absolutely final, must be taken as Rs. 100. It was not the fault of the appellant that it was decided that his appeal was insufficiently stamped, and he could not foresee that the taxing officer would take a wrong view of the law. We should say that in this case the gentleman who at that time was acting temporarily as taxing officer was not the Registrar of the Court, who ordinarily acts as taxing officer, but a gentleman who was acting in his absence. We hold in this case that the appellant has shown himself entitled to the benefit of s. 3 of Act No. VI of 1892, and the result is that we hold that the memorandum of appeal has the same effect and is "as valid," to use the words of the Act, "as if it had been properly stamped." The appeal will go to a Bench of two Judges to be disposed of on the other points.

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15 A. 119 = 13 A.W.N. (1893) 14.

[119] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

TILAK RAJ SINGH AND ANOTHER (*Defendants*) v. CHAKARDHARI SINGH AND ANOTHER (*Plaintiffs*).* [19th December, 1892.]

Civil Procedure Code, ss. 562, 591—Appeal—Objection to previous order in the case—Such objection to be taken in Memorandum of appeal.

Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree to question the validity of an order of remand previously made in the case under s. 562 of the Code of Civil Procedure.

[F., 18 A. 19 (22); 20 A. 370 (372); R., 12 C.P.L.R. 119 (121).]

THE plaintiffs sued in the Court of the Munsiff of Ballia for the recovery of possession of 3 bighas 13 biswas of land by cancelment of an auction sale, dated the 3rd of April 1883, and two settlement decisions, dated the 14th of February and the 26th June 1885, and to recover Rs. 87 as damages.

The plaintiffs claimed as purchasers under a sale-deed, dated the 4th of September 1880, from one Ram Lal, a tenant at fixed rates. They alleged that they had obtained possession, but that in the recent settlement the defendant, Tilak Raj, had caused his name to be entered in the *khasra* in respect of the land. The plaintiffs had objected to his entry of the defendant's name, but their objection was disallowed. Their application for review of judgment was also disallowed. The plaintiffs then brought

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* Second Appeal No. 888 of 1890 from a decree of Babu Lalta Prasad, Subordinate Judge of Gazipur, dated the 10th July 1890, modifying a decree of Munshi Girdhari Lal, Munsiff of Ballia, dated the 14th March 1890.

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a claim in the Civil Court for maintenance of possession, but that claim was dismissed.

The defendant, Tilak Raj, pleaded that he being the sole zemindar of the land in suit and the plaintiffs the representatives, as they alleged, of a cultivator, the suit was not cognizable by a Civil Court. He also pleaded *res judicata*, that Ram Lal was not competent to transfer his tenant rights to the plaintiffs, that the sale-deed of the plaintiffs was collusive, that his own purchase at auction sale was a valid transaction, and lastly that the damages assessed by the plaintiffs were excessive. The second defendant, Raj Kishore, was impleaded as a *pro forma* defendant, having purchased a portion of the land in dispute from Tilak Raj.

[120] The first Court after framing five issues and considering them decreed the plaintiffs' claim for possession and for a portion of the damages claimed.

In appeal the Subordinate Judge remanded the case, ostensibly under s. 562 of the Code of Civil Procedure.

The case was accordingly re-tried, by a different Munsif, and in the result the plaintiff's suit was dismissed with costs.

The plaintiffs thereupon appealed and the defendants filed objections under s. 561 of the Code of Civil Procedure. The lower appellate Court allowed the plaintiffs' appeal and gave them a decree for possession and part of the damages claimed.

The defendants thereupon appealed to the High Court, and at the hearing of this appeal, though the point was not taken in the memorandum of appeal, they attempted to plead that the remand order under s. 562 of the Code of Civil Procedure mentioned above was a bad order, and in view apparently of this contention the appeal was referred by the single Judge before whom it had been laid to a Bench of two Judges.

Munshi *Jwala Prasad*, for the appellants.

Mr. *J. E. Howard* and Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—Mr. Jwala Prasad for the surviving defendant-appellant has contended that he is entitled in this appeal from the decree of the lower appellate Court to question the order of remand passed under s. 562 of the Code of Civil Procedure, notwithstanding that that objection was not set forth amongst his grounds of objection in the memorandum of appeal here. In our opinion an objection which may be heard under s. 591 of the Code must be one set forth in the memorandum of appeal. Section 591 gives an exceptional previlege to the appellant, apparently on the condition that his objection is an objection set forth as a ground in his memorandum of appeal. Even if we were not prevented from hearing this objection by reason of its not having been set forth in the memorandum of appeal, we would not, having regard to the [121] fact that the order under s. 562 was made as long ago as the 19th of December 1888, give leave to the appellant to urge that particular objection at this late stage of the case after such a long period has elapsed since the order.

As to the second ground no attempt has been made to support it. The first ground of appeal is not very intelligible. We are told that the holding in question was one to which the second and not the first paragraph of s. 9 of Act No. XII of 1881 applies. The appellants are precluded by the finding of the Court below, which is not questioned in appeal, from contending that the holding was not one at fixed rates.

The appeal of the surviving defendant is dismissed with costs. The appeal so far as it concerns the other appellant, Tilak Raj Singh, who died more than six months ago, and whose representatives have not been brought on the record, abates. *Appeal dismissed.*

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15 A. 121 = 13 A.W.N. (1893) 44.

REVISIONAL CIVIL.

Before Mr. Justice Tyrrell, and Mr. Justice Blair.

HASAN SHAH (*Applicant*) *v.* SHEO PRASAD AND ANOTHER (*Opposite parties*).* [14th January, 1893.]

Civil Procedure Code, ss. 206, 209, 622—Amendment of decree—Interest given by amendment in decree which was not given by the judgment—Revision.

The plaintiffs sued for recovery of a certain sum of money and interest up to date of suit and for interest during the suit and subsequent to decree until satisfaction thereof. The Court in its judgment awarded the plaintiffs a specified sum of money and ordered that the rest of the plaintiffs' claim should stand dismissed. Subsequently the Court amended its decree by adding a decretal order for the payment to the plaintiffs by the defendant of interest during the pendency of the suit and after decree until the satisfaction of the debt. *Held* that it was illegal for the Court to decree the claim for interest by way of amendment of its decree and that the order so amending the decree was open to revision.

[R., 31 B. 447 (449); 11 O.C. 208 (211).]

THE facts of this case sufficiently appear from the judgment of the Court.

[122] Pandit *Sundar Lal*, for the applicant.

Munshi *Ram Prasad*, for the opposite party.

JUDGMENT.

TYRRELL and BLAIR, JJ.—This is a judgment-debtor's application for revision. A decree had been given against him after the trial of the suit for Rs. 4,791-7-0 out of the amount claimed by the plaintiffs. The rest of the plaintiffs' claim was dismissed.

The plaintiffs' case was filed on the 18th of June, 1891. They asked for Rs. 10,000 principal and interest calculated up to that date. They also asked for interest for the period covered by the trial and for further interest after the decree. These were all specific parts of the claim.

The Court, as we said above, in its judgment awarded the plaintiffs nearly half of the money as claimed and decreed that the rest of the claim, not "the rest of the money claim," should stand dismissed. The decree of the Court was framed in complete accordance with the judgment, that is, the decree gave Rs. 4,791-7-0 to the plaintiffs and no other part of the reliefs claimed by them. Subsequently, on an application of the decree-holders, the Subordinate Judge, purporting to act under ss. 206 and 209 of Act No. XIV of 1882, amended this decree by adding a decretal order for the payment to the plaintiffs by the applicant here of interest during the pendency of the suit and after decree until the satisfaction of the debt. This order is challenged in this application for revision.

We are constrained to hold that this order is open to revision and not to hold that the petitioner had his remedy by way of appeal from the

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* Application No. 34 of 1892 under s. 622 of the Civil Procedure Code for revision of an order of Maulvi Shah Ahmad-ullah, Subordinate Judge of Meerut, dated the 23rd April, 1892.

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amended decree. The Full Bench ruling in *Raghunath Das* v. *Raj Kumar* (1) is authoritative on this point. Having carefully considered the judgment in this case we think that Mr. *Sundar Lal* has made out a good case for the petitioner.

We do not hold that under s. 209 of Act No. XIV of 1882, a Court is empowered merely to embody in a decree interest which had been adjudged payable in the suit. We think such a reading of that section would make it out of place, absurd and mere sur-[123]plusage. It does not require a rule of procedure to enable a Court to decree a relief which it has adjudged in its judgment. But we find that the Subordinate Judge, whose order is before us, in adjudging a specific sum, principal and interest, to the respondents here proceeded in terms to dismiss the rest of their claim (*baqia dawa*). It is quite possible, as was the contention for the respondents, that the claim for interest after the institution of the suit may not have been present to the Subordinate Judge's mind when he made this order; but we may not speculate on this point. We must take the words of the judgment as we find them.

It is unquestionable that the claim for interest was part of the *baqia dawa* (or rest of the claim) and with it stood dismissed.

This being so, it was illegal for the Subordinate Judge to decree this claim by way of amendment of his decree.

The amended decree of the Subordinate-Judge is set-aside; the decree unamended will stand as the decree in this suit, and this application is decreed with costs.

Application allowed.

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15 A. 123=13 A.W.N. (1893) 47.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Burkitt and Mr. Justice Aikman.

AHMAD ALI (*Plaintiff*) *v.* WARIS HUSAIN AND ANOTHER (*Defendants*).* [4th January, 1893.]

Act XV of 1877, *s.* 4—*Civil Procedure Code*, ss. 541, 542, 584, 585, 587—*Limitation—Second Appeal—Plea of limitation as to first appellate Court taken orally by appellant in Second Appeal—Court not bound to consider such plea.*

An appellant in a Second Appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondent's appeal to the lower Court (where they had been appellants) had been barred by limitation when it was presented.

Held that, even though the plea proposed to be raised was one involving a question of limitation, the appellant was not entitled as of right to be heard in support [124] of it without the leave of the Court granted under s. 542 of the Code of Civil Procedure; that the Court was not itself bound to consider that plea, and under the circumstances did not think it necessary to enter into. *Ram Kishen Upadhia* v. *Dipa Upadhia* (2) approved.

[Rel. on, 13 Ind. Cas. 792 (793)=84 P.R. 1911; R., 34 C. 941=6 C.L.J. 237=11 C.W.N. 959; 17 Ind. Cas. 638 (639)=8 N.L.R. 174 (176).]

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* Second Appeal No. 601 of 1890, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 12th March 1890, reversing a decree of Lala Shankar Lal, Munsiff of Allahabad, dated the 24th December 1887.

(1) 7 A. 876. (2) 13 A. 580.

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THE facts of this case are as follows:—

The plaintiff sued in the Court of the Munsif of Allahabad for possession of a certain piece of land, alleging that the land was part of the enclosure belonging to his house, but that the defendant, Bhondu, had interfered with his possession by taking proceedings in the Criminal Court, as the result of which he had obtained an order that certain buildings erected by the plaintiff on the disputed land should be demolished.

The defendant, Bhondu, denied the plaintiff's title to the land and stated that the land formed part of his holding, which he and his ancestors held from the sole zemindar, Waris Husain, and his predecessors-in-title. Waris Husain also filed a similar written statement endorsing the statements of the defendant Bhondu.

The Munsif, finding that the land in question was originally included in the plaintiff's holding gave him, on the 24th of December 1887, a decree as prayed.

The defendants appealed to the District Judge, their appeal going entirely to the estimate placed upon the evidence by the Court of first instance. That appeal was filed on the 14th of February 1888. The District Judge decreed the appeal and dismissed the plaintiff's claim *in toto.*

The plaintiff then appealed to the High Court on several grounds, but saying nothing in his memorandum of appeal as to the question of the respondents' appeal below being barred by limitation. This appeal was referred on the 11th of July 1891, by Mahmood, J., to a Bench of two Judges and subsequently by a general order of the Court was laid before a Bench of three Judges, as involving a question which might be affected by the passing of the bill which subsequently became Act No. VI of 1882.

Pandit *Sundar Lal*, for the appellant.

[125] Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

EDGE, C. J., BURKITT and AIKMAN, JJ.—This appeal has been placed before this Bench of three Judges, as it was one of the cases in which it was understood that a question of limitation as to the appeal below would be raised as to which it might be necessary to consider whether s. 3 of Act No. VI of 1892 applied. Pandit *Sundar Lal* for the appellant asks us to hear an argument which he contends would show that when the memorandum of appeal of the defendants, respondents here, was presented, in the Court below, it was insufficiently stamped, and that the alleged deficiency was made good after the period of limitation applicable to the appeal had expired, and he would thus contend that the case comes within the principle of the decision in *Balkaram Rai* v. *Gobind Nath Tiwari*(1). The Pandit's client, who was the plaintiff in the suit and the appellant here, filed his appeal on the 28th of May 1890, and he did not by any ground in his memrandum of appeal raise any question as to the appeal of the defendants in the Court below being time-barred. Pandi *Sundar Lal*, however, contends that s. 4 of the Indian Limitation Act (Act No. XV of 1877) makes it obligatory on this Court, in Second Appeal to hear and determine the question as to whether the defendants' appeal in the Court below was or was not barred by limitation at the time when it was presented in that Court, and he necessarily contends further that s. 4 of the Indian Limitation Act, 1877, overrides the restriction imposed upon an appellant by s. 542 of the Code of Civil Procedure. He also contends that, if he is wrong

(1) 12 A. 129.

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on his first point, this is a case in which we should give leave to the appellant to have this point of limitation argued, although it was not taken in his grounds of appeal. It is necessary to see in the first instance what it is that s. 4 of the Indian Limitation Act, 1877, actually enacts. Omitting the explanation, s. 4 is as follows:—"Subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted, appeal presented and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dis-[126]missed, although limitation has not been set up as a defence." Now we have no doubt that under s. 4 it is the duty of a Court of first instance to dismiss a suit before it, which is barred by limitation, whether the plea of limitation is raised or not. We have also no doubt that under s. 4, it is the duty of an appellate Court to dismiss an appeal before it, if that appeal was barred by limitation when presented, no matter whether the respondent in such appeal raises the defence of limitation to it or not. Similarly a Court to which any application to which s. 4 applies is made, will be bound to apply the law of limitation to it even though the opposite party does not raise the question of limitation. The question before us now is not a question as to whether the appeal before us is barred by limitation. It is a question, if we allow it to be argued, as to whether the appeal in the Court below was barred by limitation. Our jurisdiction as an appellate Court does not arise by reason of s. 4 of the Indian Limitation Act, but in this case by virtue of the provisions of Chapter XLII of the Code of Civil Procedure and such provisions of Chapter XLI as are made applicable to Second Appeals by s. 587. Section 584, is an enabling section and gives the right of Second Appeal in cases which come within clauses (*a*), (*b*) or (*c*) of that section. Section 585 makes it clear that a Second Appeal can only be maintained on one or other of the grounds specified in s. 584. We have to look back to Chapter XLI, and by s. 541 the memorandum of appeal must set forth the grounds of objection. Reading that section into Chapter XLII by virtue of s. 587, it is obvious that the grounds in Second Appeal of objection to the appellate decree must be set out in the memorandum of appeal. If s. 542 was not also applicable to Second Appeals it would follow that no appellant in Second Appeal could be heard upon any grounds of appeal not set out in his memorandum of appeal. But, inasmuch as it is necessary to apply s. 541 to Second Appeals, as otherwise there would be no provision requiring any grounds to be set forth in a memorandum of Second Appeal, and as it was obviously the intention of the Legislature that the grounds of appeal, whether the appeal was a First Appeal or a Second [127] Appeal should be set forth in the memorandum of appeal, it is also necessary to apply s. 542 to Second Appeals. That s. 541 does apply to Second Appeals is obvious from the decision of their Lordships of the Privy Council in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1), for we find that their Lordships, at p. 26 of the report, in reference to sub-section (*a*) of s. 584, say:—"In sub-section (*a*) the word 'specified' obviously means specified in the memorandum or grounds of appeal."

The reason why we have gone at some length into showing that ss. 541 and 542 apply to Second Appeals, is that it was argued that s. 542 did not apply to Second Appeals. Now referring to s. 542 we find that the appellant by that section is not without the leave of the Court entitled to

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(1) 18 C. 23.

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urge or be heard in support of any ground of objection to the decree in appeal which has not been set out in his memorandum of appeal. If it had been intended by the Legislature when the Code of Civil Procedure (Act No. XIV of 1882) was passed that an appellant should be entitled to urge and be heard in support of a ground of objection to the decree below depending on limitation, although no such ground had been set out in his memorandum of appeal, we would have expected to find an exception made in s. 542 in respect of questions of limitation, and that that section would not have included in its terms an unlimited prohibition against an appellant, except by leave of the Court, urging or being heard in support of a ground of objection to the decree not taken in his memorandum of appeal. It appears to us that in considering whether or not we are bound to apply s. 4 of the Indian Limitation Act in this particular case, it is necessary to see whether that obligation is imposed upon us by these provisions as to procedure contained in the Code of Civil Procedure under and in accordance with which only can the appeal come before this Court. It further appears to us that whether the question is one as to limitation to be applied to the appeal in the Court below or any other question going to the maintenance or otherwise of that decree, we are not bound to hear an appellant in support of such an objection [128] unless it has been raised by his grounds of appeal, and we are not bound to apply s. 4 of the Indian Limitation Act, 1877, to the appeal in the Court below when that ground has not been taken in the memorandum of appeal here. That this Court can hear the appellant on that ground or could of its own motion consider the question as to whether the appeal in the Court below was barred by limitation, we have no doubt, so long as the opposite party was given an opportunity of being heard on the point. What we have said applies to the rights of an appellant. It is quite clear to us that a respondent in Second Appeal would be entitled to show that the appellant's appeal in the Court below was time-barred, and thus to support the decree of the Court below by showing that that decree was maintainable although the question of limitation as to the appeal had not been taken in the Court below. However, that is not the question before the Court in this case. We hold that the appellant is not entitled to urge or be heard in support of this objection which is not included in his grounds of appeal and that we are not bound under the circumstances to apply s. 4 of the Indian Limitation Act, 1877, to the appeal in the Court below. We are supported in this view by the decision of this Court in *Ram Kishan Upadhia* v. *Dipa Upadhia* (1), and by the decision of the High Court at Bombay in *Dattu* v. *Kasai* (2).

As to the application of the appellant for leave to urge this question, we do not think that a case is made out for granting that permission. The decision in the case of *Balkaran Rai* v. *Gobind Nath Tiwari* was given on the 14th of February 1890, and was reported in the number of the *Weekly Notes* for 8th March 1890, and the appeal in this case was not presented to this Court until the 28th of May 1890. Further, we think that, as a rule, leave should not be given in such cases where it would be necessary to go into calculations under the Court Fees Act or considerations as to dates or reasons why the Court below thought fit to consider the appeal as presented within time. The appeal will go to a Bench of two Judges to be decided on the other points involved in it.

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(1) 13 A. 580. (2) 8 B. 535.

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15 A. 129 = 13 A.W.N. (1893) 48.

15 A. 129 = 13 A.W.N. (1893) 48.

[129] APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

QUEEN-EMPRESS *v.* SANGAM LAL.* [21st January, 1893.]

Act XI *of* 1878, *ss.* 19 *(f)*, 25—*Unlawful possession of arms—Search-warrant, contents of—" Possession ", what evidence necessary where arms found in common room of joint family house.*

Where a Magistrate issues a search-warrant under s. 25 of the Indian Arms Act, 1878, it is necessary that he should record the grounds of his belief that the person against whom the warrant is issued has in his possession arms, ammunition or military stores for an unlawful purpose

Where proceedings under the Indian Arms Act, 1878, in respect of the unlawful possession of arms are taken against a member of a joint Hindu family not being the head of such joint family and arms are found in a common room of the joint family house, it is incumbent upon the prosecution to give good evidence that such arms are in the exclusive possession and control of the particular member of the joint family who is sought to be charged with their possession.

[**Rel. on**, 16 C.W.N. 145 = 13 Cr. L. J. 65 (98) = 13 Ind. Cas. 721 ; **Appl.**, 9 C.L.J. 663 (686) = 13 C. W.N. 861 = 10 Cr. L.J. 125 (146) = 2 Ind. Cas. 681 (693); 2 O.C. 99 (101); **R.**, 28 A. 598 = A.W.N. 1907, 187 = 6 Cr. L.J. 23 ; 9 C.L.J. 663 = 10 Cr. L.J. 125 (146) = 13 C.W.N. 861 = 3 Ind. Cas. 681 (693); **D.**, 28 A. 302 = 3 A.L.J. 833 (835) = A.W.N. 1906, 11 = 3 Cr. L.J. 88 ; 3 Cr. L.J. 71 = 52 P.R. 1905 (Cr.) = 158 P.L.R. 1905.]

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

The Hon'ble Mr. *Colvin* and Babu *Durga Charan Banerji*, for the appellant.

The Public Prosecutor (Mr. *A. Strachey*), for the Crown.

JUDGMENT.

KNOX and BLAIR, JJ.—The appellant, Sangam Lal, has been convicted of an offence under s. 9 *(f)* of Act XI of 1878. It appears that on a search made in a *baithak*, called by the police Sangam Lal's *baithak*, two swords were found inside an almirah which was locked when the police arrived and which had to be forced open by them because the key was not produced. Two axes were found elsewhere, but we are satisfied that the learned Judge took a proper view of them when he wrote that if the case against the appellant was limited to the discovery of these two axes he might safely have been acquitted. We have not seen the axes; they have not been produced before us; but from their description we are satisfied that they are not weapons within the meaning of the Arms Act of 1878.

[130] Before we deal with the case regarding the possession of the swords, we think it proper to place on record our disappointment at finding that the District Magistrate appears to have issued the search-warrant before he had complied with the provisions of the law which were intended as a safeguard against the undue issue of search-warrants under Act No. XI of 1878. We cannot find, and the learned Public Prosecutor has not been able to refer us to, any record by the District Magistrate setting out the grounds of his belief that there were in the possession of appellant weapons kept by him for an unlawful purpose.

* Criminal Appeal No. 723 of 1892.

Even the warrant, which was issued apparently without any such record, is silent upon this important point, *viz.*, the fact of any unlawful purpose. We trust that after this clear expression of our opinion we shall always find placed on record by Magistrates, before they issue search-warrants under this Act, the grounds of their belief that there are in the house which it is proposed to search weapons kept for an unlawful purpose.

The facts that the weapons were found in the place described by the police and that Sangam Lal possesses no license for the possession of any arms are admitted. But the learned Counsel for the appellant presses upon our notice that there is no evidence of any value to show that the weapons were in Sangam Lal's possession or control, properly so called.

There is no evidence to show that the place where the weapons were found was a place in the separate and exclusive possession of the appellant. The presumption is, and it is a presumption which is not rebutted by one jot or tittle of evidence, that the house, the room, the almirah were in the possession of a joint Hindu family living joint, and that Ram Chand, the father, who was then alive, was the managing head of that family. Ram Chand was, as a matter of fact, at the time the police arrived, in the pursuit of his ordinary avocations in the room where the almirah was in which the weapons were found. There were a *masnad* and other pieces of furniture which showed that he as well as the appellant was in the habit of using that room.

[131] In coming to the conclusion that the weapons were in the exclusive possession of the appellant, the learned Judge has relied upon a statement made by Ram Chand in the absence of the appellant. That statement was not evidence against the appellant and should never have found a place upon the record, and we dismiss it at once from all consideration.

The other reasons for the belief that the almirah was in the exclusive possession and control of the appellant, are that the weapons were encased in scabbards of a kind only made in Gwalior, and that it is in evidence that at one time the appellant was a captain in the service of the Maharaja of Gwalior, and further that on previous occasions the Sub-Inspector of Daraganj had seen this same almirah opened by the appellant with a key in his possession.

There are strong indicia of a certain amount of possession and control, but we are not disposed in the present case to depart from the well-known rule of law that where articles are found in a house in such place or places as several persons living in the house may have access to, there is no presumption as to possession and control that those articles are in the possession and control of any other person than the house-master.

There are not wanting signs that the police have been too ready to mark the house as Sangam Lal's, when in reality it was and would ordinarily have been described as the house of Ram Chand. This raises an unpleasant doubt and makes us look more critically than we might otherwise have done upon other evidence adduced by them to the fact that the almirah was in the exclusive possession and control of the appellant.

We do not lay it down as an invariable rule that where weapons are found in a house occupied by a Hindu family living jointly, possession is necessarily that of the managing member, and the managing member only; but we do lay down that in all such cases where it is sought to establish that possession and control are with some member of the family other than the managing member, there must be good and clear evidence of the

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fact before we can in an Act [132] of this kind arrive at such a conclusion. The Act is one highly penal and one which must be strictly construed.

In the present case, and for the reasons given above, we hold there has not been sufficient proof that exclusive possession and control were with the appellant.

We accordingly admit the appeal, set aside the conviction and sentence passed upon Sangam Lal, find him not guilty of the offence with which he stood charged, and direct that the fine, if paid, be refunded.

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15 A. 132 = 13 A W.N. (1893) 49.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell, and Mr. Justice Blair.

ISHWAR NARAIN (*Plaintiff*) *v.* JANKI (*Defendant*).* [24th January, 1893.]

Hindu Law—Hindu Widow—Reversioner—Right to sue—Next presumptive reversioner—Intervening woman's estate.

The plaintiff, grandson (daughter's son) of a deceased Hindu, sued during the lifetime of his mother to set aside a will made by his mother's father in favour of an idol under the management of his step-mother, the testator's second wife.

Held, that, there being no evidence of collusion or connivance, the plaintiff, not being the next reversioner, was not competent to maintain the suit. The fact that his mother's estate, should it ever come into her possession, would be only a limited estate, would not affect the plaintiff's subsisting position in respect of his right to sue. *Madari* v *Malki* (1) followed; *Balgobind* v. *Ram Kumar* (2) dissented from.

[N.F., 32 C. 62 (69) = 9 C.W.N. 25 ; A.W.N. (1908), 207 ; 5 O.C. 360 (363) ; 29 P.R. 1903 ; 149 P. R. 1903 F., 5 Ind. Cas. 283 (284) ; R., 34 A. 207 (209) = 9 A.L.J. 158 = 13 Ind. Cas. 632.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Mr. *C. Dillon* and Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

TYRRELL and BLAIR, JJ.—One Mangli died on the 27th of July, 1885, leaving a widow Musammat Janki, who obtained possession of his estate. Mangli had a daughter, Musammat Sheodeli Kuar, who is step-daughter of Musammat Janki. The plaintiff, appellant, [133] here, is son of Musammat Sheodeli Kuar. He sued Musammat Janki for a declaration that he is the adopted son and heir of Mangli, entitled to succeed him, and that a will relied on by the defendant, respondent here, is not genuine and was not the will of Mangli. This will purports to have been executed on the 25th of July, 1885, two days before Mangli's death, and to give Mangli's estate to an idol under the management of Musammat Janki. The Court below dismissed the suit in all respects, finding (*a*) that the adoption was not proved, and (*b*) that the plaintiff not being reversioner presumptive could not maintain the claim in respect of the will. The question of adoption is not before us.

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* First Appeal, No. 114 of 1890, from a decree of Maulvi Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 31st March, 1890.

(1) 6 A. 428. (2) 6 A. 431.

learned vakil for the appellant informs us that his client submits to the decree below on this point. But he contends that the appellant is qualified to sue as reversioner, because his mother, though undoubtedly she stands now between him and the reversion of Mangli's estate, would take a Hindu woman's interest only in the estate, and therefore the appellant is the presumptive reversioner *qua* the title absolute to Mangli estate. In support of this argument we were referred to a judgment of this Court in *Balgobind* v. *Ram Kumar* (1) which favours the appellant's case. But we prefer to adopt the view of the learned Judges in *Madari* v. *Malki* (2) who refused to hold that "in the absence of any proof of collusion or connivance between the defendant (the alienor), and her daughters, the plaintiffs in the presence of the latter (the daughters) would be competent to maintain the suit."

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APPELLATE CIVIL.

15 A. 132 = 13 A.W.N. (1893) 49.

We fail to discern any sound reason for holding that the accident that the interest in the property left by Mangli would in his daughters' hands, if it ever reaches them, be of a less absolute character than it would be in the hands of the appellant, should it ever come to him, can affect the unquestionable fact that at present Mangli's daughter is his next reversioner and that her son, the appellant, is not. We dismiss the appeal with costs.

Appeal dismissed.

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15 A. 134 = 13 A.W.N. (1893) 51.

[134] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

KARIM-UN-NISSA AND OTHERS (*Defendants*) v. PHUL CHAND (*Plaintiff*).*
[27th January, 1893.]

Civil Procedure Code, ss. 268, 274—Mortgage-bond—Attachment.

Where the rights and interests under his mortgage of a mortgagee out of possession are attached in execution of a decree, the procedure by which such attachment must be effected is that prescribed by s. 268 of the Code of Civil Procedure. Section 274 of the Code cannot be applied in such a case. *Bhawani Kuar* v. *Gulab Rai* (3) distinguished.

[R., 18 A. 469 = 16 A.W.N. 154; 26 B. 305 (310) = 4 Bom. L.R. 18; 14 C.P.L.R. 5 (8); 13 Ind. Cas. 91 = 22 M.L.J. 105 (106) = 10 M.L.T. 503 = (1911) 2 M.W.N. 590; 18, Ind. Cas. 492 (493).]

IN this case the plaintiff, Phul Chand, held a simple money-decree against one Ismail Khan. In execution of that decree he attached a mortgage-bond held by Ismail Khan upon certain property belonging to one Faiz Muhammad Khan. Under that attachment the mortgage-bond was brought to sale and purchased by the decree-holder. The decree-holder then proceeded to bring a suit upon the mortgage-bond against the mortgagor and other persons who were said to have been interested in various ways in the mortgaged property. The suit was defended on several grounds, but mainly on the ground that, as the attachment of the

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*First Appeal, No. 85 of 1892, from an order of A.M. Markham, Esq., District Judge of Meerut, dated the 16th April, 1892.

(1) 6 A. 431. (2) 6 A. 428. (3) 1 A. 346.

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mortgage-bond had been effected under s. 268 and not under s. 274 of the Code of Civil Procedure, such attachment was illegal, and consequently no rights under the mortgage had passed to the decree-holder, purchaser, by the subsequent sale. The Court of first instance (the Subordinate Judge of Meerut) held that the plea above mentioned was fatal to the plaintiff's case and dismissed his suit accordingly. On appeal the District Judge agreed in holding that the attachment should have been made under s. 274 of the Code of Civil Procedure; but, considering that this defect in the mode of attachment was cured by the subsequent grant of the sale-certificate, decreed the plaintiff's appeal and remanded the case under s. 562 of the Code to the first Court. From this order of remand the defendants appealed to the High Court.

Mr. *Amir-ud-din* and Mr. *Abdul Majid*, for the appellants.

Mr. *D. Banerji*, for the respondent.

JUDGMENT.

[135] EDGE, C.J., and AIKMAN, J.—This is an appeal from an order of remand made under s. 562 of the Code of Civil Procedure. The plaintiff brought his suit upon an hypothecation-bond. He was not the original mortgagee; he became the purchaser of the bond at an auction-sale under a decree against the mortgagee.

The defendants in this suit brought this appeal. On their behalf it has been contended by Mr. *Amir-ud-din* that the plaintiff derived no title to the bond under the auction-sale at which he purchased the debt secured by it. The ground of that contention is based on the attachment which preceded the sale having been made under s. 268 and not under s. 274 of the Code of Civil Procedure, it being contended that s. 268 is inapplicable to the case.

Mr. *Amir-ud-din* contends that as the bond charged immoveable property it created a benefit in that immoveable property, and that the attachment to have been good should have been made under s. 274. He refers to a decision of this Court in *Bhawani Kuar* v. *Gulab Rai* (1). That was a case of a sale of a decree under Act VIII of 1859. Act VIII of 1859 did not contain a section similar to s. 273 of the present Code which provides the mode in which decrees are to be attached. It appears to us that it would have been impossible to have proceeded under s. 274 of the Code of Civil Procedure in this case. The thing which was sold was the debt due to the mortgagee who was not in possession of, and apparently at the date of the sale had no right to the possession of, the mortgaged immoveable property. We fail to see how s. 274 could have been applied. Where was the order to be proclaimed and where was the order to be fixed up? There would have been no right to go upon the property to fix up the order. Section 274 hardly means that a copy of the order under that section was to be fixed up on a conspicuous part of the bond or that the order was to be proclaimed on some part of the bond or adjacent thereto, and yet something of the kind would be necessary if s. 274 applied.

It appears to us that s. 268 does apply. What was attached was a debt not secured by a negotiable instrument. The security [136] passed on the sale of the debt. We are consequently of opinion that the right and interest of the mortgagee under that bond vested in the plaintiff on the sale at auction under the decree.

We dismiss the appeal with costs.

Appeal dismissed.

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(1) 1 A. 348.

15 A. 136=13 A W.N. (1893) 50.

APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell and Mr Justice Aikman.

QUEEN-EMPRESS *v.* RAM LAL.* [3rd February, 1893].

Criminal Procedure Code, ss. 268, 428, 537--Material irregularity—Assessors, statement of deceased person not proved in their presence.

Where in a trial for murder held with assessors the Court relied on a statement made by the deceased, and the evidence necessary to prove such statement was not recorded until after the close of the trial and the discharge of the assessors- *Held* that this amounted to a material irregularity which was not covered by s. 537 of the Code of Criminal Procedure.

[R., 24 M. 523 (535)=2 Weir 346.]

THE facts of this case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. *A. Strachey*) for the Crown.

The appellant was not represented.

JUDGMENT.

TYRRELL and AIKMAN, JJ.—In this case one Ram Lal was convicted by the Additional Sessions Judge of Farakhabad of murdering a man named Baldeo by shooting him in the back, and was sentenced to transportation for life.

Against this conviction and sentence he appeals.

For the prosecution five witnesses were called who are alleged to have been present when Baldeo was shot. These witnesses were discredited by the Additional Sessions Judge for reasons the validity of which, in view of the order we think it necessary to pass, we will not now discuss. The Additional Sessions Judge based his judgment mainly on a statement made by the deceased. Evidence to prove that statement was not recorded by the Additional Sessions Judge until after the assessors had been discharged. We consider this an error which vitiates the trial. Section 268 of the Code of [137] Criminal Procedure provides that all trials before a Court of Sessions shall be either by jury or with the aid of assessors. In only one instance is a Court of Sessions authorized to record evidence in the absence of jury or assessors and that is when additional evidence is called for by the Appellate Court (*Vide* s. 428, Code of Criminal Procedure). But in the present case the evidence to prove the statement made by the deceased was recorded before a tribunal which had no authority to record it. It was in fact evidence recorded *coram non judice.* We consider this a material irregularity which is not covered by the provisions of s. 537 of the Code of Criminal Procedure. We are therefore obliged to set aside the conviction and sentence, and to direct that the accused, Ram Lal, be tried *de novo*, and we direct that the new trial be had before the Sessions Judge of Farakhabad.

* Criminal Appeal, No. 731 of 1892.

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REVISIONAL CIVIL.

15 A. 137 = 13 A.W.N. (1893) 63.

15 A. 137 = 13 A.W.N. (1893) 63.

REVISIONAL CIVIL.

Before Sir John Edge, Kt, Chief Justice, and Mr. Justice Aikman.

LACHMAN SINGH (*Plaintiff*) v. GHASI AND OTHERS (*Defendants*).*
[3rd February, 1893.]

Act XII of 1881, ss. 93 (g) 205—Act XIX of 1873, s. 146—"Proprietor"—"Co-sharer"—Civil and Revenue Courts, jurisdiction of.

Where a lambardar brought a suit for arrears of land revenue payable by the proprietors against several defendeants of whom some were co-sharers and others mortgagees in possession. *Held* that such suit was one of the nature contemplated by s. 93 (g) of the North-Western Provinces Rent Act, 1881, and was cognizable by a Court of Revenue as against all the defendants.

[F., 2 O.C. 64 ; 2 O.C. 299 (301) ; R., 20 A. 19 (22).]

IN this case the plaintiff, a lambardar, sued the defendants (some thirteen in number) in the Court of the Assistant Collector of Bulandshahr for recovery of arrears of revenue. In the plaint the defendants were described collectively as "co-sharers," but it appeared that of the thirteen only three were co-sharers and the remainder were mortgagees in possession. The Assistant Collector, holding that the term "co-sharer" could not include a mortgagee, [138] dismissed the suit on the ground that it was not cognizable by a Court of Revenue.

The plaintiff appealed to the Collector, who referred the question to the High Court under s. 205 of Act No. XII of 1881, by his order of the 25th of January 1892, which is given below—

"In this case the lambardar has sued the shareholders of a joint *khata* for arrears of Government revenue. In the *khata* there are some of the shares mortgaged to mortgagees and some of them still held by the co-sharers of the mahal. The lower Court has dismissed the lambardar's claim relying on the decision of the Full Bench ruling of the High Court in *Bhawani Gir* v. *Dalmardan Gir* (1). That decision was based on the law as it stood before the passing of Act VIII of 1879, by which Act XIX of 1873 was amended. Now by that Amending Act "proprietor" includes mortgagee in s. 147, Act XIX of 1873, and therefore a mortgagee is thereby rendered specially liable for the revenue of the mahal. The lambardar accordingly sues for it only; he sues the co-sharers under the Rent Act instead of the "proprietors," as the latter word does not occur in Act XII of 1881. The question therefore arises as to whether under the amended law of Revenue (Act XIX of 1873), and s. 93 (g), Act XII of 1881, a lambardar can sue the martgagee of a co-sharer for arrears of revenue in a Revenue Court or no: in other words, since the word "proprietor" covers a mortgagee in liability for the Government revenue does the substitution for the word "proprietor" of the word "co-sharer" in s. 93 (g), Act XII of 1881, preclude the lambardar from suing for arrears of revenue in the Revenue Courts.

The record in the case will therefore be forwarded to the District Judge of Meerut under s. 205 of the Rent Act for the decision of the Hon'ble the High Court on the above point."

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* Miscellaneous No. 27 of 1892. A reference under s. 205 of Act XII of 1881 (N.W.P. Rent Act) by H.P. Punnett, Esq., Collector of Bulandshahr, dated the 29th July, 1892.

(1) 3 A. 144.

On this reference the following opinion was pronounced :— 1893 FEB. 3.

OPINION.

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EDGE, C.J., and AIKMAN, J.—This is a reference under s. 205 of Act No. XII of 1881. The suit was brought in the Revenue Court [139] by a lambardar against certain persons who undoubtedly were co-sharers and also against certain mortgagees in possession for arrears of revenue payable by the proprietors, as the word "proprietor" is defined in s. 146 of Act No. XIX of 1873, through the lambardar. It is a suit contemplated by s. 93, cl. (*g*) and the jurisdiction of the Revenue Court is not in our opinion limited by the word "co-sharer" in that clause. This suit was one cognizable by the Court of Revenue against all the defendants.

This is our answer to the reference. The Appellate Court will proceed to decide the appeal according to law.

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15 A. 139 = 13 A.W.N. (1893) 59.

REVISIONAL CIVIL.

Before Mr. Justice Burkitt.

RAGHU NATH SAHAI (*Defendant*) v. THE OFFICIAL LIQUIDATOR OF THE HIMALAYA BANK, LD. (*Plaintiff*).*
[3rd February, 1893.]

Act IX of 1887, s. 25—*Civil Procedure Code s.* 622—*Revision—Limitation—Wrong decision of a point of limitation no ground for revision.*

An application under s. 25 of Act IX of 1887 to set aside a decree ought not to be entertained except in cases in which a similar application under s. 622 of the Code of Civil Procedure would be allowed.

Such an application will not lie where the sole ground is whether the first Court was or was not right in its decision on a question of limitation.

Amir Hassan Khan v. *Sheo Baksh Singh* (1) referred to.

[Appl., 16 A. 39 (40); R, 16 A. 476 (477); 21 A. 89 (90); 21 B. 250 (255); 6 A.L.J. 944 = 3 Ind. Cas. 817; 11 C.P.L.R. 91; 17 Ind. Cas. 470 (471) = 15 O.C. 319; 2 L.B.R. 333; 4 N.L.R. 184 (185).]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Pandit *Moti Lal*, for applicant.

Mr. *J. E. Howard*, for the opposite party.

JUDGMENT.

BURKITT, J.—This is an application under s. 25 of the Provincial Small Cause Courts Act asking this Court to set aside a decree passed by the Subordinate Judge of Dehra in the exercise of his powers as Small Cause Court Judge. The allegation made by appellant is that the suit was for certain reasons time-barred at the [140] date of its institution. That question was fully considered by the Court below and decided against the applicant-defendant. The present

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* Application No. 44 of 1892 for revision of an order under s. 622, Civil Procedure Code, passed by R. Greeven, Esq., Subordinate Judge of Dehra Dun, dated the 14th June, 1892.

(1) 11 C. 6.

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application is practically an appeal against that decision. It was decided by a Full Bench of this Court in the case of *Muhammad Bakar* v. *Bahal Singh* (1) that s. 25 of the Provincial Small Cause Courts Act does not give a right of appeal in all Small Cause Court cases either on law or on fact, and that the powers conferred on this Court by that section are purely discretionary and not to be exercised unless it appeared that some substantial injustice had resulted from the decree of the Court of Small Causes. In the present case I am not inclined on a consideration of the facts to use that discretion in favour of the applicant. Whether the Small Cause Court Judge was right or wrong in the view he took of the question of limitation (as to which I say nothing) there can be no doubt that applicant did owe the money to recover which the suit was brought.

In my opinion an application under s. 25 of the Small Cause Courts Act to set aside a decree (which by law is final) ought not to be entertained except in cases where a similar application under s. 622 of the Code of Civil Procedure would be allowed, and in my opinion an application under s. 622 founded only on a question of limitation could not be entertained. In the case of *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (2) their Lordships of the Privy Council held that a question of *res judicata* was a question which the Court hearing the suit in which it arose had perfect jurisdiction to decide, and even if that Court decided that question wrongly it did not thereby exercise its jurisdiction illegally or with material irregularity. I confess I can see no difference between a question of *res judicata* and a question of limitation. It was contended that because s. 4 of the Limitation Act directs that a suit barred by limitation shall be dismissed, therefore in this case the Court below, if it were wrong in its decision on the limitation question, disobeyed a positive prohibition of the law and therefore acted with material irregularity. But surely the prohibition contained in s. 13 [141] of the Code of Civil Procedure directing a Court not to try any suit or issue which is barred by *res judicata* is couched in just as strong and emphatic language as the direction in s. 4 of the Limitation Act. I am unable to understand then why in the one case a wrong decision of a question of "*res judicata*" should not be considered good ground for an application under s. 622, while in the other case a wrong decision of a limitation question should be held to be sufficient for such an application. The prohibition against the hearing of a suit in each case rests on the same foundation, namely, on the Statute law, and is equally emphatic in each case. As therefore it has been clearly laid down by their Lordships of the Privy Council that a qustion of *res judicata* is not one on which an application under s. 622 can be made, I hold that the same rule applies to a question of limitation. Such a qustion cannot in my opinion be raised under s. 622 of the Code of Civil Procedure, and therefore *a fortiori* I decline to take it up under s. 25 of the Small Cause Courts Act.

I dismiss this application with costs.

Application rejected.

(1) 13 A. 277. (2) 11 C. 6.

15 A. 141=13 A.W.N. (1893) 59.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

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REVISIONAL CRIMINAL.

15 A. 141= 13 A.W.N. (1893) 59.

QUEEN-EMPRESS *v.* RAM LAL AND OTHERS.* [7th February, 1893.]

Act III of 1877, s. 73—Criminal Procedure Code, s. 195—Registrar—"Court."

A Registrar acting under s. 73 of the Indian Registration Act, 1877, is not a Court within the meaning of s. 195 of the Code of Criminal Procedure. *Atchayya v. Gangayya* (1) dissented form.

[R., 10 Cr.L.J. 395 (405)=3 Ind. Cas. 886=3 S L.R. 66; 13 Cr. L.J. 508 (509)=15 Ind.Cas. 652=(1912) M.W N. 473=23 M.L.J. 50.]

THE facts of this case sufficiently appear from the judgment of Knox, J.

The Public Prosecutor (Mr. *A. Strachey*), for the Crown.

Mr. *A. H. S. Reid*, for the opposite parties.

JUDGMENT.

KNOX, J.—Ram Lal and three other persons stand committed to the Sessions Court of Meerut to take their trial upon a charge framed under s. 467 of the Indian Penal Code. The learned Judge [142] of Meerut has through the Public Prosecutor presented a petition to this Court asking that the case may be transferred for trial to some other Sessions Court. The ground given for the transfer is that he in his capacity as District Registrar has already had before him the bond which forms the subject-matter of this trial. On that occasion he came to the conclusion that the bond was a forged one and that the four persons now on trial were persons concerned with its preparation.

Notice was accordingly issued to the four accused to show cause why the trial should not be transferred for hearing to another District Court. In answer to this notice they set up a plea that the order of commitment is illegal, on the ground that no sanction has been given and that under s. 195 of the Code of Criminal Procedure sanction is necessary before any proceedings can be taken against them under s. 467 of the Indian Penal Code.

Mr. *Reid*, who appeared on their behalf, based this plea upon a Full Bench ruling of the Madras High Court. (*Atchayya* v. *Gangayya*) (1).

In that case the question now raised before me was before the Madras Court and a Full Bench of that Court did undoubtedly decide that a Registrar acting under ss. 72 to 75 of the Indian Registration Act was a Court for the purposes of s. 195 of the Code of Criminal Procedure. The language used in the judgments of the several Judges shows that they came to this conclusion with some hesitation.

The main ground upon which they were led to this conclusion appears to have been the consideration that in acting under ss. 72 to 75 of the Indian Registration Act a Registrar exercises more than mere administrative functions; that he has to consider the weight and credibility of evidence adduced before him and to form his own conclusions. They in fact imported the definition of "Court" given in s. 3 of the Indian Evidence Act into, and by it interpreted the word "Court" as it exists in, s. 195 of the Code of Criminal Procedure.

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* Miscellaneous No. 193 of 1892.

(1) 15 M. 138.

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[143] With every respect to the conclusion arrived at by the learned Judges, I find myself unable to adopt the view they took of the law. I do not find myself at liberty to import into the Code definitions which are provided for the purposes of some other Act of the Legislature. The Code contains a section which is devoted to the defining of words which might have an ambiguous meaning, and in that section there is a particular clause which empowers me to adopt and to import into the Code the definition of words which have been expressly defined in the Indian Penal Code, but does not empower me to import definitions from any other Act, such, for instance, as the Indian Evidence Act, which was in existence at the time when the Code of Criminal Procedure found its place in its present form on the Statute Book. The word "Court" must be taken in its ordinary sense, and the word would not in ordinary language be one used of the office of a Registrar. Throughout the Indian Registration Act the Registrar is described as an officer and his place of business as an office. When it is necessary to invest him with the powers and privileges of a Court the language used is language which clearly implies that he is not a Court. Section 75 of Act III of 1877 makes use of the expression "as if he were a Civil Court." In s. 483 of the Code of Criminal Procedure he is to be deemed to be a Civil Court "for special purposes." I accordingly, as on a previous occasion in this Court, hold that he is not a Court within the meaning of the word as used in s. 195 of the Code.

I accordingly direct that the trial in this case be transferred to the Court of Sessions at Saharanpur, this being a Court which I am informed will be more convenient for the parties and the witnesses than the Court at Aligarh.

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15 A. 143 = 13 A.W.N. (1893) 63.

CRIMINAL REVISION.

Before Mr. Justice Knox.

MAHBUBAN (*Applicant*) v. FAKIR BAKHSH (*Opposite Party*).*
[17th February, 1893.]

Criminal Procedure Code, ss. 488, 490—*Order for maintenance of wife—Application by wife to enforce order—Plea that applicant had been divorced—Duty of Court to which application for enforcement is made.*

Where a person in whose favour an order under s. 488 of the Code of Criminal Procedure has been made takes that order before a Magistrate, and the Magistrate [144] finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance. It is no part of the duty of a Magistrate on such an application as above-mentioned, *viz.*, an application under s. 490 of the Code of Criminal Procedure, to entertain a plea by the party against whom the order is sought to be enforced to the effect that he has divorced the applicant and is therefore no longer liable to pay maintenance. *Zeb un nissa* v. *Mendu Khan* (1) dissented from.

[F., U.B.R. (1897—1901), Vol. I, 112 (113); D., 19 A. 50 = 16 A.W.N. 173.

THIS was a reference made by the District Judge of Cawnpore under s. 438 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the judgment of Knox, J.

Maulvi *Ghulam Mujtaba*, for the opposite party.

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* Criminal Revision, No. 670 of 1892.

(1) 5 A.W.N. (1885) 29.

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JUDGMENT.

KNOX, J.—In this case a sum of Rs. 3 was awarded as maintenance to one Musammat Mahbuban, wife of Fakir Bakhsh, on the 17th of June, 1886. Musammat Mahbuban, on the 20th of July, 1892, took the order under s. 490 of the Code of Criminal Procedure before the Joint Magistrate of Cawnpore and prayed that the order might be enforced against Fakir Bakhsh, who was a resident of Cawnpore. When the case came before the Joint Magistrate, Fakir Bakhsh objected and stated that as he had divorced Musammat Mahbuban and she was no longer his wife, the order of maintenance could no longer run against him. The Joint Magistrate went into the question whether Fakir Bakhsh had or had not divorced Musammat Mahbuban, came to the conclusion that he had, and that Musammat Mahbuban was no longer his wife and therefore had no power to apply any more for enforcement of the order granted in her favour on the 17th of June 1886. The District Judge of Cawnpore has sent up the case to this Court in accordance with the provisions of s. 438 of the Code, being of opinion that the Joint Magistrate was wrong in assuming that the maintenance order became invalid as a necessary consequence of the divorce. Musammat Mahbuban was not represented in this Court, but Mr. *Gulam Mujtaba*, who appeared for Fakir Bakhsh, contended that the order of the Joint Magistrate was a good and proper order, and in support of the contention referred me to *Kasam Pirbhai* and his wife *Hirabai* [145] (1). This was a case in which an order was made by a Magistrate under Act XLVIII of 1860, s. 10. The Act contains no provision corresponding to s. 490 of the Code of Criminal Procedure. This case was followed by the Bombay High Court in *In re Abdul Ali Ishmailji* and his wife *Husenbi* (2). The application before the Bombay Court was one made under s. 147 of the High Courts' Criminal Procedure Act of 1875. The husband was the petitioner and prayed that the order for maintenance which had been passed by the Chief Presidency Magistrate of Bombay, might be set aside on the ground that he, having divorced his wife, was no longer liable to provide for her. The Court, without giving any reasons for his judgment and following the precedent laid down in *In re Kasam Pirbhai* and his wife *Hirabai*, the case above alluded to, held that the Magistrate should no longer enforce his order for payment of maintenance. Mr. *Ghulam Mujtaba* next referred me to the precedent of this Court in *In re Din Muhammad* (3). In that case the application immediately before the Court, and therefore the application with which the Court dealt, was an application made by the husband that an order for maintenance might be set aside on the ground that he had divorced his wife according to the Muhammadan law. The judgment shows that the application was put forward under the section of Act X of 1872, which corresponds to s. 489 of the present Code. The application was held to have been rightly rejected. The Court refused to interfere, not on the grounds given by the Assistant Magistrate, but upon a point which incidentally arose, namely, that in any case a wife who had been divorced is entitled to maintenance till the expiration of the term known in the Muhammadan law as *iddut*. In the course of the judgment the learned Judge who delivered judgment cited with approval a judgment of the Calcutta High Court in which it was held that a Magistrate ought not to issue attachment upon or otherwise to execute an order for maintenance when the application was made by a wife who had been divorced on the ground that the order

(1) 8 B.H.C.R. 95. (2) 7 B. 180. (3) 5 A. 226.

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[146] was *functus officio*, and the view approved of was that when a Magistrate found that there had been a valid dissolution of the marriage tie he should refrain from taking any steps to enforce the order for maintenance from the date of such dissolution. In all the cases that have been cited so far it is noteworthy that the application with which the Courts had to deal were applications made by husbands to set aside orders for maintenance. In not one case so far as the reports show were the Courts dealing within an application on the part of the wife to have an order for maintenance enforced. There is, however, a case of this Court in *Zeb-un-nissa* v. *Mendu Khan* (1) in which the point raised before the Court was exactly the same as that with which I have to deal. Musammat Zeb-un-nissa sought to enforce the maintenance order in her favour. She was met by her husband with a plea that he had divorced her. The Magistrate declined to enforce the maintenance order, and the Judge reported the case, as in the present instance, and this Court was of opinion that before the Magistrate could pass the order he had done, he should have ascertained and determined the date when Musammat Zeb-un-nissa was legally divorced from her husband and to what arrears of maintenance she was entitled up to that date. The view taken by the Sessions Judge was the view taken by this Court, and Mr. Justice Oldfield added that the lady would not be entitled to maintenance after the date of divorce, but was so up to that date. I find myself unable to follow that precedent. The terms of s. 490 of the Code of Criminal Procedure are very clear and precise. They lay down that persons to whom an order for maintenance has been given are entitled to take that order before the Magistrate of the place in which the persons upon whom the order is made reside. The section goes on to provide that such order shall be enforceable by any Magistrate in the place on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due. No power, it appears to me, is given to such Magistrate to make any further inquiry. It must be clearly understood that I am dealing with the case falling under [147] s. 490 and am not now considering how or in what way a person against whom an order for maintenance has been given should move or act if he wishes to have the order set aside. What I now decide is that when a person in whose favour such an order has been given takes it before a Magistrate, and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance. For these reasons I direct that the order of the Joint Magistrate by which he rejected the application for enforcement be set aside and that he be directed to confine himself to the question of the identity of parties and the non-payment of maintenance, and if he is satisfied on these points to enforce the application of Musammat Mahbuban as it stands.

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(1) 5 A.W.N. (1885), 29.

15 A. 147=13 A.W.N. (1893) 85.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Blair.

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SUPERUNDDHWAJA PRASAD (*Plaintiff*) v. GARURADDHWAJA PRASAD (*Defendant*).* [7th February, 1893.]

Wajib ul-arz—Improper use of wajib-ul arz to record wishes of sole proprietor of village —Succession—Hindu law—Primogeniture.

The object of the *wajib ul arz* is to supply a reliable record of existing local custom. It was never intended that the *wajib-ul-arz* should be used as an indirect means of giving effect to the wishes of a sole proprietor with regard to the nature of his tenure or the mode of devolution of the property which should obtain after his death.

[R., 5 A.L.J. 79.]

THE facts of this case are fully stated in the judgment of Blair, J.

Mr. *A. Strachey*, Mr. *D. Banerji* and Munshi *Ram Prasad*, for the appellant.

Mr. *T. Conlan*, *Babu Jogindro Nath Chaudri* and Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

BLAIR, J.—In this case Kuar Superunddhwaja Prasad Singh was the appellant and Thakur Garuraddhwaja Prasad Singh was [148] the respondent. The appellant was the plaintiff in the original suit, the respondent, the defendant. The parties are brothers. The plaintiff-appellant, who has been defeated in the Court below, claims that under the ordinary customary law of the Hindus he is entitled equally with his brother to the moveable and immoveable property inherited from their father. The matter has been tried at great length and with much elaboration, and upon first appeal to this Court it occupied, not improperly, something like a week in argument. The plaintiff in this case sets up a customary law. The defendant sets up a *privilegium* in his family of inheritance by primogeniture. This plea throws upon the defendant the whole *onus* of proof. Now as to what the character and extent of such proof must be I would quote the expressions used by the Subordinate Judge who tried the case and who referred to authority upon the question. He said :—"It must be proved by satisfactory and conclusive evidence and it must be proved to be ancient or long established, invariable and certain." Again in quoting another case he uses the expressions of the Court which are :—"Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India ; but it is of the essence of special usages modifying the ordinary law of succession that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." I would add that the series of acts by which a custom is to be established must be plural, uniform and constant. Now in this case the defendant in satisfaction of the demand made upon him by law has laid before the court evidence of various degrees of solidity and

* First Appeal, No. 124 of 1889, from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 14th January, 1889.

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cogency. He deduces the early history of the family which for convenience's sake I shall call the Beswan family from a work published in 1875, called the Statistical Description and Historical Account of the North-Western Provinces of India, prepared under the orders of the Government of India by E. T. Atkinson, B.A., of the Bengal Civil Service. Now I do not care to raise any question as to the admis-[149]sibility of this book in evidence, as it appears that it has been used throughout the case with the entire acquiescence of both sides. But I do not mean in dealing with it to treat it as a work of authority and unfailing accuracy, because I find myself, as the learned Subordinate Judge has found, " that as regards the Beswan family, many particulars given in it are quite wrong and are disproved by the evidence adduced in this case." Now I have myself examined the book with much care and I find grave inaccuracies in it not altogether unimportant in dealing with the suit. I shall therefore take the evidence of Mr. Atkinson, and coupled with it the oral evidence of repute in relation to the family pedigree and, to some slight extent, the family history. The pedigrees which have been drawn by the Subordinate Judge from these two sources will be copied and a copy of each will be attached to and will form part of this judgment. Up to the commencement of the British rule in or about the year 1803, we have to rely almost entirely upon the information gathered by the earlier Collectors who were entrusted by the East India Company with the administration and collection of Government revenues. But there is a very large mass of oral evidence put in by the defendant, apparently without exception by the plaintiff, of traditions connected not only with the family pedigree, but extending further to the custom of inheritance in the family and to matters put forward in support of the views entertained by the several witnesses. I think that this evidence may with advantage be summed up briefly. A large number of persons connected with the family upon one side or the other, and likely thereby to be specially well informed as to matters of pedigree, also give expression to a belief based upon much more doubtful foundation as to the devolution of property in the family. The evidence in this respect, if admissible at all, which is doubtful, has still been admitted by the consent of both parties, and forms a substantial part of the basis of the decision in the Court below. While not taking it upon myself to reject *in toto* this most dubious evidence, I think when it comes to be properly discounted its value will be minimised to the vanishing point. That there was, so to speak, floating in the air an impression current among many members of the Beswan family that [150] inheritance in the family proceeded by the rule of primogeniture, I feel no reason to doubt. I think that the impression made upon the minds of persons who were cognizant of successive devolutions, in which in every case the possession and control of the property fell to the eldest son, is very easily accounted for, but would probably never have existed had they possessed the information and accurate knowledge which in respect to some of these devolutions is now before us. It seems to have been a part of the family consensus of tradition that from Bhuri Singh, who appears to have been brotherless, the property descended to his eldest son, Nawal Singh; that on the death of Nawal Singh his eldest son, Harkishan, became the apparent proprietor of the property; that at his decease the eldest son, Jai Kishore, would appear to all the world as the person in possession and control of the family property and that upon his decease, after the brief remnant of a life which remained to Girdhar Singh had expired, Gir Prasad Singh became, as sole

surviving brother, the apparent owner of the Beswan inheritance. It was not an unnatural inference to draw from these successive inheritances that the system of primogeniture prevailed, and that the loose, perhaps unjustified, impression which prevailed at the time when Gir Prasad Singh came to the property received from the period of his life a force and solidity probably unknown before. There can be little doubt that a man of Gir Prasad's culture and wealth would not be unattracted by the idea of founding a family and placing its fortunes above the reach of accident. He found among the collateral branches of the family to which he belonged that the custom of primogeniture with all that appertained to it was in force in the family of the Raja of Mursan. The same, though in origin more dubious, may be said of the other great collateral branch of the family, that of the Raja of Hathras; and I cannot think with the Subordinate Judge that an able and ambitious man anxious to render permanent the fortunes of his family was guilty of a departure from the moral law so grave as to be incredible to the learned Subordinate Judge. We know that Gir Prasad Singh came to the property when he was very young. I think at the death of his father, or, if not then, at the death of his elder [151] brother, he was only a child of five or six years of age; so that for years the property had been accumulating and wealth increasing, to what extent we know not accurately, but we remember that one of the witnesses was asked whether he had not saved a lakh or one and a quarter lakhs of rupees. The plaintiff also stated that his father at his death left Rs. 30,000. So much for his wealth. His ambition we may measure by the fact that he applied to the English Government to confer upon him the title of Rajah. Now, as I have said above, records there were none of any kind whatever until the British conquest in 1803, and I feel little doubt that if we had found an interruption in the course of devolution by the substitution by the act of the Government of some person as an incumbent of the estate, who by the family custom was devoid of title but was better qualified to perform the services demanded by the authorities, I for one should be loth to say that they had broken down or intended permanently to break down the custom of inheritance. In this case no such question arises, because, in so far as it was determined by the English Government, in every case the responsibility for the management of the property and the collection of revenue fell on the person who either under the rule of primogeniture or the ordinary custom of a united Hindu family would be the natural person to appoint. Now I think it desirable, before dealing with the solid documentary evidence in the case, which will require the most careful scrutiny, to get rid of a mass of evidence which is wholly and absolutely inconlcusive, although it occupied a considerable portion of the time and attention of the Court below. It was set up by the respondent that in conjunction with the system of primogeniture in the *raj* of Hathras and in that of Mursan there was also found a characteristic custom called the custom of *gaddinashini*; that the head of the family took his seat upon a cushion of state; that he then received offerings called *nazars* from friends, relations and tenants, and that in some way this institution was connected with the joint worship by the family of weapons and animals; and it was alleged that the same practice had prevailed from the full memory of man in the Beswan family, and the Court was then asked to infer that [152] what was the concomitant of primogeniture in one case was strong evidence of the existence of the custom in the other case. It was a syllogism without a major premise. In order to constitute a valid argument it

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ought to have been shown, not only that *gaddinashini* and the presentation of *nazars* were the ordinary concomitants of the possession of an impartible *raj*, but also that it was an exclusive attribute of families in which the custom of primogeniture prevailed. There is no evidence, and it is not the fact that such attribute belongs exclusively to families where the custom of primogeniture prevails. It is to be found in families subject to the ordinary Hindu law, and there would be nothing exceptional or unusual in the *karta* or manager of a great united Hindu family occupying the *gaddi* and receiving *nazars*. It seems probable on the part of the Beswan family, which at all events is far inferior in wealth and importance to the branches of Mursan and Hathras, a pretension and a claim to consideration to which they might well conceive their descent entitled them. Further than this it does not go. I have already said that there were reasons enough why persons connected with the Beswan family should have been impressed by the regularity of the devolution of the estate, and there can be little doubt that Gir Prasad availed himself of this impression to record in the village papers at much length and detail, and with great insistence, that such had been the custom of the family and that such was the law by which it is to be ruled in the future; and I notice with some astonishment that witnesses most closely connected with Gir Prasad at the time of the preparation of the *wajib-ul-arzes* of 1873, conceive that they are lending additional weight and authority to those documents by declaring that there was not a word in them bearing upon the system of inheritance in the Beswan family that was not expressly ordered to be inserted by Gir Prasad. That this was to them the highest guarantee of the truth and accuracy of the statements embodied in those documents destroys to my mind the whole of the cogency of their evidence. Cases have been quoted to us which I do not care to recite, which have laid down that a *wajib-ul-arz* constitutes a document which is created by the consensus of all persons interested, and which [153] defines the rights and duties of each and all as recognized by the whole of their community and ascertained by the Settlement Officer. But when a present holder of an estate, there being nobody with a contrary interest to gainsay and contradict him, chooses to make representations as to matters affecting his status and family position, the document in relation to such entries becomes absolutely valueless as evidence. I confess I was much impressed in reading the evidence of witnesses who came to support the custom of primogeniture by the fact that not one of them from first to last, not a member of the immediate family or of the collateral families, not even the agents of Gir Prasad himself, Ganesh Rai and Pitam Lal, professed to have founded their opinion about primogeniture upon any document of any kind whatsoever. It is to me difficult to conceive that *wajib-ul-arzes* that represented the custom of ancient devolution of the estate should have absolutely disappeared from the face of the earth or been kept from the knowledge of the very people who were Gir Prasad's men of business. To speak plainly, I do not believe it. I do not believe that Pitam Lal or Ganesh Rai are ignorant of these previous *wajib-ul-arzes*. I am satisfied in my mind that they were under the belief when they obeyed the behests of a powerful master, that it was not likely until Gir Prasad had run the full extent of his natural life that anybody in the world would have any interest in inquiring for, or searching after or examining the obsolete *wajib-ul-arzes* of periods anterior to 1873. In most, or at all events a large number of villages, Gir Prasad alone was

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interested; but whenever his interests were involved with those of other persons they would find that those interests as set forth in the earlier *wajib-ul-arzes* would be recorded also in those of later dates. They would have no cause or reason to question the authority of a *wajib-ul-arz* which safeguarded their rights, and if, as happened, Gir Prasad impressed upon all that the custom of primogeniture had existed in his family without exception as far as the memory of man could run, who was there in the world who could contradict him, or who could have an interest in contradicting him until he had become the father of more than one son? And how much longer after [154] that was the question likely to remain in abeyance with a younger brother under the control, first of his father, then of his elder brother, who had every motive for concealment? This is what appears to have happened in this case. I do not suggest, I do not believe, that the defendant in the suit is acting with conscious dishonesty in maintaining in his own interest the custom of primogeniture. I do not suppose that at the time the suit was instituted he was cognizant of half the present facts that bear upon the past history of the case, and therefore, at all events, whether his position is that of an honest defendant or not, upon coming to the knowledge of the existence of certain documents produced as evidence to prove his case by his pleaders, it is difficult to imagine that he and they were not staggered at the inferences that might be drawn from those documents. Previous to the documentary period we know in a rough and general way that Bhuri Singh, who is identified in no way except by his name, was the father of two sons, the eldest, Nawal Singh, from whom the parties to the present suit are descended, and a younger brother called Daya Ram Singh. Of Nawal we know absolutely nothing. He may have been a scholarly recluse or he may have been a person of weak and incompetent intellect. He has no individuality in the family traditions. His obscurity may also have arisen from the greater prominence which has found its way into the pages of the history of his younger brother Daya Ram, and it appears to have been common ground between the parties that somehow, whether by devolution, by fraud, by force or by consent, a considerable portion of the patrimony inherited from Nawal Singh came into his possession. That an able and ambitious son in times when force prevailed, when law was in abeyance, might have possessed himself of property belonging to his feeble and inoffensive brother, is quite possible. But in assuming that force or fraud must have been used, Mr. Atkinson and the other repositories of the family tradition seemed to have assumed the right of primogeniture for the purpose of inferring fraud or force as the basis of possession of a large estate by the younger brother. I do not know how this was, but I can well understand that an able and competent younger brother [155] of one of smaller capacity for affairs, whether by consent or devolution, might well have taken the position which he occupied, and without arriving myself at an absolute conclusion upon the point, I think this construction is consistent with the future friendly relations which appear always to have subsisted between Nawal Singh and his descendants and Daya Ram Singh who survived him. There is no trace of discord or of disunion founded upon resentment against usurpation by the younger brother. But into these matters it is needless to go. It is sufficient to say that the case of Bhuri Singh proves nothing in favour of the custom of primogeniture. It does not prove the custom of primogeniture that of two brothers of a family both should be found in possession of the family estate and the younger in possession of a larger portion. It looks

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more like what might have happened on partition in a joint Hindu family. And moreover, considerable as we know the property and possession of Daya Ram to have been, we do not know with any accuracy how much of the property possessed by him was ancestral and how much acquired. Indeed one witness called by the defendant, named Kehri Singh, said positively that the Hathras estate was personally acquired by Daya Ram and that he had acquired it from the *Porch* Thakurs, and that previously it had not belonged to the *Thenna* Jats. The only reason why this statement does not impress us at all is that it shares to a large extent the lack of definiteness in the traditions of the family as to when and how the property was acquired by it. The end of the century followed close on the close of Nawal Singh's life, but previous to his death we have it upon the authority of the settlement records, and also of a report made by Raja Tikam Singh put in evidence by the defendant and numbered 250, printed on page 16 of respondent's book, and of which a correct translation is hereto appended, that Harkishan, his eldest son, had been put by his father and his uncle Daya Ram in control and management, at all events, of the family property, and therefore Harkishan, upon his father's death seems to have been looked upon for a few years for which he lived as the owner of the ancestral property. I may observe, however, that during the time there appears to have been no contention between himself and [156] his brother, and they lived together as might be the case in a joint Hindu family, in different houses, but in the same fort, and no doubt on the death of Harkishan, Jiwa Ram endeavoured, though nominally on behalf of his nephew, to strive for influence and power for himself and in his own interest among the family relations. Now about the time of Harkishan's death the East India Company, which had acquired the whole of the territory of Mursan, Hathras and Beswan, began to utilize, as far as possible, the existing owners of land for enforcement of orders and collection of revenue. We find that by a wise as well as generous policy the ambitious Daya Ram is left in possession of the whole of his domain, ancestral or acquired. The position of Harkishan also remained unassailed, and I do not think that the Raja of Mursan was dispossessed of any of his property. Indeed the Government preferred to continue an able and efficient person like Daya Ram for the collection of Government revenue, which would have been with difficulty extracted by their own underlings. We are now approaching the period in which the action of the Government makes itself plainly felt and is attested by the most interesting and instructive documentary evidence. The evidence which I am now going to read, and which is to my mind most instructive as bearing upon the point at issue in the case, is the documentary evidence put in by the pleaders for the defendant. It is perhaps not very clear whether Nawal Singh died at the close of the last century or at an early period in the present, having been practically superseded in the control of his property by his son Harkishan. The Government were anxious to single out persons to whom they could look as owners of the property for purposes of the collection of revenue, and the following document, No. 241, which is a proceeding of the Court of the Collector of the Aligrah district, was drawn up. The document is dated the 22nd of November 1809, and is to be found at page 1 of the respondent's book. It recites :—"Received a letter from the members of the Board, dated the 8th of November 1809, together with the letter of the members of the Sadr, dated the 24th October 1809, to the effect that, whereas in consequence of the death of Thakur Harkishan

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it became necessary to pass other orders in the [157] matter of his *jagir* and *istimrar*, the members of the Sadr state that the *jagir* and *istimrar* were granted only for the life of the *jagirdar* and *istimrardar*, but as the sons of Harkishan, deceased, have not been benefited by the favours of the Government, Thakur Harkishan having died before the declaration of the grant of the *sanads*, the members of the Sadr, who have the support of all respectable persons in view, have sanctioned to maintain the *jagir* and the *istimrar* of Thakur Harkishan for the life of Jai Kishore, his son, provided that it be consistent with law and usage of the Hindus according to their custom and religion, but it is proper that Thakur Jai Kishore should carefully bear in mind that, though this order has been made in his favour, it shall not be made in favour of the other heirs of the *jagirdars* and *istimrardars*, and the fact of the *jagir* and *istimrar* being maintained in favour of Thakur Jai Kishore should be noted in the body of the *sanad*. The members of the Board therefore direct that the Collector should fully inquire whether there is any son of Thakur Harkishan other than Thakur Jai Kishore and whether the *jagir* and *istimrar* of Thakur Harkishan should or should not be made over to Thakur Jai Kishore according to the custom of the Hindus." Now what strikes me on a perusal of the document is that reference is made to the law and custom of the Hindus. By these words I find it difficult to believe that the Court of the Collector and the members of the Sadr had in their minds anything but the general law appertaining to the Hindu people. Had there been at the time a custom of devolution in the family at variance with the general law, I cannot help thinking that the Government, obviously anxious to maintain all persons in authority and to break no system of native law or custom would have made some allusion, had it existed, to the custom of primogeniture. Accordingly it was ordered that a *parwana* be issued to Thakur Daya Ram, uncle of Harkishan and grand uncle of Jai Kishore, landlord of Hathras and other domains, and to Raja Bhagwant Singh who was the Raja of Mursan; and they were asked to inform the Board whether there was any son of Thakur Harkishan other than Thakur Jai Kishore and whether according to the custom of Hindus the property of Thakur [158] Harkishan devolved upon Thakur Jai Kishore and whether the *sanads* of *jagir* and *istimrar* should be granted to Thakur Jai Kishore; and accordingly these two heads of the great and important branches of the family answered the inquires of the Collector in a form so nearly identical with one another, that if I read one it will be needless to refer to the other. They were the work of one hand and obviously written after consultation. My brother Tyrrel, who I believe in substance accedes to the views which I have formed upon the case, has taken the trouble of translating them for me, as those documents do not appear to have been translated with the accuracy desirable in legal proceedings. I choose to read the shorter letter. It is dated the 14th of December 1809, and is No. 243 of the record and is to be found at page 3 of the respondent's book. It is couched in the following terms:—

"Petition of Bhagwant Singh, Bahadur, Raja, dated 24th Aghan, 1217 Fasli.

To

The Sahib exalted in rank and position, may he be ever prosperous.

I received your kind letter inquiring whether owing to the death of Thakur Harkishan the property was to be entered in the name of Jai Kishore, and (stating that) a *sanad* in respect of the *jagir* and *istimrar*

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might be issued in his name, if it was ascertained that according to the custom of Hindus he was entitled to the shield and grant of the *sanad*. I became acquainted with its contents. Formerly Thakur Harkishan was older than his other four brothers in point of age and was superior to all and distinguished in the qualities of a *sardar* and head, and in his lifetime his other four brothers were unanimous with him and obeyed his orders and worked zealously. Even in the existence of Thakur Harkishan, Jai Kishore, who has four brothers, was regarded as heir-apparent and representative. Now on the death of the said Thakur all the members of the brotherhood tied the turban of Sardarship round the head of Jai Kishore. Accordingly he (Thakur Jai Kishore) is the master of all the affairs of his father. Submitted for information."

Bhagwant Singh, Bahadur, "Raja."

[159] Now I again observe that the Raja of Mursan speaks of the custom of Hindus and not of any *privilegium* or custom to be found in force in the particular family. The same observation applies to the letter which is signed by Thakur Daya Ram Singh and which is precisely to the same effect. In summing up the construction which I am diposed to put upon these letters I may point out that the expression "eldest son" was a term of description and not of qualification, and that no condition other than the qualification of conformity to the Hindu law was expressed to be required in the status of the person to whom it was proposed to give the *jagir* and no indication shown that such appointment would rest upon the basis of primogeniture. That the order of grant was not intended except in respect of management and control to affect the relationship between the two brothers, and that it was not part of the policy of Government to strip a younger brother of all interest that he might under the Hindu law have had in the family inheritance is manifested by the treatment by the Government of Jiwa Ram. We find that Jiwa Ram, who does not appear to have held any control of any part of the family inheritance, was still awarded by the Government a *malikana* of Rs. 400 a month to be drawn from the estate under the control of his brother Harkishan. The use of the word *malikana* is, I think, most important. It is an expression totally different from that which is used where as an incident of the custom of primogeniture the maintenance of younger brothers or illegitimate brothers is dealt with. It is a word of explicit and well-founded meaning and it is a compensation for dispossession from the zemindari estate. No such expression would be applicable to a case where no right to possession existed. Now upon these letters I have this further observation to make that the tying of the turban round the head of Harkishan or Jai Kishore is not exclusively the practice in families in which the custom of primogeniture prevails. It is just as applicable to an acting head, *karta* or manager of a Hindu family, while the references to the superior capacity of one individual and to the consent of the others would be simply irrelevant to a right of inheritance which vested indefeasibly on the determination of the prior life estate. Thakur Daya Ram Singh [160] and Raja Bhagwant Singh, the heads of the two great fiefs of the family from which the Beswan family had derived its origin, are united in not saying a single word about the system of primogeniture or from which its existence could be necessarily inferred. Now upon their recommendation Jai Kishore became the practical proprietor for his lifetime, and by a *sanad* granted for his life only he became the manager of the property and for all practical purposes as proprietor and as the person to whom the Government looked for the due collection

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and payment of revenue. Now this devolution of the estate upon Jai Kishore alone has been pointed out by some witnesses as indicating the existence of the right of primogeniture. The bare and unexplained fact of such devolution would undoubtedly have pointed in that direction, had he possessed a younger legitimate brother of full age and capacity; but I find upon the evidence that it is extremely doubtful whether Jogal Kishore did not predecease his father. We think that he did. The evidence of Kharag Singh upon this point is worthy of belief, and I could turn, if necessary, to a large mass of evidence all of which shows that he predeceased his father. The holding of the property, which was granted to Jai Kishore for his life-time only, furnishes no argument for the existence of the custom of primogeniture. Now Jai Kishore was succeeded by Girdhar Singh who was one of two illegitimate brothers. Girdhar Singh, according to the account of the defendant's witnesses, never sat on the *gaddi*. His death took place a few months after that of his father, and, whatever position he might have attained in the future, it must have been very ill-defined in those few months, and seeing that his brother Gir Prasad was only five or six years old, no possible inference could be drawn in favour of the custom of primogeniture by the absolute exclusion of the infant from all control and interest in the property and the appropriation of everything to himself by Girdhar Singh. It is not proved, therefore, that the descent was one consistent only with the custom of primogeniture. Gir Prasad came to his estate early in life, and, having before him the devolutions I have mentioned, proceeded in A. D. 1873, to formulate the status of his family in a series of *wajib-ul-arzes* [161] which have been relied upon by the defendant to maintain his contention. I shall turn back hereafter to the historical document recorded in the Settlement Office at Beswan before the Deputy Collector, relating to the history and claims of two generations of the Beswan family. For the present I proceed to the *wajib ul-arzes* in which were set out, literally in accordance with his orders, the pretensions of Thakur Gir Prasad Singh as to the status of his family. One of the *wajib-ul-arzes* is to be found at page 48 of the respondent's book and is No. 358 of the record. It recites :—"According to usage and custom of the family after me the eldest son, if qualified and sensible, will be the *masnad nashin* (occupant of the *masnad*), and manager of the *riasat* (estate), and the other sons will receive out of the income of the estate (*riasat*), if qualified, Rs. 200, and if not qualified, Rs. 50 per mensem without demanding an account of profit and loss. (The distinction there is, I understand, between legitimate sons and illegitimate sons). Whatever property will henceforth be purchased by means of the income of the estate (*riasat*), it shall be deemed to be of the same character. Should any of my issue give up his religion or act contrary to the family usage he shall get nothing from this *riasalt* (estate)." Then there is an interesting paragraph " I, Thakur Gir Prasad Singh, or after me my heirs, shall not transfer property in order that the estate might be preserved, but they shall be competent to dispose of the profit as their own." That is indeed of the very essence of the custom of primogeniture and the mention of it is absolutely superfluous upon the assumption that the custom of primogeniture did in point of fact govern the devolution of property in the family. The proceeding adopted in relation to one village seems to have been adopted in the completion of the *wajib-ul-arzes* of all the villages. And again I emphasize the observation that any such provision as has been inserted in relation to the Beswan family has never been seen or heard of as existing in the records of the previous settlements.

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I think the absence or presumed absence of any such clauses in any previous document is enormously more significant than their detailed insertion in the *wajib-ul-arzes* of 1873. Another observation of the same kind [162] I desire to make in relation to the members of the family like Raja Ghanshyam Singh of Mursan who say, in contradiction to the majority of witnesses called for the defendant, that they never heard that the custom of primogeniture existed in the Beswan family. While it is conceivable, indeed not difficult to conceive, that some persons, aware only of the bare fact of devolution on the lines of primogeniture, may have given too ready belief to the assurance of Gir Prasad and others, and, moved by the interest they felt in the enhancement of the greatness of the family with which they were connected, may have been induced more or less to strain their evidence upon a point of this kind; it is impossible that a person such as the Raja of Mursan, called by the defendant as a witness, could have failed to know such a custom had it existed in a branch of his own family with which, at all events in the present generation, he appears to have been upon terms of amity. The learned Subordinate Judge feeling the force of the evidence of the Raja of Mursan upon the point endeavoured to discredit it by suggesting that some previous litigation between the Raja and Gir Prasad might have excited his animosity, so that he was dishonestly willing to assist in a case against the eldest son of Gir Prasad. Why this animosity should have been directed to the eldest son instead of to the younger brother or both equally, unless the animosity followed the custom of primogeniture, it is difficult to understand. I do not see how any serious and reasonable person, considering the manner in which Raja Ghanshyam Singh had been accredited by the defendant himself, can venture to impeach the *bona fides* of his testimony. It appears that some time before the suit was instituted a dispute had arisen between the brothers as to the custom of inheritance in the family, and it was decided to refer the matter to arbitration, an arbitration in which Har Narain Singh was to be the arbitrator for the plaintiff while Raja Ghanshyam Singh was chosen by the defendant as his arbitrator; and it was only on failure of these arbitration proceedings that the present suit was instituted. It does not, I think, lie in the mouth of the defendant to impeach the veracity of a witness of this class. I believe every word of what Raja Ghanshyam [163] Singh asserts, nor can I see any better reason for looking upon Har Narain Singh, the grandson of Daya Ram, as anything but a trustworthy and honorable witness when he also asserts his ignorance of the prevalence of primogeniture in the Beswan branch of his family. Now I do not propose to read the document to which I have previously alluded and which is No. 252 of the record at page 20 of the respondent's book. It is headed as "Proceeding recorded in the Settlement Office at Beswan, district Aligarh, before the Deputy Collector and Settlement Officer on the 30th of April, 1846," and I have already in the course of the observations repeated most of the important facts that are to be found in the proceeding in the order in which they appeared to me relevant. But there is one point in this respect which seems to me significant and which may now be touched upon. I may mention that Jiwa Ram, the uncle of Jai Kishore, had made some attempt to obtain a footing in the property of his young nephew. I did not mention that he was thereupon evicted from its management. I have mentioned that Rs. 400 per mensem was ordered by the Government to be paid to Jiwa Ram as *malikana*. For some 8 or 10 years this sum was paid. Afterwards it was paid to the sons of Jiwa Ram in gradually decreasing amounts. Now it is one

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of the suggestions that was made by the defendant in the case that Harkishan must have held the Beswan property by right of primogeniture because Jiwa Ram never brought any effective proceedings to establish the claim which he would have had to an equal right in the ancestral property with his brother. It is true that Jiwa Ram did not go beyond the proceedings in the Revenue Court in which he endeavoured to substantiate the very claim which is now being made by the plaintiff in this suit, and the Collector, dealing always with the fact of possession, and knowing also that the holder of the estate had received the *sanad* of *jagir* and *istimrar*, declined to entertain his claim. Although his (Jiwa Ram's) neglect to press his claim in a Civil Court is evidence against him, it loses a great part of its importance when we recollect that Jiwa Ram was a poor man, and that, whatever his right may have been under the Hindu law, his brother was the nominee of the Government, and the same remarks **[164]** apply to the qualified acquiescence of the heirs of Jiwa Ram, because again we find that proceedings were taken *in forma pauperis*, but probably for the same reasons they did not press on the matter in the Civil Court in the teeth of the Government. I have mentioned that Jiwa Ram was at the time a poor man ; but there came a later period when he received an estate as recompense for his services to Government, and it was contended on behalf of the defendant that he had become possessed of ample means to contest his right in a Court of law. I think he may well have believed, when he was ordered by the Government to be paid Rs. 400 per mensem, and when they afterwards availed themselves of his services and bestowed upon him an estate, that such a gift was intended partly as a *solatium* for his dispossession of all interest in the family property above and beyond the *malikana* allowance of Rs. 400, and that any attempt to deprive his relative, the appointee of the Government, of the family estate would be unfavourably regarded by them. But there is in this case in respect to an earlier devolution an acquiescence much more impressive. From first to last no descendant of Nawal Singh ever impeached the title of Daya Ram to the ancestral property which he is alleged to have appropriated. This is not a very instructive fact in the early period of this century, because Daya Ram was treated by the Government with confidence ; was left in full possession of his property ; and was looked to by them for recovery of revenue. But this observation fails in effect entirely when we come to 1817, only 20 years after the death of Nawal Singh, when Daya Ram had brought himself into such sharp collision with the Government that forces were sent to besiege and capture his fortress at Hathras. Then it was when his contumacy had brought upon him disaster and confiscation, that one would have expected that the heirs of his elder brother Nawal Singh, untainted themselves by rebellion, might have applied to Government for reinstation in the fiefs which had been seized by Daya Ram, as has been alleged, in violation of Nawal Singh's right of primogeniture. They did not do so, and to my mind this acquiescence of the descendants of Nawal Singh is far more impressive than the acquiescence of Jiwa Ram and his descendants. I have said that the **[165]** non-production by the defendant of the *wajib-ul-arzes* of older dates than 1873, and the absence of evidence as to their contents is to me most significant, but it fortunately happens that they have not all been destroyed, and there are some on the record which must vitally influence the opinion of any tribunal in adjudicating upon the questions at issue. On page 127 of the appellant's book I find an impressive document. It is an extract from the *wajib-ul-arz* of mauza Bhaman, part of the Beswan

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estate. It is dated 1267 F., and verified in 1269 F., that is about 1862, the settlement immediately previous to that of 1873. It is signed by Ganeshi Lal, Kanungo, who, it can hardly be doubted, is the defendant's witness Ganeshi Rai, who for thirty years was *mukhtar alam* of Gir Prasad. It says in paragraph 18:—"On the death of the lambardar his eldest son will succeed him as lambardar without any objection. If there be no son, then one of the heirs shall be the lambardar with the consent of the other heirs." Why should the consent of other heirs be required, if by primogeniture one only could have a heritable title? But paragraph 22 sets up an absoluteness of title which is wholly inconsistent with the idea of primogeniture and with the limited life-estate of each successive incumbent. It says:—"My client has an exclusive right of transferring the property." Paragraph 24 says:—"My client is the sole proprietor, there is no necessity for partition." Now this is the view of his rights enunciated by Gir Prasad in 1862 and it is diametrically opposed to that set up by him in the *wajib-ul-arz* of 1873, and which forms the basis of the defendant's contention in his action. I turn to the *wajib-ul-arz* of mauza Bahadur, *ilaka* Beswan, at page 128 of the appellant's book. I find in paragraph 24 the following words:—"Of transfer." This is a pure zemindari village, and Thakur Gir Prasad Singh is the proprietor. He is at liberty to sell his right." In mauza Namwattia there is a *wajib-ul-arz* similar to the preceding, and the same remarks apply to its contents, as well as to those of the *wajb-ul-arz* at page 131 of the appellant's book, except that I think in this particular case no mention is made in relation to the right of alienation. Now I pass on to page 134. [166] Paragraph 8 says:—"This is a zemindari village, and Thakur Gir Prasad Singh pays the Government revenue into the tahsil treasury." Now it is according to our view that this very duty was to be performed by the persons selected by the Government by virtue of the *sanad* I have mentioned. Again I find in that *wajib-ul-arz* the expression:—"My client is competent to transfer his property. I notice the observation of the learned Judge who admitted the document that it, like other *wajib-ul-arzes* of about the same date was not prepared with the knowledge of Gir Prasad or signed on his behalf, and still it was received in evidence. I think it was most properly received in evidence. But how the Court which admitted and perused those documents could have failed to see that the contention of Gir Prasad as to his tenure and title was one thing in 1873 and another in 1863, I utterly fail to understand. On page 138 and subsequent pages, there are extracts from another *wajib-ul-arz* in which again Gir Prasad, who is entered as "my client," by some pleader or representative, is described as "competent to transfer his property.'

Before I leave the subject of the *wajib-ul-arzes* on the record, looking to the contents of the *wajib-ul-arzes*, the material parts of which I have just read, of the settlement of 1863 and thereabouts, and looking back to those framed in accordance with the instructions of Gir Prasad in 1873, I find that the observations of their Lordships of the Privy Council in *Uman Parshad* v. *Gandharp Singh* (1) are relevant and impressive. At page 134 their Lordships are reported to have said:—"In this case the Judicial Commissioner has treated the *wajib-ul-arz* in question as a document of weight which must be taken as showing local customs until some proof to the contrary is produced. But on looking at the evidence

(1) 14 I. A. 127.

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their Lordships find that this *wajib-ul-arz* was the concoction of Fatteh Kunwar herself, received by the Settlement Officer as an expression of her views, which she had a right to enter upon the village records because she was proprietor of the estate. But they are not entered as her views, they are entered as the official record of a custom. [167] And supposing fifty years had gone by and then a dispute arose about the family or the local custom, this would probably have been produced from the office as an entry made fifty years ago under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it delibeately stated (though there was an appeal from the entry of this *wajib-ul-arz*) by the Oudh Courts that the proprietor has the right to enter his own views upon the village records and have them recorded as if they were the official records of the local customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the Local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless; they are worse than useless; they are abosolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876 which empowers the Local Government to make rules under which these records shall be framed, such proceedings will not take place any more." I have some doubt whether the entries in the *wajib-ul-arz* made under the circumstances and conditions described by Pitam Lal are admissible at all in evidence in support of any claim of Gir Prasad on the topic of primogeniture. I recur to the dicta of the learned Subordinate Judge and I ask myself whether it has been proved by satisfactory and conclusive evidence that the custom of primogeniture has existed in the Beswan family, whether it has been proved to be ancient and long-established, and whether it has been proved to be invariable and certain. I ask whether the evidence in support of the proposition is clear and unambiguous, and whether the evidence is such that upon it a court could be assured of the existence of such a special privilege. I ask whether the series of acts from which we are asked to infer the custom are plural, uniform and constant. To all these questions I most unhesitatingly reply in the negative. I do not think that in the half a dozen devolutions which I have been describing, there is a single one which is conclusively proved by evidence to be consistent with the custom of primogeniture [168] and with the custom of primogeniture alone. Now this being the opinion which has been forced upon me by the study of the evidence with great hesitation, and after careful thought, I recur for one moment to a matter which, though unimportant to my mind, should not be left untouched. It is alleged that at about the age of sixteen, the plaintiff, who is now trying to set up a right equal to his brothers in the family property, took part in a transaction in which he acquiesced in his brother's claim to be entered as sole proprietor of the Beswan estate, and repudiated upon his own part any right or claim except to the allowance of Rs. 200 per mensem. It is true, we believe, in spite of the denial upon oath of the plaintiff, that he did fully and unreservedly make the admission, but it does not operate against him as an estoppel in point of law. The value of such admission depends upon the knowledge or ignorance of the real facts possessed at the time it was made. We believe that the plaintiff knew just as much and not more than what Gir Prasad chose to tell him,

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and that probably until he had come in contact with other members of the family who had not allowed themselves to be overpowered by the attractive statements of Gir Prasad, he never doubted his brother's right by virtue of primogeniture and that his own exclusion was according to the custom of the family. I do not think that there is any reason in the presence of what I must call an entire failure of the defendant to substantiate his case to refuse the plaintiff the relief he asks.

The result is that the appeal will be allowed. But, having regard to what appears the probable fact that both the plaintiff and defendant were misled by the misrepresentations of their father and his dependents as to their rights in the matter, we think that justice would be done by decreeing the appeal and leaving the parties to bear their own costs here and below.

TYRRELL, J.—I fully concur in the judgment and in the decree proposed by my brother Blair.

Appeal decreed.

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15 A. 169 = 13 A.W.N. (1893) 78.

[169] REVISIONAL CIVIL.

Before Mr. Justice Knox.

MARY DICK AND OTHERS (*Applicants*) *v.* LOUISA DICK (*Opposite Party*).* [18th February, 1893.]

Costs—Taxation—Competency of Judge before taxation to reconsider an order as to costs made by his predecessor in office—Certificate of pleader's fee—Civil Procedure Code, s. 373—Revision.

A Subordinate Judge in granting the application of a plaintiff before him for permission to withdraw with leave to file a fresh suit in the same matter made an order as to costs in favour of the defendants in the following terms :—"As the case has not been contested to the bitter end, half the pleader's fees are allowed and the process expenses, &c., incurred in the case, except those already refused to the defendants. For travelling and incidental expenses defendants to put in a bill in one week, this to be subject to the decision of the Court after hearing both parties. The application under s. 373 of the Code of Civil Procedure is granted with leave to the plaintiff to bring a fresh suit for the same matter. Costs allowed to defendants as above."

The Judge who had made the above order having been transferred before taxation was completed.

Held that it was competent to his successor at taxation and before granting payment of the pleader's fees to consider whether the certificate given by a pleader as to the fee paid to him in the case was according to rule and to disallow payment of any fee not duly certified as paid.

Held also that the order under s. 373 of the Code of Civil Procedure was an order liable to revision. *Kalia Shingh* v. *Lekhraj Singh* (1) referred to.

[R., 5 Ind. Cas. 187 (189) = 11 C.L.J. 45.]

THE facts of this case sufficiently appear from the judgment of KNOX, J.

Mr. *W. Wallach*, for the applicants.

Mr. *A. E. Ryves*, for the opposite party.

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* Application No. 61 of 1892 under s. 622, Civil Procedure Code, to revise an order passed by R. Greeven, Esq., Subordinate Judge of Dehra Dun, dated the 16th June 1892.

(1) 4 A.W.N. (1884) 28.

JUDGMENT.

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15 A. 169= 13 A.W.N. (1893) 78.

KNOX, J.—This is an application presented by Mrs. Dick and others asking this Court to revise an order passed by the Subordinate Judge of Dehra Dun, dated the 16th of June, 1892. [170] The order is an order passed by the Subordinate Judge of Dehra Dun in which he directed that a certain bill of costs presented on behalf of Mrs. Mary Dick in the case of Mrs. Louisa Dick and others be passed, but that neither the fee of Mr. *Morton* nor the expenses of Captain Hearsey be allowed. The portion of this order to which exception is taken is that whereby the fee of Mr. *Morton* is disallowed, and the grounds on which it is prayed that this Court should revise the order are two-fold; firstly, that the Court has exercised jurisdiction not vested in it by law, and, secondly, that the order was illegal, as all requirements precedent to payment of pleader's fees had not been fulfilled. A good deal of argument in the case was directed to the question whether or not this was a case for revision, and exception was taken on the ground that the order was one in which an appeal was granted by law. The order of which the portion above cited forms part was an order permitting withdrawal of an application and passed under s. 373 of the Code of Civil Procedure. On behalf of the petitioner I was referred to a judgment of this Court, *Kalian Singh* v. *Lekhraj Singh* (1) in which this Court held that an order of this nature was an order against which an appeal did not lie, and for the purpose of the present case it is sufficient to say that I am prepared to follow that precedent and act on the case as one in which this Court can exercise powers of revision. The next and more important question in the case was whether the Judge in acting as he did had exercised a jurisdiction not vested in him by law. In order to determine this point it will be necessary to set out further the particular circumstances out of which that order arose. Mrs. Louisa Dick had sued the petitioners before me for a declaratory decree. Three of the said petitioners were permitted in that case to appear through a person known as Captain Hearsey who held a power of attorney on their behalf. The pleader appointed under the power of attorney was one Mr. *Morton*. For reasons into which it is unnecessary to enter, Mrs. Lousia Dick was permitted to withdraw the application subject to payment of costs. The question of costs was first [171] gone into by Mr. Leggatt, who was at that time seised of the case as Subordinate Judge of Dehra Dun. The order that he passed is couched in the following terms:—"As the case has not been contested to the bitter end, half the pleader's fees are allowed and the process expenses, &c., incurred in the case, except those already refused to defendants. For the travelling and incidental expenses defendants to put in a bill in one week, this to be subject to the decision of the Court after hearing both parties. The application under s. 373 of the Code of Civil Procedure is granted, with leave to the plaintiff to bring a fresh suit for the same matter. Costs allowed to defendants as above." Before the case could again be considered Mr. Greeven had succeed Mr. Leggatt as the Subordinate Judge, and finding that the question of costs was one in which the parties concerned were at considerable variance, he proceeded to take evidence, and amongst other persons examined were the persons mentioned before as Captain Hearsey and Mr. *Morton*. In the examination of the former he elicited the following facts.

(1) 4 A.W.N. (1884) 28.

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That the case was one in which a percentage of 50 per cent. on whatever was recovered was to go to the witness; that the witness was not in good circumstances; that his yearly income consisted of pensions amounting to £ 120; that he was considerably indebted to a local bank; that a liability of Rs. 4,000 due from the witness may or may not have been wiped off by that bank as a bad debt; that he had engaged Messrs. *Morton* and *Dyer* as legal practitioners; that Mr. *Dyer* had received no remuneration, and that Mr. *Morton's* remuneration was £ 68 by a cheque drawn by the witness on his bankers in England; that he had made up the amount of Rs. 1,000 due to Mr. *Morton* by a payment of Rs. 12 in view of exchange. Mr. *Morton's* explanation was to the effect that he had received the sum due to him by a cheque on the date mentioned in the certificate which he had filed in the case, but he had not up to that time, namely, the 13th of June 1892, negotiated that cheque. That an attempt which he had made ended in an offer to negotiate on the condition that Mr. *Morton* should endorse the cheque. For this reason, and also on account of the heavy discount charged by [172] the bank, Mr. *Morton* declined to negotiate the cheque; and he ended his evidence with the statement that up to the present he had not been paid, but proposed to present the cheque through an agent in England. Upon this and other evidence the Subordinate Judge ruled that as no fees actually were paid to Mr. *Morton* no costs could be allowed on the certificate. I have gone into the evidence at this length, though I might have contented myself with the finding of the Subordinate Judge, because the point raised is an important one and affects the proceedings of Subordinate Courts, and I think it well that the exact nature of the evidence on which the Judge acted should be fully set out. The learned counsel who appeared for the petitioners contended that, in thus going behind the order of Mr. Leggatt, Mr. Greeven acted without jurisdiction, and that if he did not act without jurisdiction he acted illegally. It should be noted here that Mr. Greeven appears to have passed his order under Rule 221 of the Rules of this Court. That was of course an error. The order by which Subordinate Courts are guided in this matter is Circular Order No. 5 of 1889. There is not, however, in any material point affecting this case any difference between Rule 221 of the Rules of this Court and the provisions of Circular Order No. 5 of 1889. The latter requires that when costs are taxed between party and party no fee to any pleader shall be allowed unless, prior to the commencement of taxation, a certificate dated and signed by the pleader has been filed certifying that the fee claimed by him was actually paid to him by the client. Looking to the terms of the Circular Order and also to the fact that on the 21st of March 1892, when Mr. Leggatt passed his order, costs had not been taxed, I am clearly of opinion that Mr. Greeven had jurisdiction to consider the certificate and whether or not payment had been made. The taxation of costs was a matter subsequent to the 21st of March 1892, and by the Circular Order it was the duty of the Subordinate Judge of Dehra Dun to exercise proper caution that no fee was allowed in the bill of costs the payment of which had not been certified in the manner required by this order. The Court therefore acted with jurisdiction and acted legally in the exercise of its jurisdiction. I agree in finding with the Subordi-[173]nate Judge that in face of that evidence and in consideration of the manner in which the so-called payment was made, that it was not an actual payment as required by the Circular Order.

The petition before me will stand dismissed with costs.

Application rejected.

15 A. 173=13 A.W.N. (1893) 71.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

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APPELLATE CRIMINAL.
15 A. 173=
13 A.W.N.
(1893) 71.

IN THE MATTER OF THE PETITION OF R. MACCREA.
[24th February, 1893.]

Letters Patent, s. 32—*Act XLV of* 1860, ss. 415, 511—*Attempt—Acts necessary to constitute an attempt.*

Section 511 of the Indian Penal Code was not meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, or done with the intent to commit it and done towards its commission.

Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation is a question of fact in each case.

[R., 25 B. 90 (97); 2 A.L.J. 718 (719).]

[N.B.—For a later stage of the case, see 15 A. 310, *infra*.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. H. S. Reid*, for the applicant.

JUDGMENT.

KNOX, J.—This is an application under s. 32 of the Letters Patent of 1866, praying that the case of one Robert MacCrea, who was convicted and sentenced at a Criminal Sessions of this Court held in the month of June, 1892, might be declared a fit case for appeal to Her Majesty in Council on the grounds—

1st.—That the evidence that the said Robert MacCrea acted with guilty knowledge and intention, was most unsatisfactory and totally inadequate to justify the conviction.

2nd.—That one of the witnesses for the prosecution had stated that, so far as he was aware, no application had been made by the said MacCrea for payment of interest or renewal of any Government promissory note, and that the acts of the said MacCrea had simply amounted to an asking for information and to the despatch of a money order with a view to obtain that information.

[174] 3rd.—That these acts of the said MacCrea, even if they had been accompanied with guilty knowledge, do not amount to more than a preparation for an attempt to cheat, and that such an attempt is not an offence under the Indian Penal Code.

4th.—That no other acts attributed to the appellant could be held to constitute the offence of attempting to cheat under the Indian Penal Code.

5th.—That with the substantive charge the charge of abetment must fail.

6th.—That, even if the conviction on the charge of abetment be good, the sentence passed was illegal.

The charges upon which the petitioner was convicted were three in number. They consisted of:—

(1) An attempt to cheat, and thereby fraudulently to induce the delivery of a valuable security.

(2) Conspiracy with one Asad Ali, and thereby abetment of the offence of cheating and thereby inducing the delivery of a valuable security.

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(3) Abetment of on attempt to cheat, committed by the aforesaid Asad Ali.

Upon conviction of the three offences thus charged, MacCrea was sentenced to rigorous imprisonment for two years.

No argument was addressed to us upon the fifth and sixth grounds taken in this petition. The first ground is directed to matters of fact which were distinctly within and were left to the decision of the jury. There was evidence upon which such a finding could be based. That evidence was found by a majority of the jurors to be satisfactory and sufficient for a conviction.

The only question really pressed upon our consideration was whether the jury had been rightly directed when told that if they were satisfied that the acts covered by the evidence and said to have been committed by the said MacCrea were so committed, those acts [175] performed with guilty intent did amount to an attempt at cheating under the Indian Penal Code.

It is important first to set out to that portion of the charge which related to the first charge on the charge-sheet, *viz.*, the attempt to commit an offence under s. 420 of the Indian Penal Code. A careful note of this portion of the charge was made before it was delivered to the jury, and the jury were directly charged from the note thus recorded. The instruction to them was that before they could find the prisoner MacCrea guilty of an attempt at cheating as charged, they must satisfy themselves that there was proof of an intention on his part to cheat and thereby induce the delivery to himself or to Asad Ali of a Government promissory note which he knew to be the property not of the late brother of Asad Ali but of one Muhammad Husain Ali Khan.

That, coupled with proof of such intention to cheat on his part, there was proof of an act or acts done by the said MacCrea towards such cheating.

That those acts if proved, were sufficientiy important to be taken notice of by the law, and also that they were sufficiently near to the act of cheating intended and contemplated.

The various acts deposed to on the part of the witnesses for the Crown were then detailed, and the evidence bearing on them pointed out and commented on, and it was left to the jury to find and to pronounce whether the evidence proved that those acts had been committed by the prisoner, and whether they were evidence of an intention on his part to cheat and thereby induce delivery of a valuable security.

As to whether the acts, or any of them, were sufficiently great for the law to take note of, the jury were instructed that, if they were satisfied that MacCrea had, as alleged by the Crown, towards the offence of cheating, used the letters of administration granted by the Subordinate Judge of Lucknow, knowing them to be false in the material point that they set out Government promissory note No. 9764 to have been the property of Husain Ali Khan, Chabuk [176] Sawar, this was an act sufficiently great for the law to take note of, and an act which it would take note of.

As regards proximity, the jury were instructed to consider whether any of the acts were sufficient to excite reasonable apprehension that the act attempted would be carried out and accomplished with the intent to cheat.

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It is contended by Mr. *Reid* who appears for the petitioner, that no act committed by MacCrea amounted to more at the outside than a preparation for an attempt to commit the crime, and that no act was punishable under the Indian Penal Code as an attempt, unless it was an act which, if successful, would have resulted in the commission of the crime attempted.

In the argument which he addressed to us, the learned counsel drew our attention mainly and almost entirely to the various letters which were addressed by MacCrea to the Comptroller-General's office, and passed by without comment the various other acts committed by MacCrea in the inverval between the 17th day of June and the 18th day of October, 1891. His contention was two-fold; first, that none of the communications addressed to the Comptroller-General, did, as a matter of fact, deceive that officer, or any of the officers through whose hands they passed, and, second, that beyond those acts there would necessarily have followed several other acts, some of them to be done by himself or by Asad Ali, extending over a period of time which might have amounted to two years, before the Comptroller-General would have paid over either the principal or the interest due upon the Government note No. 9764.

But the notes of my charges to the jury show that their attention was directed to various other acts which the Crown sought to establish, and notably to the acts committed by the prisoner in making use of the letters of administration granted to Asad Ali Khan and in the preparation of a so-called copy of the lost note and its production before the city Magistrate in October 1891.

In support of his contention, the learned counsel referred us to the case of *The Queen* v. *Ramsarun Chowbey* (1). That was a case [177] in which upon the findings that a prisoner intending to procure a forged document had directed a servant to purchase blank stamped paper on which the document might be executed, and to describe himself to the stamp vendor as the person who, the prisoner wished it to be deemed, was the executant of that document, and that the stamp vendor has endorsed upon the bond an endorsement stating that he had sold the stamp paper to the person personated by the servant, the said prisoner was convicted of an attempt to forge a valuable security. Sir Charles Turner in that case held that the provisions of s. 511 of the Code would not extend to make punishable, as attempts, acts done in the mere stage of preparation, "although," he continued, "such acts, are doubtless done towards the commission of the offence, they are not done *in the attempt* to commit the offence, in the construction which I think should be put on the term 'attempt' as used in this section. I regard that term, as here employed, as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done or omitted which of itself is a necessary constituent of the offence committed."

In considering this case, it is to be noted, first, that the learned Judge who arrived at this decision confesses that he arrived at that conclusion not without some doubt, and that he considered the endorsement no part of the document intended to be forged, and that the act of the prisoner in procuring the endorsement would not immediately lead to the forgery. He further observed that the prisoner had had a most narrow escape. The grounds upon which he acquitted the prisoner were, because he

(1) N.W.P.H.C.R. (1872) 46.

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considered that no act proved against him went beyond the stage of preparation.

We were next referred to the case of *The Empress* v. *Riasat Ali* (1). In that case the learned Chief Justice appears to have acted upon English precedents, and those precedents, precedents of no modern date. So far as I am concerned, I feel myself unable to follow the English law, because there appears to me a wide difference between the meaning of the word 'attempt' as understood by [178] English lawyers in the phrase "attempt to commit a felony," and the word "attempt" as actually defined in the Indian Penal Code.

If there be such a difference, I have no hesitation in affirming that we are bound to follow the Code. In *Reg.* v. *Cheeseman*, one of the cases followed by Sir R. Garth, it is laid down that if the actual transaction had commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. In *McPherson's* case, the second case followed, it is said that "the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged." Now it is impossible to read these definitions of attempt and to fail to see that the language used differs very greatly from the language used in s. 511 of the Indian Penal Code. Sir Charles Turner in the case just cited (*The Queen* v. *Ramsarun Chowbey* (2) points out that in his opinion the language and the illustrations used in s. 511 were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English law. With all respect therefore to the learned Judges who decided the case of *The Empress* v. *Riasat Ali*, I have no doubt myself that the interpretation laid down by them is not a sound and exhaustive interpretation of the word "attempt" as used in s. 511.

The case of *The Queen-Empreess* v. *Dhundi* (3), which was next cited to us, is not a case in point. The Judge who referred that case and whose reasons were adopted by this Court, points out that the person upon whom the fraud had to be perpetrated had not been approached in any way by the prisoner Dhundi.

The words used in s. 511 by which whoever attempts to commit an offence punishable by the Code and in such attempt does any act towards the commission of the offence, is guilty of an attempt, appear to me to be quite wide enough to cover the acts committed by MacCrea. There was a stage in which he was undoubtedly only making preparations, and had not got beyond the stage of preparation. These were such acts as those when he first commenced [179] making inquiries from the Public Debt Office to find if the note No. 9764 was still outstanding; when he instituted inquiries at the Bahrampur Hospital as to the death of Husain Ali Khan and the disposal of his bedding.. These were acts in the preparation stage. But a majority of the jury have found, and I agree with them, that MacCrea committed a long series of acts subsequent to that which showed a distinct intention to cheat; acts committed for the purpose and with the intent to bring all his preparations to bear upon the mind of the person to be deceived: that with those acts, beginning with the procuring of letters of administration setting out Asad Ali Khan as the lawful owner of Government promissory note No. 9764, the forwarding of those false

(1) 7 C. 352. (2) N.W.P.H.C.R. (1872) 46. (3) 8 A. 304.

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letters of administration and draft notice for publication in the Gazette, had begun an attempt to cheat; that in that attempt he had committed more than one act of distinct crime and sufficiently near towards completion to arouse apprehension and alarm that the attempt, if not interrupted, would end in the commission of the offence. I do not hold, and have no hesitation, in saying, that s. 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may [180] be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series.

Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of valuable security commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt.

The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence. It is in most cases a question for the jury to distinguish between an act before attempt has begun, an act after attempt begun, and towards commission of the offence attempted, and an act independent of the attempt altogether. It cannot be said that there was not evidence in this case upon which the jury could find under which of these heads the acts committed by MacCrea properly fell.

I gave the case most careful consideration before I charged the jury. I have listened with minute care and attention to the very able and lengthened argument of the learned counsel who appeared for MacCrea and have given that argument most careful consideration; but I do not find in it all one word which makes me hesitate or doubt that the conviction was a proper and sound one. I do not think the case a fit case for appeal and reject the application.

BLAIR, J.—I wish to add a few words upon the sections of the Indian Penal Code applicable to this case.

The offence, an attempt to commit which was the subject of the charge before us, is created by s. 415 of the Indian Penal Code. The words run as follows:—

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[181] "Whoever by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property or to do certain other acts." Converting that section into a section dealing with attempts it would read:—"Whoever by deceiving or attempting to deceive any person fraudulently or dishonstly attempts to induce, &c."

That which is done in furtherance of the dishonest attempt, is to attempt to deceive, the act being one which must have a tendency to induce the person so deceived to do that which is dishonestly desired by the deceiver.

The definition of "attempt" is conveyed in s. 511, Indian Penal Code. The words are "whoever attempts to commit an offence punishable by this Code"—"or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, &c."

It seems to me that that section uses the word "attempt" in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and, though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, &c., shall be punishable. The term "any act" excludes the notion that the *final* act short of actual commission is alone punishable, and the notion that any of the other acts would be without the range of this section is probably derived from the rulings in the English cases cited by Mr. *Reid*. An illustration is fortunately appended to the section by which we are enabled to test the soundness of that interpretation. Illustration (*a*).

"A makes an attempt to steal jewellery by breaking open a box and finds after opening the box that there is no jewellery in it. [182] He has done an act towards the commission of theft and is therefore guilty under this section."

That is an illustration applicable to theft, and yet, upon the very face of the statement it would not be an attempt having regard to the definition of theft in the Indian Penal Code, within the meaning of the contention of Mr. *Reid*. The essence of theft is *asportatio*, *i.e.*, removal. The opening of a box which might or might not contain valuables is not an attempt to remove its contents it would require some act further than that to constitute an attempt within the meaning of the English cases cited by Mr. *Reid*.

Now in the present case the acts done were acts bearing, and intended to bear, upon the mind of another person. The acts having been done, that mind was left to operate. If therefore that which was done amounted to the commission of an act towards deceiving, in a case where such deception would operate as an inducement to the person deceived to deliver any chattels or to do or omit any of the things mentioned in s. 415, then I think, within the meaning of s. 511 read together with illustration (*a*), an attempt to deceive and thereby induce within the meaning of that section has been proved in this case.

It may be that further acts having a tendency to deceive might have been required to complete the influence intended upon the mind of the deceived. It may have been that preliminary inquiries and steps of other kinds must have intervened between the act of deception and its entire success; but that would not, in my opinion, render an act tending

directly towards deception the less an attempt within the meaning of s. 511, even though a further act of deception did not follow, which might probably have been required to complete the offence of attempt within the meaning of the English law.

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The difficulty with s. 511 might easily have been removed by saying that where in such an attempt, using the word in the larger sense, any person does any act towards the commission of an offence he shall be held to have committed an "attempt" within the [183] meaning of this section. That I take to be the real meaning and drift of the section, differentiating in a marked manner the definition of "attempt" in the Indian Penal Code and the accepted English doctrine.

I agree that this is not a fit case to be sent to the Privy Council.

Application rejected.

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15 A. 183=13 A.W.N. (1893) 68.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

BANNA MAL (*Applicant*) v. JAMNA DAS AND OTHERS (*Opposite parties*).*
[6th March, 1893.]

Civil Procedure Code, ss. 244, 336, 622—*Insolvency—Surety for filing petition—Revision.*

One B.M. became surety under s. 336 of the Code of Civil Procedure on behalf of one G.R., a judgment-debtor, to the effect that G R., would appeal before the Court when called on, and would within one month file an application to be declared an insolvent. G.R., did so apply, but on the surety's asking the Court to declare him discharged of his liability the Court refused to do so. *Held*, (1) that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent, and (2) that the order refusing to discharge him was not appealable was therefore open to revision under s. 622 of the Code. *Koylash Chandra Shaha* v. *Christophoridi* (1) referred to.

[F., 58 P.L.R. 1902 ; Appr., 16 A. 37 ; R., 100 P.R. 1894 ; U.B.R. (1892—1896). Vol. II, 269 ; D., 13 M.L.J. 484 (485) ; 8 P.R. 1903=31 P.L.R. 1903.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Babu *Rajendro Nath Mukerji*, for the applicant.

Munshi *Ram Prasad*, for the opposite party.

JUDGMENT.

AIKMAN, J.—This is an application under s. 622 of the Code of Civil Procedure, asking for revision of an order of the Munsif of Cawnpur, dated the 4th of June 1892. The following are the circumstances of the case. One Ganga Ram, judgment-debtor, was arrested in the execution of a decree for money. When brought before the Court under the provisions of s. 336 of the Code of Civil [184] Procedure, he expressed his intention of applying to be declared an insolvent. The

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* Application No. 53 of 1892 to revise an order of Lala Banke Behari Lal, Munsif of Cawnpur, under s. 622, Civil Procedure Code, dated the 4th June 1893.

(1) 15 C. 171.

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REVISIONAL CIVIL.

15 A. 183 = 13 A. W. N. (1893) 68.

applicant, Banna Mal, furnished security under the terms of that section that the judgment-debtor would appear when called on, and that he would within a month apply to be declared an insolvent. It is admitted that the judgment-debtor did within one month so apply. After the judgment-debtor had applied, the surety Banna Mal presented an application to the Munsif asking that it should be declared that he was discharged of his liability under his bond. Looking to the fact that the security not only made himself liable that an application under s. 344 would be filed, but also bound himself that the judgment-debtor would appear when called on, the Munsif refused to declare the petitioner free of liability under this bond. It is this refusal that the surety, Banna Mal, seeks to have revised. A preliminary objection has been raised by Mr. *Ram Prasad* on behalf of the decree-holder to the effect that this is not a case in which the Court has power to interfere under s. 622 of the Code of Civil Procedure. The ground of this objection is that by furnishing the security aforesaid the surety became a party to the suit, and in support of this argument reference is made to the concluding paragraph of s. 336 by which the provisions of s. 253 of the Code of Civil Procedure are made applicable to the realization of a security such as that given by the applicant in this case. It has been contended that as the applicant became a party to the suit his remedy with reference to s. 244 was by way of appeal and not by way of an application for revision. There is much plausibility in this contention, but after full consideration I am of opinion that it cannot be sustained. The sureties who would be considered parties to the suit with reference to cl. (*c*) of s. 244 are, in my opinion, sureties who have rendered themselves liable for the amount of the decree, whether during the course of the suit or on an application under s. 545 for stay of execution. It has been held by the Calcutta High Court in *Koylash Chandra Shaha* v. *Cristophoridi* (1) that a surety under the provisions of s. 336 of the Code of Civil Procedure is discharged from liability upon the judgment-debtor's [185] applying to be declared an insolvent. In the case referred to, it appears from the terms of the bond at page 172 of the report that the surety, like the applicant in this case, bound himself to produce the judgment-debtor at any time the Court directed him to do so. The object of taking security under s. 336 is to insure that the judgment-debtor will do a certain act, *viz.*, apply to be declared an insolvent. That this is the meaning of the section appears to me clear from the paragraph which provides that in the case of a judgment-debtor failing so to apply, the Court may direct the security to be realized. The Court is given no power of realizing the security in the event of an application having been presented within the time fixed. The circumstance that in this case the amount of the security was fixed at the amount of the decree appears to be merely accidental. In my opinion a person who renders himself responsible that the judgment-debtor shall apply to be declared an insolvent is not, by virtue of that undertaking, a party to the suit within the meaning of s. 244, Civil Procedure Code. We have to consider now whether the order of the Munsif refusing to discharge the surety from his liability was one with which this Court can interfere under s. 622 of the Code of Civil Procedure. In my opinion it is an order from which no appeal lies, and for the reasons given above I am clearly of opinion that it was a wrong order. All liability under the bond determined when an application by the judgment-

(1) 15 C. 171.

debtor to be declared insolvent was filed, and the Munsif had in my opinion no jurisdiction thereafter to declare that the security subsisted. I allow the application, and setting aside the Munsif's order I declare the applicant, Banna Mal, discharged from his security. I make no order as to costs.

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Application allowed.

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15 A. 186 = 13 A.W.N. (1893) 69.

[186] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

NAIKU KHAN AND ANOTHER (*Defendants*) v. GAYANI KUAR (*Plaintiff*).*
[8th March, 1893.]

Appeal—Pleadings—Case set up in appeal which was not that set up in the Court of first instance.

The plaintiff came into Court on the allegation that she was the owner of a certain house and that the defendants were her tenants at a certain rent, and she sought to eject the defendants for non-payment of rent. The Court of first instance having found her allegations of tenancy to be untrue, she then in appeal endeavoured to support a plea that the defendants were trespassers, such plea having formed no part of the original case. *Held* that the plaintiff could not under the circumstances be heard in support of new plea of which the defendants had had no notice until the case was in appeal. *Lakshmibai* v. *Hari-bin-Raoji* (1), referred to.

[Overruled, 25 A. 498 (503) (F.B.) = 21 A.W.N. 157; Not F., 1 N.L.R. 4; R. 24 A. 90 = 21 A.W.N. 188.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr *Amir-ud-din* and Mr. *Abdul Majid*, for the appellants.

Mr. *A. H. S. Reid*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—This is an ejectment suit. The plaintiff-respondent came into Court alleging (1) that she was the owner of a house in the town of Sikandarpur occupied by the defendants-appellants, (2) that she had leased that house at a rent of Rs. 3-0-0 per month to the defendants and (3) that the defendants after paying rent regularly to her for one year had paid nothing in the 2nd and 3rd years. She therefore sued for possession of the house and Rs. 72, rent for two years. The defendants claimed the house as their own property.

Out of the three allegations mentioned above the only one found in favour of the plaintiff-respondent in the lower appellate Court is that she was the owner of the house. That finding is attacked on [187] the ground that there is no evidence on record to support it, the plaintiff not having proved the deed on which she founded her title. Into that question we think it unnecessary to enter here, as there are other grounds on which we are of opinion that the suit must fail.

It will be observed that the cause of action set forth by the plaintiff-respondent is that she had let the house on rent to the defendants-appel-

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* Second Appeal, No. 1148 of 1890, from a decree of Rai Lalta Prasad, Subordinate Judge of Ghazipur, dated the 18th August 1890, reversing a decree of Babu Bhawani Chandar Chackrabati, Munsif of Rasra, dated the 30th April 1890.

(1) 9 B.H.C.R. 16.

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lants, and that the latter had failed to pay rent after the first year and refused to surrender possession. Both the Munsif and the lower appellate Courts are unanimous in finding that the plaintiff-respondent has proved neither the letting nor the payment of rent during the first year. She called witnesses to prove both those alleged facts, but both Courts refused to give any credit to those witnesses and plainly intimated their opinion that those witnesses had spoken falsely. The result therefore is that the plaintiff-respondent has failed to prove the cause of action on which she sought relief from the Court. Had her allegations as to the letting and as to payment by defendants been true, the plaintiff would no doubt have been able to prove those facts by credible witnesses. As she failed to establish them we must (applying the maxim "*de non apparentibus et non existentibus edem est ratio*") hold that no such letting and payment occurred, and that in fact the plaintiff came into Court with a suit founded on an untrue cause of action. It is to be noticed that she did not allege any alternative cause of action, such as, *e.g.*, that the defendants were trespassers.

The question then is, can the plaintiff, having failed to establish the cause of action on which she came into Court, now be permitted to fall back on her alleged title as owner of the house and claim to have the defendants ejected as trespassers, she having hitherto always described them as her tenants? We think not.

In an almost similar case *Lashmibai* v. *Hari-bin-Raoji* (1), which came before a Full Bench of the Bombay High Court, it was held unanimously that "the general rule is that a party must be limited to the case which he puts forward in his plaint. He may indeed from the commencement of the suit put forward in his suit [188] an alternative case, and then the defendant will have notice that he has more than one case to meet and will not be taken by surprise. When plaintiff has not put forward an alternative case he may have leave to amend. * * * * * But as a general rule a plaintiff must abide by his plaint." And the learned Judges who decided the case add the following very significant words. "The adoption by Courts of a general principle of decision other than this would encourage perjury and forgery." Other cases also are referred to in support of their ruling. In the rule of law so laid down we fully concur. Applying that rule to the present case, we are of opinion that the plaintiff who came into Court on an untrue cause of action and who endeavoured to support that cause of action by the evidence of witnesses whom the lower Courts disbelieved, cannot now be allowed to turn round and obtain a decree for the ejectment of the defendants as trespassers on the strength merely of her alleged proprietary title.

It is not for us to say what the result will be if the plaintiff were to institute another suit on another cause of action. All we need say is that this suit, founded on the cause of action set forth in the plaint fails, cause that cause of action has not been established.

We therefore allow this appeal. We set aside the decision and decree of the lower appellate Court. We dismiss plaintiff's appeal to that Court, and, restoring the decree of the Court of first instance, we direct that the plaintiff-respondent's suit do stand dismissed with costs of all three Courts.

Appeal allowed.

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(1) 9 B.H.C.R. 16.

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[189] APPELLATE CIVIL.

Before Mr. Justice Burkitt.

BALDEO SINGH AND ANOTHER (*Defendants*) v. IMDAD ALI AND ANOTHER (*Plaintiffs*).* [8th February, 1893.]

Act XII of 1881, s. 36—Suit in ejectment as against trespassers—Previous admission by plaintiff of defendant's tenancy—Estoppel.

The service of a notice of ejectment under s. 36 of Act No XII of 1881 is, as between the person who causes such notice to be served and the person on whom it is served, a conclusive admission by the former of the existence between them of the relationship of landlord and tenant; and the landlord cannot afterwards sue in the Civil Court to eject the same tenant from the same land on the ground that he is not a tenant but a mere trespasser.

[D., 22 A. 93 (95); 27 A. 163 (166)=1 A.L.J. 503=A.W.N. (1904) 202.]

IN this case the plaintiffs sued in the Court of the Munsif of Sambhal to recover possession as occupancy tenants of a certain piece of land by ejectment of the defendants, whom they alleged to be trespassers.

Prior to this suit the plaintiffs had served the defendants with a notice of ejectment under the provisions of Act No. XII of 1881 in respect of the land in suit. The defendants had contested that notice of ejectment, but were at first defeated. Subsequently, however, on appeal to the Commissioner of Rohilkhand, the ejectment proceedings were finally decided in favour of the defendants. That decision was dated the 28th March 1889, being about eleven months before the commecement of the present suit.

In the present suit the Munsif, holding that the defendants had not established the position claimed by them as co-cultivators with the last occupancy tenant of the land in suit, and also that the Commissioner's decision was erroneous, gave the plaintiffs the decree which they claimed.

The defendants then appealed to the Subordinate Judge, who agreed with the findings of the Munsif and dismissed the appeal.

The defendants then appealed to the High Court.

Mr. *J. Simeon*, for the appellants.

[190] Mr. *Abdul Raoof*, for the respondents.

JUDGMENT.

BURKITT, J.—In this appeal it is contended for the appellants Baldeo and Jangi that the suit is not cognizable in a Civil Court, and that it is cognizable in a Revenune Court only. That objection is in my opinion untenable. The plaint alleges that the defendants (now appellants) are in possession as trepassers of certain fields, and prays that they be ejected and possession of the land be given to the plaintiffs. A suit so framed is clearly one which can be entertained in none but a Civil Court. But when the defence is looked into it is perfectly clear, on the undisputed facts set forth in defendants' written statement, that the result of the trial must be a dismissal of the suit.

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* Second Appeal, No. 170 of 1891, from a decree of Babu Anant Ram, Subordinate Judge of Moradabad, dated the 1st December 1890, confirming a decree of Maulvi Mirza Kamruddin Ahmad, Munsiff of Sambhal, dated the 4th April 1890.

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It is shown and not denied that plaintiffs-respondents have treated these defendants as tenants and acknowledged that the relationship of landlord and tenant existed between themselves and the defendants. The plaintiffs first of all had recourse to a Revenue Court for redress. They caused a notice under s. 36 of Act No. XII of 1881, to be served on the defendants. Now that notice presupposes the existence of the relationship of landlord and tenant between the landlord who causes it to issue and the person on whom it is served. From the wording of s. 36 it is evident that the notice provided for by it is not a notice which could be served on a mere trespasser without title, or squatter on land from which the true owner desires to dispossess him. With such a case Revenue Courts have no concern. Their functions in the matter of ejectment extend, under Act No. XII of 1881, only to litigation between persons who admittedly occupy the respective positions of landlord and tenant. They have no jurisdiction under that Act to entertain and decide a suit for the dispossession of a trespasser. A suit of the latter nature can be heard only by a Civil Court. The very notice served on the defendants in this case was addressed to them as tenants of the land, not as trespassers, and called on them to apply to the Collector if they desired to contest the landlord's right to eject them. They accordingly did make an application as [191] provided in s. 39 of the Revenue Act. The Commissioner, to whom the case went in appeal, decided that they were tenants with a right of occupancy and cancelled the notice. It thus appears that a competent Revenue Court, the only Court empowered in these Provinces to decide the status of a tenant, has held that these defendants, appellants, are tenants with rights of occupancy.

The present suit therefore is practically an appeal from the Commissioner's order, and I notice that in its concluding clause the plaint prays that the Civil Court will set aside the Commissioner's decision. No Civil Court has any power to grant such a relief in a matter which the Rent Act declares to be exclusively within the jurisdiction of a Revenue Court. I am not little surprised to find that both the Munsif and the Subordinate Judge have ignorantly taken it on themselves to cancel the Commissioner's order in this matter. Further, it shows that the plaintiffs accepted rent from the defendants, appellants, thereby further admitting that defendant were tenants and not trespassers. I confess I do not comprehend what the learned Subordinate Judge means by saying that plaintiffs accepted rent "*unwillingly.*" It is perfectly clear that they accepted payment from the defendants and that they accepted it as rent. I do not, however, base my judgment in any way on that matter. I find that the plaintiffs, by causing a notice under s. 36 of the Rent Act to be served on the defendants, conclusively admitted that the relationship of landlord and of tenant existed between themselves and the defendants, and I hold that the plaintiffs cannot now turn round, and, shifting their ground, allege that the defendants are not tenants and are trespassers.

In my opinion, therefore, the suit fails and should have been dismissed. I allow this appeal. I set aside the decisions and decrees of the lower Courts, and I direct that the suit be dismissed. Costs in all three Courts will be paid by the plaintiffs, respondents.

Appeal decreed.

15 A. 192 (F.B.) = 13 A.W.N. (1893) 79.

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FULL BENCH.

15 A. 192 (F.B.) = 13 A.W.N. (1893) 79.

[192] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF GANESHI.
[10th March, 1893.]

Criminal Procedure Code, s. 555—*Act No. I of* 1878, s. 9—*Jurisdiction of officer in charge of the excise and opium administration of a district to try cases under the Opium Act—Meaning of the term* "*personally interested.*"

A Magistrate in charge of the excise and opium administration of a district is not "personally interested" in the observance of the provisions of Act No. I of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the abovementioned Act.

[F., 27 A. 33 (37) = A.W.N. (1904) 157; R., 22 A. 340 (342); 24 M. 238 (240) = 2Weir, 730; U.B.R. (1897—1901), Vol. I, 127 (130); D. 5 A.L.J. 357 = A.W.N. (1908), 95 = 7 Cr.L.J. 36.]

THE facts of this case sufficiently appear from the judgment of Edge, C.J.

The Public Prosecutor (Mr. *A. Strachey*) for the Crown.

JUDGMENT.

EDGE, C.J.—This is a case which was referred under s. 438 of the Code of Criminal Procedure, 1882, by the Sessions Judge of Benares for the order of this Court.

Musammat Ganeshi had applied to the Court of the Sessions Judge to revise an order of conviction by which she had been convicted under s. 9 of Act No. I of 1878 of the offence of selling opium without a license. Against that conviction she had previously appealed and her appeal had been dismissed by the Sessions Judge. The application for revision, which was made subsequently to the order dismissing the appeal, was an application which the Sessions Judge could not entertain so far as his Court was concerned. All questions with regard to the legality of the conviction had been finally determined by his order dismissing the appeal. Properly speaking, Musammat Ganeshi, if she desired to raise a question as to the legality of the proceedings against her, should, as her appeal to the Sessions Judge had been dismissed, have applied to this Court to exercise its powers of revision. However, the matter is now before us and we have jurisdiction to deal with the case. Musammat Ganeshi had been convicted of the offence under s. 9 of Act No I of 1878 by the Joint Magistrate of Benares, who was the officer [193] who had been placed in charge of the excise and opium administration of the district within which the offence is alleged to have been committed. The Joint Magistrate was not a party to the prosecution. It had been instituted in his Court by a Sub-Inspector of Police. The only question which we have to decide is whether s. 555 of the Code of Criminal Procedure, 1882, precluded the Joint Magistrate from taking cognizance of the offence and adjudicating upon the charge. The section is as follows:—"No Judge or Magistrate shall, except with the permission

* Criminal Revision No. 735 of 1892.

1893 MARCH 10. — FULL BENCH. — 15 A. 192 (F.B.) = 13 A.W.N. (1893) 79.

of the Court to which an appeal lies from his Court, try or commit for trial any case, to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself." The explanation contained in the section is immaterial for the purposes of this case. The Joint Magistrate was not a party to the case. The only question we have to consider is this :—was he personally interested in this case before him? It is proved that he was the person apparently responsible to Government for the maintenance and enforcement of the law relating to the cultivation and keeping and sale of opium. Now the Magistrate of a district would be the person responsible for the public peace and the enforcement of the law within his district. It could not be suggested that, because it would be the duty of the District Magistrate to see that the law was maintained and carried into effect in his district, he would be thereby "personally interested" within the meaning of s. 555 in the prosecution of an offender for an offence within the district against the statute-law relating to the preservation of the public peace. In my opinion a Magistrate cannot be said to be "personally interested," within the meaning of s. 555 of the Code of Criminal Procedure merely by reason of its being his duty as an officer under Government to see the law relating to the sale of opium is enforced and maintained in the part of the district of which he has charge. It is difficult to define what is the meaning of "personally interested." Probably it is safer to attempt no definition of these general words. In my opinion they cannot mean that a public officer whose duty it is to see that the law is obeyed is, merely by reason of that duty, a person personally interested [194] in the prosecution and trial of an offender against the statute-law. The words "personally interested" cannot refer to any very remote interest in the matter, and must refer to some particular and immediate personal interest in the case and its results. If it were otherwise no paid judicial officer under the Government of India could take cognizance of an offence the commission or repetition of which might affect the public revenue, which is the source from which those officers are paid, and in that event not only all Magistrates, but Session Judges and Judges of the High Court, would be precluded from taking cognizance of any offence against the laws relating to the public revenue, and there would be no Court which could entertain an appeal or an application in revision from a conviction by a Bench of Honorary Magistrates for an offence against the laws relating to or affecting the public revenue. Section 191 of the Code of Criminal Procedure shows that the mere fact that a District Magistrate or a Sub-Divisional Magistrate or any other Magistrate specially empowered in that behalf who is authorised under clause (c) to take cognizance of offences has directed the institution of a prosecution upon his own knowledge, or upon his own suspicion that the offence has been committed, does not preclude such Magistrate from jurisdiction to hear and determine the case, which may in fact have been instituted upon his own peculiar knowledge of the facts. In such cases the accused has a power given him by the statute to obtain the transfer of the case to some other Magistrate, but unless the accused exercises that privilege the jurisdiction of the Magistrate to institute, hear and determine the particular case is unquestionable. I refer to s. 191 for the purpose of showing that a merely preconceived opinion as to the guilt of an accused does not necessarily deprive a Magistrate of jurisdiction to adjudicate on the charge. We have been referred by Mr. *Strachey* to a number of cases, some decided in this country, some in England. In my

opinion none of those cases touch the case which is before us, in which the Magistrate was neither a party nor personally interested. The cases to which Mr. *Strachey* referred are the following:—*Queen-Empress* v. *Saha Devvalad Tukaram* (1), [195] *The Queen* v. *Farrant*; (2) *The Queen* v. *Rand* (3); *The Queen* v. *Handsley* (4); *Leeson* v. *General Council of Medical Education and Registration* (5); *The Queen* v. *McKenzie* (6); *The Queen on the Prosecution of Shaw* v. *Lee* (7); *The Queen* v. *Gaisford* (8); *Municipality of Benares* v. *Bishen Chand* (9); In the matter of the petition of *Nobin Krishna Mookerjee* (10); In the matter of *Kharak Chand Pal* v. *Tarack Chunder Gupta* (11).

In conclusion, I am of opinion that the Joint Magistrate had jurisdiction to hear and determine the charge against Musammat Ganeshi, and I would return the record to the Court of the Sessions Judge with this expression of opinion.

TYRRELL, J.—I entirely concur.

KNOX, J.—The sole question before us is whether the Joint Magistrate of Benares was personally interested in the case of *The Queen-Empress* v. *Musammat Ganeshi*, and therefore debarred from trying the case without the permission of the Court to which an appeal lay from his Court. The circumstances of the case have been fully set out by the learned Chief Justice in his judgment. There is nothing in the circumstances which discloses that there existed in the mind of the Joint Magistrate any feeling prejudicial to the accused before him. It is not a mere interest in a case or in the circumstances of a case which disqualifies a Magistrate or a Judge from trying a case. That which disqualifies him is, to adopt the language used in the case of *The Queen* v. *Handsley* (4), "a substantial interest giving rise to a real bias and not merely to a possibility of a bias." I would therefore return the papers to the Sessions Court of Benares with no orders or directions beyond the opinion of the Court.

BLAIR, J.—I would answer this reference in the terms used by the Chief Justice and return the record without further orders.

[196] BURKITT, J.—I also would make the same reply.

AIKMAN, J.—I entirely concur with the learned Chief Justice. It is, as remarked by him, difficult to define what is the personal interest referred to in s. 555 of the Code of Criminal Procedure as debarring a Magistrate or Judge from trying a case. I should be inclined to say that it was an interest attaching to him as an individual, *e.g.*, in the present case to Mr. Porter, as Mr. Porter, and not an interest which he derives solely from his official position. The decisions which have given a wider meaning to the words of s. 555, have, it seems to me, overlooked the important provisions of s. 191, cl. (*c*), Code of Criminal Procedure.

I concur in the order proposed.

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(1) 14 B. 572.
(2) 20 Q.B. D. 58.
(3) 1 Q.B. 230.
(4) 8 Q.B.D. 383.
(5) 43 Ch. D. 366.
(6) 2 Q.B. of 1892, p. 519.
(7) 9 Q.B.D. 394.
(8) 1 Q.B. of 1892, p. 381.
(9) 6 A.W.N. (1886) 291.
(10) 10 C. 194.
(11) 10 C. 1030.

1893
MARCH 24.

APPELLATE CIVIL.

15 A. 196 = 13 A.W.N. (1893) 99.

15 A. 196 = 13 A.W.N. (1893) 99.

APPELLATE CIVIL.

Before Sir John Edge., Kt., Chief Justice, and Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF MURAD-UN-NISSA.
[24th March, 1893.]

Civil Procedure Code, s. 546—Execution of decree—Application for stay of sale of immoveable property in execution of a money-decree under appeal.

An application under the third paragraph of s. 546 of the Code of Civil Procedure to stay the sale of immoveable property in execution of a decree for money against which an appeal has been filed must be made to the Court which passed the decree and not to the appellate Court. *Gossain Money Puree* v. *Gour Pershad Singh* (1) referred to.

[F., 8 C.W.N. 381 ; R., 34 C. 1037 (F.B.) = 6 C.L.J. 298 = 11 C.W.N. 1030.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *Adul Raoof* and Mr. *Mahomed Raoof*, for the applicant.

JUDGMENT.

EDGE, C.J., and AIKMAN, J.—This is an application to stay the execution of a decree for money against which decree an appeal is pending in this Court, and in execution of which decree an order has been passed for the sale of immoveable property. It is an applica-[197] tion falling under the last paragraph of s. 546 of the Code of Civil Procedure. An application to stay was made to the Court which passed the decree and an interim stay was ordered by that Court to enable the appellant to present the present application to this Court. In our opinion the Court which passed the decree was the proper Court to deal with the application. The application could only be granted "on such terms as to giving security or otherwise as theCourt which passed the decree thinks fit." This Court was not the Court which passed the decree. Consequently we could not decide or suggest what should be the "terms as to giving security or otherwise," as those terms are entirely for the Court which passed the decree, and are in its discretion and not in ours. The paragraph in question is not very explicit. We infer from the wording of that paragraph, and to some extent from the fact that in the second paragraph of the same section, the appellate Court is expressly given jurisdiction to make an order as to security, which, by the wording of the first paragraph of the same section, otherwise would be confined to the Court which passed the decree, that the intention of the Legislature was that the Court which should act under the last paragraph of the s. 546 was the Court which passed the decree and not the appellate Court. The High Court of Calcutta in *Gossain Money Puree* v. *Gour Pershad Singh* (1) apparently took the same view of the last paragraph of s. 546 as we do. In this case we dismiss the application in this Court on the above grounds. Under the circumstances our order of dismissal, being one entirely dependent on the question of the jurisdiction of this Court, will not debar the appellant here from prosecuting his application in the Court which passed the decree.

We make no order as to costs.

Application rejected.

* Application under s. 546, Civil Procedure Code, in First Appeal No. 258 of 1892.

(1) 11 C. 146.

15 A.198=13 A.W.N. (1893) 93.

1893 APRIL 14.

APPELLATE CIVIL.

15 A. 198=13 A.W.N. (1893) 93.

[198] APPELLATE CIVIL.

Before Mr. Justice Burkitt.

TILESHAR RAI AND OTHERS (*Decree-holders*) v. PARBATI AND OTHERS. (*Judgment-debtors*).* [14th April, 1893.]

Civil Procedure Code, s. 230—*Execution of decree*—"*Application to execute a decree*" —*Limitation.*

The term "application to execute a decree" in the third paragraph of s. 230 of the Code of Civil Procedure means any application to execute a decree. It is not confined to the last application preceding the expiry of the period of twelve years from either of the points of time mentioned in cl. (*a*) or cl ; (*b*) of the same paragraph of the section above-mentioned. *Paraga Knar* v. *Bhagwan Din* (1) distinguished. *Ramadhar* v. *Ram Dayal* (2) referred to.

[**Diss.**, 15 C L.J. 453 (456)=17 C.W.N. 113 (116)=10 Ind. Cas. 359 (361) ; **Appr.**, 18 A. 482 (489)=16 A.W.N. 142 ; **R.**, 28 C. 122=5 C.W.N. 80 ; 14 C.W.N. 114 (117)=3 Ind. Cas. 47 ; **D.**, 24 A. 282 (286)=22 A.W.N. 63.

THE facts of this case are fully stated in the judgment of Burkitt, J.

Munshi *Gobind Prasad*, for the appellants.

Baboo *Bishnu Chandar Motra*, for the respondents.

JUDGMENT.

BURKITT, J.—This is an appeal against an order of the Subordinate Judge of Ghazipur affirming an order of the Munsif of Saidpur by which the appellants', decree-holders' application for execution of a decree was rejected as time-barred. The date of the decree is the 25th of June 1877. It therefore was more than twelve years old at the date of the application which I am now considering, that application having been presented on the 15th of April 1890, while the sum decreed was payable on the 20th of November 1877. But it is contended for the appellants that because the application for execution which immediately preceded that of the 15th of April 1890, was not "granted," they are still, despite the twelve years' rule contained in s. 230 of the Code of Civil Procedure, entitled to have satisfaction of their decree by process of execution; and in order to meet the facts of this case the learned vakil who represents the appellants further contends that if the application for execution which immediately preceded the application made after the expiration of the twelve years had not been "granted" it was immaterial [199] that another previous application for execution of the same decree had been granted during the twelve years. In fact, the learned vakil's argument amounts to this, that in the third sentence of s. 230 of the Code of Civil Procedure, the words "where an application," instead of being construed according to their ordinary grammatical meaning as applying to any application made and granted, should be interpreted to mean "where the last application prior to an application made after the expiration of twelve years" has been granted.

Before discussing the force of this argument it will be useful to set forth some of the previous applications made for the execution of this decree. The earliest application to which I need allude is the fourth.

* Second Appeal, No. 664 of 1891, from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 23rd April, 1891, confirming a decree of Babu Chandi Prasad Munsif, of Saidpur, dated the 13th December, 1890.

(1) 8 A. 401.

(2) 8 A. 536.

1893 APRIL 14. — APPELLATE CIVIL. — 15 A. 198 = 13 A.W.N. (1893) 93.

It was made on the 24th of May, 1885. Notice under s. 248 was served on the judgment-debtors, but as the decree-holders failed to deposit the fees for attaching the property against which they sought execution the application was "struck off" in June, 1885. The fifth application was made on the 8th of August 1885. In the course of proceedings on this application the judgment-debtors' property was attached and as that property was ancestral the execution case was, on the 3rd of February 1886, transferred to the Collector under the provisions of s. 320 of the Code of Civil Procedure. There is nothing on the record to show what happened before the Collector. The sixth application for execution was made on the 14th of November, 1887. Notice was served on the judgment-debtors, who came in and took certain objections to the execution. No order was passed on those objections, because, on the 23rd of April, 1888, the decree-holders withdrew their application and asked that it might be struck out, intimating their intention of making a further application at some future date.

This is the last application which was made within the twelve years from the date when the money due under the decree was payable. The seventh and last application for execution was made on the 15th April, 1890. It is the application now before me. In it the usual notice having been issued to the judgment-debtors they appeared and, *inter alia*, objected that the execution was time-barred. [200] A date was fixed for hearing the objection, and, strange to say, that date was a Sunday. The judgment-debtors being absent on the following day (the 4th of August 1890) their objection was struck out in default and subsequently an order was passed directing the case to be sent to the Collector under s. 320. Shortly afterwards the judgment-debtors again came in and reiterated their objections. The question was then taken up by the Court, which eventually coming to the conclusion that execution was barred by the twelve years' rule contained in s. 230 of the Code of Civil Procedure rejected the application for execution. That order was upheld on appeal by the Subordinate Judge, and it is from that appellate order that this appeal is brought.

The contention then put forward on behalf of the appellants is that inasmuch as the sixth application for execution was not granted, they are now entitled to have out execution on the seventh application. Their learned vakil based his contention on the judgment of this Court in the case of *Paraga Kuar* v. *Bhagwan Din* (1). Now accepting fully the definition of the word "granted" as laid down in that case, I hold with the learned vakil that the sixth application was not "granted." But I must also hold that the fifth application, that of the 8th of August 1885, was granted. The Court did much more on it than merely issue a notice. It attached the property against which execution was sought, and then, finding that that property came under the definition of "ancestral property," it transferred the further proceedings in execution to the Collector as it was bound by law to do. In fact, the Court took every step within its lawful power to further the execution of the decree, and when the limits of its own jurisdiction were reached it transferred the further proceedings to a tribunal empowered by law to continue them. Under such circumstances I cannot but hold that this fifth application was "granted" within the meaning of s. 230 of the Code of Civil Procedure.

(1) 8 A. 301.

1893 APRIL 14. — APPELLATE CIVIL. — 15 A. 98 = 13 A.W.N. (1893) 93.

Now the third sentence of s. 230 of Act No. XIV of 1882 provides that "where an application to execute a decree * * * [201] has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from * * * * * * * the date of the default in making the payment in respect of which the applicant seeks to enforce the decree."

Prima facie, therefore, as it appears that at least one application for execution of this decree had been granted, no subsequent application to execute the same decree should be granted after the expiration of twelve years from the date on which the decretal amount was payble, *i.e.*, the 20th of November 1877.

But it is contended that I should disregard the fifth application altogether as immaterial, and that the only application which can be taken into consideration is the sixth, because it was the application immediately preceding the application made after the expiration of twelve years from the 20th of November 1877.

The case cited, *Paraga Kuar* v. *Bhagwan Din* (1), undoubtedly at first sight appears to lend some support to this contention. But on a close examination of the facts of that case and of the judgment of the learned Officiating Chief Justice, who delivered the judgment of the Court, I am of opinion that it does not support the construction which the learned vakil would have me put on it. The decree in that case was made in August 1865. It was an instalment decree providing for periodical payments over a period of sixteen years from 1866 to 1882. The twelfth year from the date fixed for the payment of the last instalment would be the year 1894. Up to 1877 several payments had been made apparently without issue of process of execution. In March of that year an application for execution was made, but would appear not to have been granted (within the technical meaning of that word) as the parties came to an arrangement for liquidation of the debt which was confirmed by the Court and the case was thereupon "struck off." The next application was in March 1881. It came to an end in the same manner as the preceding application of March 1877. The Court was informed that a new arrangement for payment had been [202] come to between the parties and that part payment had been made. Another application was made in March 1883. On it nothing was done further than the issue of notice, whereupon the Court was informed that an arrangement for payment had been made. The case was accordingly "struck off." It will be noticed that the applications of 1881 and of 1883 were made after the expiration of twelve years from the date of the decree. But the report of the case does not state what instalments were due at the date of the application of March 1877, a matter of no little importance with reference to clause (*b*) of the third sentence of s. 230 of Act No. XIV of 1882.

The last application was made in March 1884, and it was with reference to it that the judgment of this Court was delivered. In his judgment the learned Officiating Chief Justice, after premising that the only ground on which the Court was asked to interfere in appeal was that "the original decree having been more than twelve years old at the date of the two last applications for execution, it is barred by limitation," proceeded to say :— "Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that after a decree is twelve years old there is a prohibition against

(1) 8 A. 301.

1893 APRIL 14. — APPELLATE CIVIL. — 15 A. 98 = 13 A.W.N. (1893) 93.

its being executed more than once, that is, an application should not be granted if a previous application had been allowed under the provisions of that section." The first and second clauses of the paragraph just cited somewhat conflict one with the other, but at any rate, the second clause distinctly lays down that if a previous application had been allowed (which I interpret to mean *any* previous application) no subsequent application can be granted after the expiration of twelve years from the date of the decree. Then follow the words on which the argument in the case I am now considering has been founded, namely,—"Now the test to apply to this case is to see whether the last of those applications preceding the application the granting of which is the subject of appeal was granted, because, if granted, the prohibition referred to in the section, applies." I am unable, however, to consider these words as an authority for holding that the last application immediately preceding an application made after the expiration of twelve years from [203] the date of the decree, is "the only application to be taken into consideration," and that it is immaterial whether any previous application had been granted. That the learned Officiating Chief Justice did not himself take that view is evident from the fact that having come to the conclusion that the application of 1883 had not been granted he went on to consider the previous application of 1881. He found that it also had not been granted and that therefore it also was "not within the prohibition contained in s. 230." But surely, if the argument I am considering be sound, there was no necessity whatever for looking into the application of 1881. All that in that case would have been necessary was to have decided that the application of 1883 had not been granted, without going any further. The inference I draw from the learned Officiating Chief Justice's remarks about the application of 1881 is that, if in his opinion that application had been granted, he would have held that the decree was time-barred. It is (as I before remarked) important that the report does not give any information as to the date when the instalment, to recover which the application of 1877 was made, fell due. That matter does not appear to have been brought to the notice of the Court. The case of *Paraga Kuar* v. *Bhagwan Din* (1) was considered in the subsequent case of *Ramadhar* v. *Ram Dayal* (2). In that case an application had been made in November 1884, for execution of a decree passed in April 1872. In his judgment Mr. Justice Mahmood, while accepting fully the meaning of the word "granted" as laid down in *Paraga Kuar's* case, did not confine his attention to the last application immediately preceding that made in November 1884, but considered the effect of the two previous applications made in February 1883 and in December 1883, respectively. That learned Judge evidently did not believe in the existence of the rule now contended for. The point was not touched on by the other learned Judge (Mr. Justice Oldfield) who heard *Ramadhar* v. *Ram Dayal* (2). His judgment proceeded on a clause of s. 230 which has been repealed by Act No. VII of 1888.

[204] The case of *Chengaya* v. *Appasami Ayyar* (3) has no bearing on the question under discussion. It simply gives to the word "granted" the meaning given to it in *Paraga Kuar's* case. The only other case bearing on this matter which I have been able to find is that of *Motichand* v. *Krishnarav Gonesh* (4). The judgment in it, however, proceeds on the repealed clause of s. 230 and is not in point here.

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(1) 8 A. 301. (2) 8 A. 536. (3) 6 M. 172. (4) 11 P. 524.

On a review of the authorities cited above I have come to the conclusion that the argument addressed to me on this point for the appellants is unsound. I hold that the words "an application to execute * * * has been made * * * * and granted," should be interpreted according to their ordinary grammatical sense as meaning any "application", and that they should not be restricted to the last application immediately preceding an application made after the expiration of twelve years from the date of the decree sought to be enforced, or on which the sum decreed became payable.

It follows therefore that as the fifth application, that made in August, 1885, was "granted" the present application made after the expiration of twelve years from the date when the decretal amount became payable cannot be allowed.

For these reasons I hold that the lower appellate Court was right in rejecting the appellants' application of the 15th of April, 1890.

It was further contended for the appellant that the application of the 15th of April, 1890 was but an application for revival of the proceedings under the application of August, 1885. Unfortunately for the appellants the facts on this matter are against them. The application of April, 1890, contained no prayer for revival of previous lapsed proceedings, but was a distinct and separate application for execution.

And lastly it was argued that the Courts below had no power to "go behind" the order of the 4th of August, 1890, by which the judgment-debtors' objection to execution had been shelved in default of their appearing on a day on which they had not been summoned [205] to appear. In my opinion there is nothing in this contention. I would apply to it the principle recently unanimously adopted by all the Judges of this Court in the case of *Dhonkal Singh* v. *Phakkar Singh* (1), and would hold that as the Court below had not judicially decided that the judgment-debtors' objections to execution were unsound, and had simply struck them off the file of pending cases by reason of the objectors' failing to appear, that Court was quite justified (when those objections were renewed) in afterwards hearing the parties respecting them and in judicially deciding whether they were valid or not. The Court did decide that the objections were valid and that they were fatal to the applications for execution. That decision is in my opinion perfectly right. I therefore dismiss the appeal with costs.

Appeal dismissed.

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15 A. 205=13 A.W.N. (1893) 105.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MAULA BAKHSH.* [25th April, 1893.]

Criminal Procedure Code, ss. 423, 439—Sessions Judge, powers of, as a Court of appeal —Commitment.

It is competent to a Sessions Judge acting as a Court of appeal under s. 423 of the Code of Criminal Procedure, 1882, having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session. *Queen-Empress* v. *Sukha* (2) overruled.

[F., 16 P.R. 1895 (Cr.); R., 27 C. 172 (173); 7 C.W.N. 301 (304); 17 C.P.L.R. 97 (102).]

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* Criminal Revision, No. 105 of 1893.

(1) 15 A. 84.

(2) 8 A. 14.

1893
APRIL 25.
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REVISIONAL
CRIMINAL.
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15 A. 205=
13 A.W.N.
(1893) 105.

THIS was an application on behalf of Government for revision of an order of the Sessions Judge of Meerut on appeal from an order of a first class Magistrate of the Bulandshahr district, convicting the appellant of an offence under s. 379, read with s. 511 of the Indian Penal Code, and sentencing him to six months' rigorous imprisonment. It appeared that there was reason to believe that the appellant had, when put on his trial before the Magistrates been four times previously convicted. Only one of such convictions was proved against him, the Magistrate omitting to question him about the others. On appeal the Sessions Judge [206] quashed the conviction and directed a new trial, adding that care should be taken that all previous convictions are proved under s. 511 of the Criminal Procedure Code. An application for revision of this order was made on behalf of Government on the following grounds:—(1) Because having regard to the rulings of the High Court, the case not being exclusively triable by the Court of Session, the Sessions Judge had no power on the appeal before him to quash the proceedings and order a commitment, and (2) because the learned Judge's direction to the Magistrate to prove certain previous convictions against the accused, in a case to which s. 75 of the Indian Penal Code was not applicable, was illegal.

The Public Prosecutor (Mr. A. *Strachey*), for the applicant.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—The question which we have to consider here is whether a Sessions Judge sitting as a Court of appeal under s. 423 of the Code of Criminal Procedure 1882 can, having reversed the finding and sentence, order the appellant to be committed for trial to the Court of Session. According to the ordinary English construction of cl. (*b*) of s. 423, we have no doubt that the appellate Court, whether that appellate Court is a Court of Session, or a District Magistrate can, in an appeal from a conviction, having reversed the finding and sentence, order the accused to be committed to the Court of Session. That power is conferred in our opinion by sub-cl. (1) of cl. (*b*) of s. 423, and is not in any way controlled by the prohibition as to enhancing a sentence contained in sub-cl (3) of cl. (*b*) of s. 423. There can be no doubt that it has been considered by this High Court that when acting under s. 439 of the Code, it had power, having reversed the finding and sentence, to order a committal for trial to a Court of Session. That power could not be exercised under s. 439, read with s. 423, unless the appellate Court referred to in cl. (*b*) of s. 423, had by reason of that latter section such power conferred upon it. It was contended that to hold that a Court of Session had such a power conferred upon it would be inconsistent with the course of legislation. In support of that argument it was pointed out that the power of enhancement which was conferred by s. 280 of Act No. X of 1872 [207] upon all appellate Courts, was taken away by Act No. X of 1882, and that power was by the latter Act restricted to a High Court when acting under s. 439 of Act No. X of 1882. Section 28 of Act No. XI of 1874 amended s. 280 of Act No. X of 1872, and whilst leaving the power of enhancement in the appellate Court, it conferred on the appellate Court a further power of ordering an appellant to be re-tried, presumably to be re-tried by the same Court which had originally tried him. Consequently under s. 280 of Act No. X of 1872 before it was amended, or as amended by s. 28 of Act No. XI of 1874, the appellate Court had not under those sections a power to order a commitment to itself or a commitment at all. When we come to Act No. X of 1882, we

1893 APRIL 25. — REVISIONAL CRIMINAL. — 15 A. 205= 13 A.W.N. (1893) 105.

find a great change in procedure. The power of enhancement which had existed in the appellate Court as such was taken away, but words were introduced which can only be construed as conferring upon the appellate Court a power of ordering the accused appellant to be committed to the Court of Session even where the Court of Session was the appellate Court. The object of the alteration in the procedure may have been to prevent a Court other than a High Court enhancing sentences except upon a fresh trial before itself, and under circumstances which would give the accused a right of being heard, and having his witnesses heard by the Court enhancing the sentence, and would give him an appeal from the conviction under which the heavier sentence was passed. Whatever may have been the object of the Legislature we consider no other construction can be put by us on s. 423 of Act No. X of 1882. In the course of the argument we were referred to the decision of this Court in the case of *The Queen* v. *Seetul Pershad* (1). That was a case which was decided in 1873, and turned upon the construction of the proviso contained in s. 296 of Act No. X of 1872, and in our opinion it has no bearing on this case. We were also referred to the decision of this Court in *Queen-Empress* v. *Sukha* (2). That case is directly in point, but with every respect for the decision of the learned Judge who decided that case we entirely differ **[208]** from his reasonings and conclusions. That decision has also been dissented from in the case of *Queen-Empress* v. *Abdul Rahiman* (3). It has also been contended here that even if the Sessions Judge had power to make the order that the accused be committed to his Court for trial, we ought to set aside that order because it was obviously made with the intention that a heavier sentence should be imposed in the Sessions Court in case of a conviction than had been imposed by the Magistrate. We find nothing in s. 423 of Act No. X of 1882 to limit the power of the Sessions Judge to do any of the acts which he as an appellate Court is empowered to do by sub-cl. (1) of cl. (*b*) of s. 423. Although we dismiss this application in revision, we consider that it was a most proper case for the Public Prosecutor to bring before the Court in order to settle the procedure.

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15 A. 208=13 A.W.N. (1893) 107.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice, Aikman.

QUEEN-EMPRESS *v.* NARAIN.* [27th April, 1893.]

Act V of 1876 s. 22 – *Government Notification* (*India*) *No.* 173 *of the* 14*th March*, 1889—*Sentence—Reformatory School.*

Where a boy over fourteen, but otherwise of uncertain age, was ordered upon conviction by a Magistrate, to be detained in a Reformatory School for two years: *Held* that such sentence, having regard to the rule made by the Governor-General in Council on the 14th of March 1889, under s. 22 of Act No. V of 1876, was illegal. The proper course for the Magistrate to have adopted with reference to the above-mentioned rules was to have ascertained as near as might be the exact age of the offender and sentenced him to a specified period of detention which should be that elapsing between his conviction and the attainment by him of the age of eighteen years.

[R., Rat. Un. Cr. C. 708.]

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* Criminal Revision, No. 112 of 1893.

(1) 5 N.W.P.H.C.R. 168. (2) 8 A. 14. (3) 16 B. 580.

1893 APIRL 27. — REVISIONAL CRIMINAL. — 15 A. 208= 13 A.W.N. (1893) 107.

THIS was an application on behalf of Government for revision of an order passed by the Assistant Magistrate of Meerut. The facts of the case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. *A. Strachey*) for the applicant.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—Narain was convicted of an offence under s. 379 of the Indian Penal Code, and was sentenced to six months' rigorous imprisonment by a Magistrate of the first class. [209] In the judgment of that Magistrate Narain was under the age of 16 years and was a proper person to be an inmate of a Reformatory School. The Magistrate, acting under Act No. V of 1876, directed that Narain, instead of undergoing the sentence of six months' rigorous imprisonment, should be sent to a Reformatory School and should be there detained for a period of two years. The Magistrate found that Narain was fourteen years of age, but did not find how much beyond fourteen years of age he was. Under s. 22 of Act No. V of 1876, the Governor-General in Council on the 14th of March 1889, made the following rule:—" No boy shall be sent to a Reformatory School, if under ten years of age, for a less period than seven years, if over ten years of age, for a less period than five years, unless he shall sooner attain the age of eighteen years." That rule was published in Notification No. 173 in part I of the Gazette of India on the 16th of March 1889, at page 151. The intention of the rule is clear, the manner in which the intention is expressed is not, as it does not provide, except by implication, what shall be the term for which a boy over the age of thirteen should be sent to a Reformatory School. The sentence must be plain and complete in itself, so that the officer who has to act under the warrant may know exactly for what period the person sentenced may be legally detained. In the present case a direction that Narain should be detained in a Reformatory School for a period of five years unless he should sooner attain the age of eighteen years, would not, it appears to us, be a legal sentence, as it would leave it to the officer in charge of the Reformatory School to determine when the sentence would expire otherwise than by reference to the warrant. We, for want of information as to the precise age of the boy, cannot amend the order of the Magistrate. We set aside the order directing Narain to be detained in the Reformatory School for two years, and we direct the Magistrate to ascertain what was the precise age of the boy at the date of his order, and to make an order that he be detained for such period as would be equivalent to the period intervening between Narain's then age and eighteen. As the prisoner is already in the Reformatory, the order [210] will be so worded that the period will run from the date of the original order and will determine on the date, which must be specified, on which the prisoner will attain the age of eighteen. The period of detention must be clearly expressed in the warrant.

15 A. 210=13 A.W.N. (1893) 96.

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APPEL-LATE CRIMINAL.

15 A. 210= 13 A.W.N. (1893) 96.

APPELLATE CRIMINAL.

Before Sir. John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* SOSHI BHUSHAN.*
[29th April, 1893.]

Act XLV of 1860, *ss.* 463, 464, 470, 471, 23, 24, 25, 29—*Using forged document—False certificate of attendance at law lectures—" Claim "—" Property."*

The terms "claim" in s. 463 of the Indian Penal Code is not limited in its application to a claim to property.

The term "property" in the same section will cover a written certificate.

It is not necessary to constitute a forgery under s. 463 of the Indian Penal Code that the property with which it is intended that the false document shall cause a person to part should be in existence at the time when the false document was made. *Queen-Empress* v. *Haradhan* (1), dissented from. *Queen-Empress* v. *Appasami* (2) and *Queen-Empress* v. *Ganesh Khanderao* and *Ganesh Daulat* (3) approved.

One S. B. presented to the Principal of Queen's College, Benares, a false certificate purporting to have been granted by the Principal of Canning College, Lucknow, to the effect that he had attended a certain proportion of a certain first year course of law lectures delivered at Canning College, S. B. in fact never having attended such lectures. Had that certificate been a true one it would have entitled S. B. to attend a further course of law lectures at any one of several associated institutions, amongst which was Queen's College, Benares, without attending or paying the fees for the first course of lectures.

On presentation of the above certificate S. B. obtained permission to attend, and attended, a course of second year lectures at Queen's College, Benares, without attending or paying the fees required for the first year course. After S. B. had attended the above mentioned second-year course of lectures at Queen's College, Benares, he again presented the said false certificate to the Principal of Queen's College with a view to his obtaining a consolidated certificate, which was necessary, as he alleged, to enable him to become a candidate in the Judge's Court Pleadership Examination in Calcutta.

Held that on both occasions, when he presented the false certificate to obtain admission to the second-year law class at Queen's College, Benares, and again [211] when he endeavoured by its use to obtain the consolidated certificate in order to gain admission to the Pleadership Examination in Calcutta S. B. was guilty of the offence provided for by s. 471 of the Indian Penal Code.

[R., 21 A. 113 (115)=18 A.W.N. 197; 28 A. 358=3 A.L.J. 149 (155=A.W.N. (1906) 48=3 Cr.L.J. 249; 19 B. 717 (723); 21 B. 517 (520); 22 B. 768 (769); 25 C. 512 (519)=1 C.W.N. 255=L.B.R. (1893—1900) 437; 28 M. 90 (98)=1 Weir, 538—A.; 9 Cr.L.J. 15 (18)=4 L.B.R. 315 (317); 11 Cr.L.J. 656=8 Ind.Cas. 596=3 Bur. L.T. 11; 2 P.R. 1895 (Cr.); 1 P.R. 1907 (Cr.)=32 P.L.R. 1907; Rat. Un. Cr. C. 761 (762).]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *D. Banerji*, for the appellant.

The Public Prosecutor (Mr. *A. Strachey*), for the Crown.

The judgment of the Court (EDGE, C. J. and AIKMAN, J.) was delivered by EDGE, C. J.

JUDGMENT.

Soshi Bhushan Singh, who is described as a son of Gopi Nath Singh, was convicted by the Sessions Judge of Benares of an offence under

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* Criminal Appeal, No. 180 of 1893.

(1) 19 C. 380. (2) 12 M. 151. (3) 13 B. 506.

1893 APRIL 29. — APPELLATE CRIMINAL. — 15 A. 210 = 13 A.W.N. (1893) 96.

s. 471 of the Indian Penal Code, that is, of fraudulently and dishonestly using as genuine a document which he knew to be a forged document, and was for that offence sentenced to a term of six months' rigorous imprisonment. From that conviction Soshi Bushan Singh has appealed. After hearing Mr. *Dwarka Nath Banerji* for the appellant, and Mr. *Arthur Strachey* for the Crown, we took time to consider the wording of our judgment, as the questions of law involved in the case seemed to us to be important, but we had no doubt as to what our conclusions must be. We may say at once that we entirely agree with the findings of fact set out in the very careful and able judgment of the learned Sessions Judge.

On the 3rd of November 1891 the prisoner presented to the Principal of Queen's College, Benares, the following application :—" To the Principal, Queen's College, Benares. Sir,—I should feel much obliged if you would kindly allow me to get admission into the second year law class of your College. As for my qualifications, I beg leave to state that I passed the F.A Examination in 1886 from the Canning College, Lucknow, and studied in the law class there for a considerable portion of the session, during which between 60 and 70 lectures were delivered ; and I am almost sure that I was present in not less than 55 of them. So under the present rules of your College, I attended a full course of lectures to [212] be delivered in your College, and was present in more than 75 per cent. of them. My transfer certificate is not with me for the present. It is in the office of the Metropolitan Institution, which is yet closed for the Dusserah vacation. I shall be able to produce it in a very short time. Should I be found behind the percentage required for the completion of the first year lectures, or I fail to produce the certificate in a reasonable time, two months at the most, I should raise no objection to my name being transferred to the roll of the first year class.—I have, &c., SOSHI BHUSHAN SINGH, Benares, the 3rd November 1891."

No student is permitted to attend the second year law class at Queen's College unless he has attended the first year law class at the College, or produces a " transfer certificate " granted by the Principal of one of the other recognized Colleges or educational institutions, showing that at such other College or institution he had attended a first year law class. Upon that application the Principal of Queen's College, on the 4th of November 1891, passed the following order :—

" May join the second year class on condition that if his certificate is incomplete he will be transferred to the first year."

The Professor of Law at Queen's College is paid by the fees received from students admitted to the law classes. Those fees are as follows :— A student admitted to a first year law class pays Rs. 5 as an admission fee and Rs. 45 as the tuition fee for that year. A student admitted to a second year law class pays Rs. 54 as the tutition fee for that year. A student admitted to the second year law class in Queen's College on a " transfer certificate " pays the latter fee of Rs. 54 only to the College. In November or December 1891, and after the Principal of Queen's College had passed the order which we have set out, the prisoner presented to the Law Professor of Queen's College the document which has been found to be a forged document, and in respect of the using of which the prisoner has been convicted. That document is as follows :—

" Certified that Soshi Bushan Singh attended the law class attached to this College from June 1886 to February 1887. The [213] roll was called 72 times during this period and Soshi Bhushan was

present in 63 of them. Fees paid up.—M. J. White, M. A., Principal, Canning College. The 17th March 1887.

After perusing that document the Professor of Law returned it to the prisoner. The prisoner was permitted, on the faith of that document being a genuine "transfer certificate," to attend, and he did attend, the second year law class at Queen's College. After the completion of the attendance of the second year law class, the prisoner, on the 21st or 22nd of November 1892, presented to the Professor of Law the following application:—

"To the Law Professor, Queen's College, Benares.—Sir,—As I have completed the course of lectures in the law class, I most respectfully beg to request the favour of your granting me a certificate to that effect.—I have, &c., SOSHI BHUSHAN SINGH, Benares, the 22nd of November 1892."

Although the application bears date the 22nd November, 1892, it apparently must have been presented on the 21st of November, 1892, as on the 21st of November the Principal of Queen's College passed on that application the following order:—

"Give him a certificate stating the period he has attended here."

On the 23rd of November 1892, the prisoner presented to the Professor of Law the following application:—

"To the Law Professor, Queen's College, Benares.—Sir, I most respectfully beg to state that I am going to appear in the Calcutta Judge's Court pleadership examination. But the authorities there do not recognise two separate certificates from two separate institutions. I therefore request the favour of your granting me a fresh certificate consolidating these two into one.—I have, &c., SOSHI BHUSHAN SINGH, Benares, 23rd of November 1892."

Upon that application the Principal of Queen's College, on the 24th of November 1892, passed the following order:—

"Former application must be produced."

[214] The head clerk of Benares College asked the prisoner for his "transfer certificate," and the prisoner gave to the head clerk the document, bearing date the 17th of March 1887, which we have already set out. A draft certificate stating that the prisoner had attended thirty-nine out of sixty-eight lectures in the law department of Queen's College from the 3rd of November, 1891 to the 23rd of November 1892 had been prepared in the office of the College.

The papers were submitted to the Principal of Queen's College, and the prisoner attended before him. The Principal's suspicions as to the genuineness of the document which bears date the 17th of March 1887 were aroused, and he suspended the issuing of the consolidated certificate pending inquiries. In the result the prisoner was prosecuted and was convicted of the offence under s. 471 of the Indian Penal Code.

The signature of the document which bears date the 17th of March 1887 was not the signature of Mr. M. J. White, the Principal of Canning College, Lucknow; that document was not issued by his authority. Between June 1886 and February 1887 inclusive, only forty-eight lectures, and not seventy-two, were delivered in the law class of Canning College; the prisoner had not paid any fee for attendance at the law class of Canning College; his name was not on the register of Canning College as that of a student attending the law class, and in fact he had not attended any of the lectures of the law class of Canning College, Lucknow. It is obvious, on the above facts, that the prisoner must have known that the document bearing date the 17th of March 1887 was not, what it purported to be,

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a genuine transfer certificate. It is also obvious that when the prisoner in November or December 1891 presented to the Professor of Law of Queen's College the document which bears date the 17th of March 1887, he did so with the twofold object of avoiding the necessity of attending the first year law class and of paying the fees of Rs. 5 and Rs. 45, which, as a student attending the first year law class, he would otherwise be obliged to pay, and of obtaining admission to the second year law class.

[215] It is also obvious that when the prisoner in November 1892 gave to the head clerk of Queen's College the document which bears date the 17th of March 1887, he did so in order to induce the Principal of Queen's College to believe that he had attended a first year law class at Canning's College, Lucknow, and thereby to obtain a consolidated certificate, which according to his application, dated the 23rd of November 1892, would be required for the purpose of his being admitted to the pleadership examination in Calcutta.

On the above facts the question of law is, had the prisoner committed the offence of which he has been convicted? In support of the appeal Mr. *Banerji* relied upon the decisions in *Queen-Empress* v. *Haradhan* (1), *Jan Mahomed* and *Jabar Mahomed* v. *Queen-Empress* (2), *Empress* v. *Dwarka Prasad* (3) and *Queen-Empress* v. *Girdhari Lal* (4).

For the Crown Mr. *Strachey* relied upon the decisions in *Queen-Empress* v. *Appasami* (5), *Queen-Empress* v. *Ganesh Kanderao* and *Ganesh Daulat* (6) and an unreported decision of this Court in the *Queen-Empress* v. *Bhushan Chandra*, decided on the 29th of July 1890.

In order to ascertain whether the necessary ingredients of an offence under s. 471 of the Indian Penal Code existed in this case on the facts found by us, and also by the Court below, we must read ss. 470, 464, 463, 29, 25, 24, and 23 of that Code. The document in question, namely that bearing date the 17th of March 1887, could only have been made with the object of being used. It would be useless, except as a certificate that the prisoner had from June 1886 to February 1887 attended the law class of Canning College, and had been present of sixty-three out of seventy-two lectures in that law class; and the only object for which it could have been made was that purporting to be a geunine certificate under the hand of the Principal of Canning College, it would enable the prisoner to avoid the necessity of attending a first year law class and of paying the fees payable for an attend[216]ance at a first year law class. It was made with the obvious intention of being presented to the Principal of some College or educational institution in which students are not allowed to attend a second year law class unless they have previously attended a first year law class. In our opinion it was not only "dishonestly" made, as that word is defined in s. 24 but it was also "fraudulently" made as that word is defined in s. 25 of the Indian Penal Code. It was made with the intention of causing wrongful gain to the prisoner and wrongful loss to the Professor of Law, or to the College authority where it was to be used, by enabling the prisoner to keep in his own pocket fees which otherwise he would have had to pay. Such fees would, in our opinion, be "property" within the meaning of s. 23. That document was further fraudulently made as having been made with the intention that the prisoner should by the use of it deceive a College authority, and obtain admission to a second year law class. Illustration (*k*) to s. 464 of the Indian Penal Code shows that if

(1) 19 C. 380. (2) 10 C. 584. (3) 6 A. 97.
(4) 8 A. 653. (4) 12 M. 151. (6) 13 B. 506.

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A without B's authority writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z, A commits forgery, inasmuch as he intended to deceive Z by the forged certificate and thereby to induce Z to enter into an implied or express contract of service. We can see no difference in principle between the case of a man making a false certificate in order to obtain employment and the case of a man making a false certificate in order to obtain admission to a law class. In each case the intention is to deceive another person, and thereby to obtain an advantage, or a privilege, which without such deception could not have been obtained. We are consequently of opinion that the document in question was a false document within the meaning of s. 464 of the Indian Penal Code.

The next question is, did the person who made that false document commit forgery within the meaning of s. 463 of the Indian Penal Code? That section is as follows:—"Whoever makes any false document or part of a document with intent to cause damage or injury to the public, or to any person, or to support any claim [217] or title, or to cause any person to part with property or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

We cannot agree with Norris, J., in *Queen-Empress* v. *Haradhan* (1), that the claim in that section is limited to a claim to property. There does not appear to us to be anything in the section to so limit the application of that word. If the Legislature had intended to limit that word to a claim to property, we should have expected that the section would have run thus:—"Or to support any claim or title to, or to cause any person to part with, property."

In our opinion the claim may be a claim to anything, as, for instance, a claim to a woman as the claimant's wife, a claim to the custody of a child as being the claimant's child, or a claim to be admitted to attendance at a law class in a college, or to be admitted to a university or other examination, or a claim to the possession of immoveable or any other kind of property. Why should the making of a false document to support a claim to an old coat, not worth Rs. 5, be a forgery, and the making of a false document to support a claim to the custody of a child not be a forgery? The document dated the 17th of March 1887 was made with some object. The person who made it must have intended that it should be used for some purpose which could not have been honest. He must have made it with the intention that it should be used to deceive some one into the belief that the prisoner had attended a year's course of law lectures at Canning College. It is only reasonable to believe that the document was made with the intention of supporting a claim by the prisoner to be admitted as a student to a second year law class.

It is possible that it was made with the intention of being used to obtain ultimately for the prisoner a consolidated certificate. In any case it must have been made with the intention that by using it the prisoner might obtain admission to a second year law class. That document was in our opinion made with the intent to [218] support a claim within the meaning of s. 463 of the Indian Penal Code.

There cannot in our opinion be any doubt that a written certificate is "property" within the meaning of s. 463. If the prisoner had obtained the certificate which he tried to obtain, and some one had stolen it

(1) 19 C. 380.

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from him, no one, we imagine, would suggest that the thief could not legally be convicted, under s. 379 of the Indian Penal Code, of the theft of the certificate, but if the certificate was not moveable "property," the person who dishonestly took the certificate out of the possession of the prisoner, without the prisoner's consent, could not be convicted of a theft in respect of it. It is not in our opinion necessary to constitute a forgery under s. 463 that the "property" with which it is intended that the false document shall cause a person to part, should be in existence at the time when the false document was made. For example, if A gave an order to B to buy the material for making and to make a silver tea service for him, and C, before the tea service was made or the materials for making it had been bought, were to make a false letter purporting, but falsely, to be signed by A, authorizing B to deliver to D the tea service when made, C would have committed forgery within the meaning of s. 463 by making that false document with intent to cause B to part with property, namely, the tea service, when made. We are further of opinion that the document in question was made with intent that fraud might be committed.

We entirely agree with the view of the law expressed by Sir Arthur Collins, C. J., and Parker, J., in *Queen-Empress* v. *Appasami* (1). We also entirely agree with the view of the law expressed by Jardine and Candy, JJ., in *Queen-Empress* v. *Ganesh Khanderao* and *Ganesh Daulat* (2), at pp. 512, 513 and 514 of the report.

Finally we are satisfied that the prisoner committed an offence under s. 471 of the Indian Penal Code, when in November or December 1891 he used the document which bears date the 17th [219] of March 1887, by handing that document to the Professor of Law of Queen's, College, as a genuine certificate signed by the Principal of Canning College, and that he again committed an offence under s. 471 of the Code when, in November 1892, he handed that document to the head clerk of Queen's College for the purpose of obtaining the grant to him of a consolidated certificate. We dismiss this appeal.

(1) 12 M. 151. (2) 13 B. 506.

15 A. 219 (F.B.) = 13 A.W.N. (1893) 125.

1893 JUNE 28.

FULL BENCH.

15 A. 219 (F.B.) = 13 A.W.N. (1893) 125.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

KHIALI RAM (*Plaintiff Appellant*) *v.* NATHU LAL AND OTHERS (*Defendants-Respondents.*)* [28th June, 1893.]

Act XII of 1881, *ss.* 7, 8, 9—*Landlord and tenant—Ex-proprietary tenant, power of to sub let—Right of occupancy.*

An ex-proprietary tenant can sub-let the whole or any part of his occupancy holding, and such a sub-letting is not forbidden by s. 9 of Act No. XII of 1881.

[F., 18 A. 354 (356); 8 A.L.J. 695 (696); 5 Ind. Cas. 82 (83); R., 16 A. 337 (342) (F.B.); 24 A. 538; 26 A. 78 (81); 26 A. 591 (593) = 24 A.W.N. 132; 29 A. 129 (132) = 3 A.L J. 731 = A.W.N. (1906), 300; 33 A. 335 (336) = 8 A.L.J. 117; 27 M. 401; 3 A.L.J. 40 = A.W.N. (1906). 28; 5 A.L.J. 30 (32) = A.W.N. (1908). 33; 13 A.W.N. 177; 13 A.W.N. 182; 9 C.P.L.R. 101 (106); 11 C P.L.R. 5; 9 Ind. Cas. 217 (218); 2 O.C. 12 (1216); 2 O.C. 204 (208); 2 O.C. 292 (294).]

THIS was a reference to the Full Bench made at the instance of Knox and Burkitt, JJ. The facts of the case as stated in the referring order are as follows :—" Khiali Ram, the appellant in this second appeal, was plaintiff in the Court of first instance. He is the zemindar of the mahal, and Nathu Lal, one of the respondents, is an ex-proprietary tenant in the same mahal. Khiali Ram alleges that Nathu Lal had given a lease for a term of five years, bearing date the 21st of June 1887, over certain land set out in the plaint to the respondents Khiali Ram, Dudraj and Baldeo. He sought to have the lease set aside, to have the lessees ejected, and possession given to him the zamindar. The ground on which he claims these reliefs was that the lease was one in contravention of the terms of s. 9 of Act No. XII of 1881. The Court of first instance held that the prohibition against the transfer of his holding by an ex-proprietary tenant refers to a complete transfer only, and not to a lease for **[220]** a short period like five years, and dismissed the plaintiff's claim so far as the ex-proprietary tenure was concerned. The lower appellate Court confirmed the decree so far, and the appellant now again contends before us that the lease is invalid inasmuch as it is opposed to the provisions of the rent law above cited."

The point arising on these facts was thus referred to the Full Bench : —" Can an ex-proprietary tenant to whom s. 9 of Act No. XII of 1881 applies, sub-let his holding or any part of it; in other words, is such a sub-letting forbidden by s. 9 of Act No. XII of 1881 ?

Mr. J. *Simeon* for the appellant.

Pandit *Sundar Lal*, for the respondents.

The judgment of the Court was delivered by EDGE, C. J.

JUDGMENT.

The question which has been referred to the Full Bench is,—" Can an ex-proprietary tenant, to whom s. 9 of Act No. XII of 1881 applies sub-let his holding or any part of it; in other words, is such a sub-letting

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* Second Appeal, No. 948 of 1889, from a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 24th of April 1889, confirming a decree of Pandit Pitambar Joshi, Munsif of Tilhar, dated the 17th of July 1888.

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forbidden by s. 9 of Act No. XII of 1881 ?" The reference was rendered necessary by the conflicting decisions of this Court, some bearing directly on this question, others applying by analogy.

The sub-letting in this case was by a lease for a term of five years, by which the lessees agreed to pay an annual rent of Rs. 100, of which they agreed to pay Rs. 40 to the zemindar and Rs. 60 to Nathu Lal, the ex-proprietary tenant and grantor of the lease. The zemindar, who was no party to the granting of the lease, is the plaintiff, and has brought the suit, out of which this reference has arisen, for possession of the occupancy holding, alleging that the granting of the lease was, by reason of s. 9 of Act No. XII of 1881, illegal, and had determined the right of occupancy of his ex-proprietary tenant. Nathu, the ex-proprietary tenant, and his lessees are the defendants to the suit.

The three sections of Act No. XII of 1881, which appear to us to be material to the consideration of the question referred, are ss. 7, 8 and 9. By the first two paragraphs of s. 7 it is enacted that [221] "Every person who may hereafter lose or part with his proprietary rights in any mahal, shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages.

"Persons having such rights of occupancy shall be called ex-proprietary tenants, and shall have all the rights of occupancy tenants."

S. 8 is as follows :—

"Every tenant who has actually occupied or cultivated land continuously for 12 years has a right of occupancy in the land so occupied or cultivated by him.

"Such tenants shall be called occupancy tenants. The occupation or cultivating of the father or other person from whom the tenant inherits shall be deemed to be the occupation or cultivating of the tenant within the meaning of this section :

"Provided that no tenant shall acquire, under this section, a right of occupancy—

"(*a*) In land which he holds from an occupancy tenant, or from an ex-proprietary tenant, or from a tenant at fixed rates ;

"(*b*) In sir land ;

"(*c*) In land held by him in lieu of wages :

"Provided also that, when a tenant actually occupies or cultivates land under a written lease, without having a right of occupancy in such land, the period of twelve years necessary for acquiring a right of occupancy therein by him or any one claiming under him shall begin on the expiration of the term of such lease. If during the currency of such lease he ceases to occupy the land comprised therein and sub-lets it to another, no right of occupancy in such land shall be acquired by the sub-lessee during the currency of the lease."

[222] S. 9 is as follows :—

"The right of tenants at fixed rates may devolve by succession or be transferred.

"No other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein.

"When any person entitled to such last-mentioned right dies, the right shall devolve as if it were land : Provided that no collateral relative

of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this clause."

An "occupancy tenant" under the Act is a person having a "right of occupancy." As we shall show presently, a "right of occupancy," as that term is used in the Act, does not imply that the person in whom that right is vested must himself or by his servants actually occupy or cultivate the holding in which he has the "right of occupancy."

It will be seen from s. 8 of Act No. XII of 1881, first, that proviso (*a*) refers to cases in which a person having no right of occupancy in a holding in respect of which there is a right of occupancy may hold such land as a tenant of the occupancy tenant, that is, of the person who has in such land the right of occupancy, and, secondly, from the last proviso, that it was contemplated that a sub-lessee not holding under an existing lease, may, under the earlier part of the section, acquire a right of occupancy in the land held by him after the expiration of the lease to his immediate landlord who is not an occupancy tenant.

We have thus in s. 8 two classes of sub-tenants recognised, namely, a tenant of an occupancy tenant and a tenant of a lessee who holds under a written lease. The word "tenant" was thus defined by Littledale, J., in *R.* v. *Ditcheat* (1), "a tenant is a person who holds of another, he does not necessarily occupy."

[223] The tenant of an occupancy tenant until his tenancy is determined either by the determination of the right of occupancy of the occupancy tenant under whom he is holding, as, for instance, by an ejectment under the Act, or by his own ejectment under the Act, has a right to occupy the land, although whilst the right of occupancy of the occupancy tenant from whom he is holding is subsisting he never can obtain a right of occupancy in the land. Similarly the sub-tenant of a tenant holding under a written lease has a right to occupy the land held by him as such sub-tenant, although he cannot during the currency of such written lease obtain any right of occupancy in the land.

These considerations show that a right of occupancy must not be confounded with a right to occupy. Those two rights may co-exist in the same person, as when an occupancy tenant himself or by his servants, cultivates his occupancy holding. Or, those two rights may be vested in two different persons, the right of occupancy being vested in the occupancy tenant and the right to occupy being vested in his tenant during the currency of the latter's tenancy. In the latter case the position is similar in some respects to the position of a proprietor who lets his land to a tenant, the proprietary right remaining vested in the landlord and the right to occupy the land vesting in the tenant. A right of occupancy may be acquired under s. 8 by a person who has not acquired it under s. 5 as a tenant at a fixed rate or under s. 7 as an ex-proprietary tenant: but, although under s. 9 the right of tenants at fixed rates may devolve or be transferred, a different limitation is placed by that section on the devolution or transfer of any other right of occupancy. S. 9 does not prohibit the transfer of any right to occupy. What the second paragraph of s. 9 of Act No. XII of 1881 does enact is "No other *right of occupancy* shall be transferable, &c.," which is a very different thing from enacting that "no other right to occupy shall be transferable." The second paragraph of s. 9 makes all rights of occupancy other than those of tenants at fixed

(1) 9 B. and C. 183.

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rates absolutely incapable of being transferred except by voluntary transfer between persons in favour of whom as co-sharers such right [224] originally arose, or who have become by succession co-sharers therein."

The omission to recognise the distinction between "a right of occupancy" as those words are used in Act No. XII of 1881, and a right to occupy, and the assumption by some members of the Court in one case that a right of occupancy means "Nothing but the right to live on and cultivate the land as one's own," led to the conflict of authority which exists in the rulings of this Court on the effect of the second paragraph of s. 9 of Act No. XII of 1881.

We now propose to show that since 1851, except in some decisions of this Court, to which we shall refer later on, a tenant with a right of occupancy has always been considered to have enjoyed the power of sub-letting and that such power has not been interfered with by the Legislature.

In 1851 the question arose as to whether a maurusi ryot had a right to sub-let his holding. The opinion of the Local Government on that subject is to be found in the letter from the Secretary to Government, North-Western Provinces, to the Secretary to the Sudder Board of Revenue, dated Simla, the 6th October 1851, No. 3580 of 1851, published in *Selections from Government Records*: *Thomson's Despatches*, Vol. 2, pages 216 and 217.

The third paragraph of that letter is as follows :—

"On mature deliberation, the Lieutenant-Governor does not perceive how the right of a mouroosee ryot to sub-let his land can be denied. He has a right of occupancy so long as he pays according to the pargana rate for the land in his occupation. If from any cause he does not cultivate the land himself, he is at liberty, sooner than throw up any portion of his land, to provide for itscultivation by others. He continues responsible to the malguzar for the rent of his land, and so long as he pays it, the malguzar cannot interfere with him. If he sub-lets to a great advantage, presumption exists that the rent he pays is below the pargana usage, and the malguzar may sue for re-adjustment and increase of rent; but he cannot summarily set aside the mouroosee ryot and collect direct from the [225] under-tenant. That would virtually be to oust the mouroosee ryot, contrary to the conditions of his tenure, which are continued cultivation and punctual payment of the equitable rent."

S. 6 of Act No. X of 1859 was as follows :—

"Every ryot, who has cultivated or held land for a period of twelve years, has a right of a occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khomar, neejjote, or seer land beloning to the proprietor of the estate or tenure and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year by a ryot having a right of occupancy. The holding of the father, or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section."

The question whether a ryot having a right of occupancy under s. 6 of Act No. X of 1859 could legally sub-let his holding came before the High Court at Calcutta on at least two occasions.

In *Haran Chundra Paul* v. *Mookta Soonduree* (1) Sir Barnes Peacock, C. J., and Dwarkanath Mitter, J., in 1868 held that the plaintiff, who was

(1) 10 W.R.C.R. 113.

a tenant with a right of occupancy, "did not transfer any right of occupancy, if he merely sub-let the land to ryots to hold under him. It is expressly provided by s. 6 of Act X of 1859 that the rule therein laid down does not, as respects the actual cultivator, apply to land sub-let for a term of years by a ryot having a right of occupancy. It therefore recognises the right of a ryot having a right of occupancy to sub-let the lands which he holds, although the ryot holding under him does not gain a right of occupancy as against him."

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In *Jumeer Gazee* v. *Goneye Mundul* (1) the right of a tenant who had a right of occupancy to sub-let by lease was recognised. That case was decided under Act No. X of 1859.

[226] In *Sadut Ali* v. *Pundit Hait Ram* (2) it was stated in the judgment of the Court that in respect of occupancy tenures sub-letting had been recognised to be the practice by high authority.

Section 7 of Act No. XVIII of 1873 is the same as the first two paragraphs of s. 7 of Act No. XII of 1881. Section 8 of Act No. XVIII of 1873 is the same as s. 8 of Act No. XII of 1881. Section 9 of Act No. XVIII of 1873 is as follows :—

"The right of tenants at fixed rates shall be heritable and transferable.

"No other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such right.

"When any person entitled to such last mentioned right dies, the right shall devolve as if it were land: Provided that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this section."

The difference which exists between s. 9 of Act No. XVIII of 1873 and s. 9 of Act No. XII of 1881 is immaterial to the purpose for which we refer to s. 9 of Act No. XVIII of 1873.

In *Goki* v. *Kewal Ram* (3) the Sudder Board of Revenue, N. W. P., held, with reference to s. 9 of Act No. XVIII of 1873, that an occupancy tenant had a right to sub-let his holding. In *Kunj Behari* v. *Kinlock* (4) Spankie and Oldfield, JJ., held that s. 9 of Act No. XVIII of 1873, did not bar a sub-letting "by an occupancy tenant, as by so doing he does not part with his occupancy right within the meaning of that section."

In *Haji Hidayat-ulla* v. *Ram Newaz Rai* (5) Sir R. Stuart, C. J., and Oldfield, J., held that s. 8 of Act No. XVIII of 1873 showed that a sub-lease by an occupancy tenant was contemplated by that Act and consequently was not a transfer of the right of [227] occupancy to which s. 9 of that Act would apply. The lease in that case was granted by an ex-proprietary tenant and provided that the lessor should have no right of re-entry on the land so long as the stipulated rent was paid. Those learned Judges held that the perpetual character of the lease made no difference, that under the lease the use of the land passed to the lessee, that such use was recoverable on non-payment of the rent reserved, and that the right of occupancy remained in the lessor, who was an ex-proprietary tenant.

The authorities which we have cited show that down to 1882 the right of every occupancy tenant to sub-let his occupancy holding was recognised.

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(1) 12 W.R.C.R. 110.
(2) S.D.A.N.W.P.R. 1866, Vol. I, p. 37.
(3) 1 Legal Remembrancer, Rent and Revenue Series, 202.
(4) 1 A.W.N. (1881), 11.
(5) 2 A.W.N. (1882), 80.

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The earliest decision, of which we are aware, which threw a doubt upon the right of an occupancy tenant, other than a tenant at a fixed rate, to sub-let his occupancy holding was that of *Ganga Din* v. *Dhurandhar Singh.* That case came before the Full Bench in 1883 and is reported in I. L. R., 5 All. 495, and W. N. for 1883, p. 89. It was there held that a mortgage with possession by an occupancy tenant of his occupancy holding was a transfer which was prohibited by the second paragraph of s. 9 of Act No. XII of 1881. The mortgagor was not a tenant at a fixed rate. The mortgage then in question was usufructuary. No doubt a usufructuary mortgage by an occupancy tenant of his occupancy holding does for the term of the mortgage transfer such right to the possession of the land mortgaged as the mortgagor has, but it does not transfer the right of occupancy and no decree for sale of the right of occupancy could be obtained in a suit by the mortgagee under Act No. IV of 1882, whether the second paragraph of s. 9 of Act No. XII of 1881 applied or not. Even if an occupancy tenant other than a tenant at a fixed rate were to bring a suit for the redemption of a usufructuary mortgage of his occupancy holding, no decree for sale under s. 92 and no order for sale under s. 93 of Act No. IV of 1882 of the right of occupancy could, by reason of the bar of the second paragraph of s. 9 of Act No. XII of 1881, be made. Possibly Act No. IV of 1882 did not apply to the mortgage in the case [228] which we are considering, or was not present to the minds of the learned Judges who decided that case. It is plain from ss. 58, 67, and 68 of Act No. IV of 1882 that a usufructuary mortgagee of land cannot maintain a suit for sale of the mortgaged property, and that his rights of suit are confined to a right of suit for possession for the purposes of enjoying the usufruct in the manner provided by the mortgage, and to a right of suit for the mortgage money, when such suit would lie under s. 68 of Act No. IV of 1882. We fail to see how the second paragraph of s. 9 of Act No. XII of 1881 can apply to a usufructuary mortgage, as that word is defined in clause (*d*) of s. 58 of Act No. IV of 1882, of an occupancy holding by the tenant having the right of occupancy. On the other hand, the second paragraph of s. 9 of Act No. XII of 1881 would, as it appears to us, apply to a simple mortgage, a mortgage by conditional sale, or an English mortgage, as such mortgages are defined respectively in clauses (*b*), (*c*), and (*e*), of s. 58 of Act No. IV of 1882, as the mortgagee would, if it were not that the second paragraph of s. 9 enacts that "no other right of occupancy shall be transferable in execution of a decree, &c.," be entitled in case of default to obtain from a Civil Court a decree for sale of all the mortgagor's rights in the property, or a decree for foreclosure which would deprive the mortgagor of all rights in the property. By reason of the second paragraph of s. 9 of Act No. XII of 1881 a mortgagee, under a simple mortgage, a mortgage by conditional sale, an English mortgage, or any other form of mortgage under which in other cases a mortgagee could obtain a decree for sale or a decree for foreclosure, granted by a tenant, other than a tenant at a fixed rate, having a right of occupancy, would take no interest in the occupancy holding, as any such mortgage would be in contravention of the spirit, if not of the letter, of the paragraph in question.

In *Wajiha Bibi* v. *Abhman Singh* (1) a Division Bench followed the ruling of the Full Bench in *Ganga Din* v. *Dhurandhar Singh* (2).

(1) 3 A.W.N. (1883) 166. (2) 5 A. 495.

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[229] In *Abadi Husain* v. *Jurawan Lal* (1) it was held by a Full Bench that a zar-i-peshgi lease of an occupancy holding granted by tenants with a right of occupancy was a transfer in contravention of s. 9 of Act No. XII of 1881. The grantors were not tenants at fixed rates. How far the fact that the zar-i-peshgi lessees claimed and pleaded that they had acquired all the rights of the occupancy tenants may have influenced the Full Bench in its decision, we cannot say. For the same reasons which we have expressed in our comments upon the decision in *Ganga Din* v. *Dhurandhar Singh* (2) we are of opinion that the decision in *Abadi Husain* v. *Jurawan Lal* and others was wrong, and was based on a confusion by one or more members of the Court of a grant of a right to occupy with a grant of a right occupancy.

In *Jharan Singh* v. *Shadi Ram* (3), in *Wali Muhammad* v. *Raghubar* (4), and in *Nugpal* v. *Sital Puri* (5) the decision of the Full Bench in *Abadi Husain* v, *Jurawan Lal* (1) and others was followed by Division Benches.

So far as the decision in *Madho Lal* v. *Sheo Prasad Misr* (6) related to the second paragraph of s. 9 of Act No. XII of 1881, it followed the decisions in *Ganga Din* v. *Dhurandhar Singh* (2) and *Abadi Husain* v. *Jurawan Lal* (1), and was, we are satisfied, wrong. The case of *Jhinguri Tewari* v. *Durga* (7) does not affect the question which we have to consider, as there the sale-deed professed to transfer the right of occupancy. It has recently been decided, and we think rightly, in *Khamani Ram* v. *Sundar* (8), by the Board of Revenue, North-Western Provinces and Oudh, that although a tenant with a right of occupancy, other than a tenant at a fixed rate, cannot legally transfer his right of occupancy, he can sub-let the right to cultivate the land comprised in his occupancy holding, as such a sub-letting does not profess to be a transfer of the right of occupancy, and is not in contravention of section 9 of Act No. XII of 1881.

[230] Our answer to the question referred is, that an ex-proprietary tenant can sub-let the whole or any part of his occupancy holding, and that such a sub-letting is not forbidden by section 9 of Act No. XII of 1881.

In order that the effect of our opinion may not be misunderstood and our decision be not misapplied, it is necessary to say that it is obvious to us that the interest in an occupancy holding of any person to whom an occupancy tenant sub-lets, or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding, will determine, if it has not previously determined, on the termination of the right of occupancy, and can subsist no longer than the right of occupancy subsists. Such sub-tenant does not by the sub-letting become the tenant of the zemindar, who is entitled to receive from his occupancy tenant the rent due by him. The rights of the zemindar under Act No. XII of 1881 to obtain an enhancement of the rent payable to him or to obtain an ejectment of his occupancy tenant and of those holding under him, cannot be interfered with or lessened by the fact that his occupancy tenant has by a lease, or other form of sub-letting, or by a usufructuary mortgage, to the granting of which the zemindar was not an actively consenting party, sub-let or mortgaged the occupancy holding or any part of it. A sub-tenant or usufructuary mortgagee as such is not entitled to use the land for any

(1) 7 A. 866. (2) 5 A. 495. (3) 9 A.W.N. (1889) 145.
(4) 9 A.W.N. (1889) 145. (5) 10 A.W.N. (1890) 3.
(6) 12 A. 419. (7) 7 A. 878. (8) 13 A.W.N. (1893) 9.

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purposes other than those for which the occupancy tenant, if in possession, would be entitled to use it.

On the appeal being sent back to the Bench concerned, judgment was delivered on the 30th of June 1893 dismissing the appeal in accordance with the judgment of the Full Bench given above.

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15 A. 231 (F.B.)=13 A.W.N. (1893) 130.

[231] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

MAHESH SINGH (*Defendant*) *v.* GANESH DUBE AND ANOTHER (*Plaintiffs*).* [28th June, 1893.]

Act XII of 1881, *ss.* 7, 8, 9—*Landlord and tenant—Occupancy tenant, power of, to sub-let—Perpetual lease by occupancy tenant.*

The effect of a perpetual lease made by an occupancy tenant of his occupancy holding to a person not a co-sharer in the right of occupancy considered.

[R., 5 A.L.J. 30=A.W.N. (1908), 33; 11 C.P.L.R. 22 (25); 2 O.C. 12; 2 O.C. 204; 2 O.C. 294.]

THIS was a reference to the Full Bench made by Edge, C. J., and Aikman, J., as to the effect of the granting, by an occupancy tenant, of a perpetual lease of his occupancy holding. The essential facts of the case, with the exception that in this instance the lease purported to be perpetual, were similar to those in *Khiali Ram* v. *Nathu Lal* reported above at p. 219.

Munsif *Jwala Prasad*, for the appellant.

Mr. *D. Banerji*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by EDGE, C. J.

The question referred to the Full Bench is as follows:—

"Is a lease in perpetuity of an occupancy holding granted by the occupancy tenant to whom the second and third paragraphs of s. 9 of Act No. XII apply, to a person who is not a co-sharer in the right of occupancy, valid as against the occupancy tenant?"

In the reference to the Full Bench in S. A. No. 948 of 1889† we have in our judgment delivered this day expressed our opinion that s. 9 of Act No. XII of 1881 does not prohibit a sub-letting by an occupancy tenant of his occupancy holding or of any part of it. The term for which the occupancy tenant may have sub-let is immaterial, as by sub-letting he does not and cannot transfer his right of occupancy. The sub-tenant by the sub-letting in perpetuity does not become a tenant of the zemindar, and his interest will not survive the determination of the occupancy right. Such sub-tenant cannot use the land for any purpose other than that for which the occupancy tenant, if in possession, would be entitled to use it. That is our answer to the question referred.

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* Second Appeal, No. 1163 of 1890, from a decree of Babu Mritunjoy Mukerji, Subordinate Judge of Banares, dated the 11th of September 1890, confirming a decree of the Munsif of Benares, dated the 30 January 1886.

† 15 A. 219, *supra*.

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[232] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

BANKE BEHARI AND OTHERS (*Defendants*) *v.* SUNDAR LAL AND OTHERS (*Plaintiffs*).* [28th June, 1893.]

Act No. IX of 1872, *s.* 74—*Mortgage—Interest—Penalty.*

Where in a contract under which interest is payable it is agreed between the parties that if such interest be not paid punctually the defaulter shall be liable to pay interest at an enhanced rate, (whether from the time of default or from the time when interest first became payable under the contract) such agreement does not come within s. 74 of the Indian Contract Act, and is to be construed according to the intentions of the parties as expressed therein and not as a stipulation for a penalty. Such agreement is to be enforced according to its terms, unless it be found to have been when made unconscionable or fraudulent.

The English doctrine of penal stipulations as applied to such agreements considered and not followed.

Rai Balkishen Das v. *Raja Run Bahadur* (1) considered and explained.

[Not F., 8 C.P.L.R. 54 ; 8 C.P.L.R. 77 ; F., 17 M. 62=4 M.L.J. 17 ; R., 22 C. 658, (667); 25 M. 343 (346)=11 M.L.J. 421 ; 24 M.L.J. 135 (175)=13 M.L.T. 20 ; 11 O.C. 307 (309) ; 99 P.R. 1894.]

THIS was a reference to the Full Bench made at the instance of Tyrrell and Blair, JJ. The question for determination was thus stated in the referring order :—"This appeal in its single and somewhat clumsy plea raises the question whether a portion of the contract between the parties is liable to be treated as a promise under given circumstances to pay damages for the breach of contract, or whether the parties did stipulate or intended to stipulate that certain charges by way of interest should be contractual interest, and as such not liable to be assessed by a Court as damages. This question has recently been discussed by a Full Bench of the Calcutta High Court in *Kala Chand Kyal* v. *Shib Chunder Roy* (2), and by a Full Bench of the Bombay High Court in *Umar Khan Muhammad Khan Deshmukh* v. *Sale Khan* (3). The point was also considered by this Court in *Banwari Das* v. *Muhammad Mashiat* (4). We think it desirable that a Full Bench of this Court should consider and determine the point, and we therefore refer it to a Full Bench."

[233] The facts of the case, so far as they are necessary for the purposes of this report, are stated in the judgment of the Court.

Mr. *Roshan Lal* and Babu *Durga Charn Banerji*, for the appellants.

Pandit *Moti Lal Nehru* for the plaintiffs.

The judgment of the Court (Edge, C. J., Tyrrell, Knox, Blair, Burkitt and Aikman, JJ.), was delivered by EDGE, C. J.

JUDGMENT.

The suit, in an appeal in which this reference to the Full Bench was made, was brought for foreclosure of a mortgage by way of conditional sale.

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* First Appeal, No. 47 of 1891, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Mainpuri, dated the 3rd of December, 1890.

(1) L.R. 10 I.A. 162=10 C. 305. (2) 19 C. 392.
(3) 17 B. 106. (4) 9 A. 690.

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The mortgage-deed was made on, and dated, the 25th of April, 1874, by Chaudhri Nand Kishore. So far as it is material to the question we have to consider, it is as follows :—

"That a 5-biswa zemindari share in the village Niwari Kalan, pargana Bharthna, mahal Nand Kishore, is exclusively owned and possessed by me as a separate mahal ; that as each mahal is now recorded as consisting of 20 biswas ; that 5-biswa share is entered in my name as a 20-biswa (mahal) ; that in order to pay the debt and my personal expenses, I have mortgaged eight biswas out of the 20-biswa mahal, the aforesaid share, owned and possessed by me, *i.e.*, two out of five biswas of the entire village, together with all the rights and interests appertaining to the aforesaid share, to Dichit Sundar Lal, Mata Parshad, and Rang Lal, sons of Dichit Behari Lal, caste Brahmans, occupation monetary dealings and zemindari, residents of the village Niwari Kalan, pargana Bharthna, in lieu of Rs. 2,000, half of which is Rs. 1,000 ; that it is agreed that I shall pay interest of the aforesaid money at the rate of Re. 1 per cent. per mensem every year ; that I shall pay the principal sum within 10 years; that should I fail to pay any amount of interests in any year, it shall be added to the principal ; that in case of default in payment of interest every year the aforesaid rate of interest shall be disregarded and interest shall be charged on the entire principal and interest at the rate of Re. 1-8-0 per cent. per mensem from the date of the execution of this document ; that if I fail to pay on due date the entire [234] principal sum, together with interest and compound interest which may then be due, the mortgaged share shall be foreclosed in favour of the mortgagees. I or my heirs shall have no objection to it ; that when I offer to pay Rs. 1,000 and interest in a lump sum within the fixed term, the mortgagees should take the same, but I have no power to pay the entire money within the stipulated term; that I shall get the mortgaged share redeemed from mortgage on payment of the entire principal and interest after the expiry of the fixed term."

In the plaint it was alleged that no payment of principal or interest had been made. The plaintiffs claimed to have interest allowed at the rate of Re. 1-8-0 per centum per mensem from the date of the mortgage.

For present purposes it is necessary to refer only to the fourth paragraph of the written statement, which is as follows :—"The rate of interest at Re. 1-8-0 instead of 1 per centum being penal, should not justly be allowed according to many precedents."

There is no plea that the mortgagor was induced by fraud to enter into the contract contained in the deed. It is not suggested in the pleadings that the mortgagor did not in fact thoroughly understand the terms of the mortgage-deed, or that the language of the deed did not express correctly and plainly the terms upon which the mortgagees agreed to lend and the mortgagor agreed to borrow the Rs. 2,000 principal moneys, nor is it alleged in the pleadings that the agreement as to interest was unconscionable. The defendants do not suggest by their fourth plea that the contract was made on the basis of any decisions in England or in India, or what were the decisions prior to the 25th of April, 1874 in India, according to which the contract as to alternative rates of interest should be regarded as penal. No evidence has been given to show that the mortgagor was induced by any fraud or deception to enter into the agreement embodied in the mortgage-deed, or to show that he did not thoroughly understand the language of that deed, or that it was not the intention of the parties at the time the principal [235] moneys were lent, that in the event mentioned in the deed the mortgagor should become

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liable to allow in account interest from the date of the deed at the rate of Re. 1-8-0 per centum per mensem, or that having regard to any facts existing at the time when the mortgage contract was made the rate of Re. 1-8-0 per centum per mensem was an unconscionable rate of interest.

As the case thus stands we have to determine whether the plaintiffs are entitled to be allowed in the taking of the accounts interest at the rate of Re. 1-8-0 per centum per mensem, as from the date of the mortgage-deed, or at some other and what rate, or are to be allowed interest at the rate of Re. 1 per centum per mensem with or without some and what compensation for the non-payment of the yearly interest as it became due. In other words, are we on the above facts bound to interpret the contract in accordance with the ordinary and natural meaning of its language, or are we entitled to say that the parties did not mean what is expressed by the language which they used in this document in writing, and can we discard the clearly expressed intention of the parties and make a contract for them which they neither made, nor intended to make for themselves? If we are bound to follow blindly the law as decided in English Courts on contracts made in England and apply that law in this case to a contract made in these Provinces by parties who are not alleged to have known what the law on this subject in England was, or to have intended that their contract should be interpreted by the law of England and not according to their intention as expressed by them in thier own language, the answer would be obvious. It would be, we must disregard the intentions of the parties to the contract and declare that the stipulation as to the Re. 1-8-0 per centum per mensem interest is penal, and not to be enforced. Before doing violence to the expressed intention of the parties to the contract we must see whether in the case of this contract made in these Provinces of India between natives of these Provinces, we should be justified by statute or other law or on authority in holding that the plaintiffs are not entitled to the interest at the rate of Re. 1-8-0 per centum per mensem which the [236] mortgagor by his contract agreed that the mortgagees in the event which happened should have.

It has not been suggested, nor could it indeed be suggested, that an agreement for compound interest and for interest at the rate of Re. 1-8-0 per centum per mensem would *prima facie* be an exorbitant, unconscionable, or unjust agreement in a contract of mortgage made in these Provinces. The rate is no doubt high, but it is not unusual, and, although above the average, the security might be doubtful, or the lender might not be disposed to tie up his capital for 10 years at a less rate of interest. According to the English decisions and some of those in India such considerations would not affect the question.

As the contract in this case was made subsequently to the first day of January, 1856, on which day Act No. XXVIII of 1855 came into force, the Regulations relating to usury, which were then repealed, do not apply. By s. 2 of Act No. XXVIII of 1855 it was enacted—"In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable." Consequently, we are not allowed in deciding on the rights of the parties to this mortgage-deed or their representatives to regard any argument that the rate of interest was usurious. As the rate of interest in the event which has happened has been agreed upon by the parties to the contract, and is not shown to have been unconscionable, s. 2 of Act

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No. XXVIII of 1855, unless it has been modified by subsequent legislation, precludes us from decreeing any other rate which we might deem reasonable, and from interpreting the agreement as to interest in any other sense than that which was expressed by the parties.

Unless s. 74 of the Indian Contract Act, 1872 (Act No. IX of 1872) has the effect of modifying s. 2 of Act No. XXVIII of 1855, we are aware of no statutory modification of s. 2 of Act No. XXVIII of 1855.

[237] It appears to us that s. 74 of the Indian Contract Act, 1872, relates only to those cases in which a specific sum is named in a contract as the sum to be paid on a breach of the whole contract or on a breach of a particular and specified condition or conditions contained in a contract, and cannot possibly apply to a contract such as the present one in which no specific sum is named in that respect, and the contract is to make periodic yearly payments of interest at the rate of Re. 1 per centum per mensem, and that, if a default is made, the rate of interest shall be 1½ per centum per mensem from the date of the contract.

In the present case the term of the mortgage has expired, no interest has been paid, and the principal is still due. Interest for the first year became due and payable on the 25th of April 1875. It was not paid. It may be doubtful, having regard to the terms of this mortgage-deed, whether the mortgagees could at any time have sued for the yearly amounts of interest as they became due, and whether the intention of the parties was not that in case of default in payment of the lower rate of interest, interest should be calculated at the higher rate as from the date of the contract and added to the principal as principal.

For the purpose of illustrating our views as to the inapplicability of s. 74 of the Indian Contract Act, 1872, to agreements to substitute on the happening of a given state of circumstances, a higher rate of interest for a lower, we will assume a case of a mortgage for 10 years from the 25th of April 1893, with an agreement to pay on the 25th of April in each year interest on the principal at the rate of Re. 1 per centum per mensem and that in case of default being made in the due payment of such interest the mortgagor should, as from the 25th of April 1893, and thenceforward, pay interest on the principal at the rate of Re. 1-8 per centum per mensem in lieu of interest at the lower rate of Re. 1. In such case how is s. 74 of the Indian Contract Act., 1872, to be applied should default be made in the payment of the interest due on the 25th of April 1894, and again default be made on the 25th of April 1895? If the mortgagee should bring his suit in May 1895 for [238] the interest due in 1894 and for that due in 1895, what should be the decree? Should it be for the amount of the higher rate of interest, or of the lower rate of interest from the date of the contract to the 25th of April 1894, *plus* compensation, and of the higher rate of interest from the date of the breach, that is, from the 25th April 1894, or should it be for the lower rate of interest for the two years *plus* compensation, or should it be one for compensation only? It has been held in India, in cases to which we shall subsequently refer, that a contract to pay a higher rate of interest from the date of the contract, on default being made in payment of a lower rate of interest, is to be regarded as a stipulation for a penalty, to which s. 74 of the Indian Contract Act, 1872, is to be applied. It has also been held in India, and so far as we are aware, has been seldom doubted, that an agreement to pay a higher rate of interest from the date of the default in payment of a lower rate is a contract to be performed, and

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not a stipulation for a penalty to be relieved against, and that s. 74 of the Indian Contract Act, 1872, does not apply to such an agreement.

The two propositions are clearly and concisely put in the judgment in *Nanjappa* v. *Nanjappa* (1). Although the cases there put, like many of those in which this question has arisen, were cases in which a borrower had agreed to pay the principal money with certain interest on a given day, with a stipulation that a higher rate of interest should be paid if default were made, there cannot, as it appears to us, be any difference in principle between such cases and that which we are putting by way of illustration. In each case it is the stipulation as to a higher rate of interest, if it could be enforced, which would impose on the borrower the obligation of paying a larger sum than he would have to pay if no default were made. At pp. 166 and 167 of I.L.R., 12 Mad., the two propositions are thus stated :—

"By the cases in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate with a stipulation that in default the debtor shall [239] thenceforward pay a higher rate of interest is strictly enforceable. In such an agreement no question of penalty arises, because it imposes an obligation on the debtor to pay a larger sum than what was originally due. In the words of s. 74 of the Contract Act no sum is named as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor, but from that date the terms on which the debtor holds the money became less favourable. By the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other land, where the stipulation is that on default the higher rate shall be payable from the date of the original obligation, the debtor does on default become immediately liable for a larger sum, *viz.*, the difference between the enhanced and the original rate of interest already due." We should have thought that in each of those cases the debtor by the default accepted the alternative arrangement of paying a higher rate of interest.

Now, to continue our illustration. According to those decisions in India which regard an agreement to pay a higher rate of interest from the date of the contract in lieu of a lower rate as a penalty and as within s. 74 of the Indian Contract Act, 1872, the decree of the mortgagee of our illustration, so far as it related to the claim for interest from the 25th of April 1893 to the 25th of April 1894, should, to be consistent with s. 74, be for one year's interest at the rate of Re. 1 per centum per mensem *plus* reasonable compensation. Otherwise where would the compensation be? It might easily happpen that on the 25th of April 1894 and thence until the decree in the suit of 1895 was made, the rate of interest at which money could be invested on reasonably good security would be only eight annas per centum per mensem. In such case the decree so far as it related to the claim for interest from the 25th of April 1893 to the 25th of April 1894, would be for 12 months' interest on the principle at the rate of 12 per centum per annum *plus* compensation at the rate of 6 per centum per annum calculated on the amount of the 12 per centum interest from the date of the breach, that is, from the 25th of April 1894, and would not be [240] a decree for interest at the rate of 18 per centum per annum calculated on the principal, and yet the latter decree would be according to the agreement as the parties who made it understood it.

(1) 12 M. 161 at pp. 166 and 167.

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Then what should be the decree so far as it related to the claim for interest from the 25th of April 1894 to the 25th of April 1895? It should, apparently according to some of the decisions, to which we are referring, be for 12 months' interest at the rate of 18 per centum per annum calculated on the principal, as the agreement so far as it related to a higher rate from the date of default was to be performed, and consequently from the default of the 25th of April 1894 interest on the principal would be at the rate of 18 per centum per annum. We are unable to understand on what principle one and the same contract as to interest can receive two different and inconsistent interpretations. In reply to this it might be said,—"Let there be one consistent rule and in such a case apply section 74 of the Indian Contract Act, 1872, to the whole period of the agreement."—If that were the reply, the question might be asked, why should the mortgagor be in a better position and the mortgagee in a worse under the contract as it was made than they would have been if in the negotiation for the loan, to give a second illustration, the borrower had said,—"I will regularly pay you interest at the rate of 12 per centum per annum, and should I make default in the payment of that interest I will pay you interest from the date of the loan at the rate of 18 per centum per annum,"—and the mortgagee should say,—"No, I fear you would make default. I will lend you my money only on the terms that you pay interest for the whole period at the rate of 18 per centum per annum,—"and the borrower said,—"Very well, I accept your terms," —and the mortgage was drawn up accordingly, providing for only one rate of interest and that rate 18 per centum per annum. In this latter case we presume that no Court would hold that the contract did not express what the parties to it meant, or, if nothing showing that the contract was unconscionable or tainted with fraud was proved, that it was a contract from the performance of which the borrower was to be relieved. An ordinary man, who was not acquainted with the English equitable doctrine of penalties, would be amazed [241] to find that the money-lender, who had refused to lend his money at a less rate of interest than 18 per centum per annum, would in the eye and conscience of the law be, in case of a default in payment of interest, in a better position than would be the man who gave the borrower a chance of not having to pay 18 per centum per annum interest but only 12: yet such is the English equitable doctrine of penalties and such is the principle which we are asked to sanction in these Provinces. We fail to see on what sound principle the mortgagor of our principal illustration, if s.74 of the Indian Contract Act, 1872, is to be applied to the whole period of his contract, is to be by his default in a better position than would be another debtor, who had by a mortgage of the same date giving an equally good security contracted to pay interest at the rate of 12 per centum per annum, with a stipulation that in default he should thenceforward pay interest at the rate of 18 per centum per annum, or, why one and the same agreement as to higher interest is to receive two different interpretations, as appears to have been held by Banerjee, J., in *Kalachand Kyal* v. *Shib Chander Roy* (1), and as would appear to be the logical result of many of the decisions in India, and why such a contract is to be construed as a penalty so far as it relates to the payment of a higher rate of interest from the date of the agreement to the default and as a contract to be performed so far as it relates to the payment of a higher rate from the

(1) 19 C. 392.

date of the default. By the agreement which we are using as an illustration the parties had agreed that on default in payment of interest at the lower rate the contract should be construed as if the higher rate of interest was the rate payable during the whole period of the mortgage. That stipulation would attach, if it was capable of attaching at all, the moment default in paying the interest due in 1894 would be made, and if s. 74 of the Indian Contract Act, 1872, applied, it must, as it appears to us, apply, on the happening of the breach to the whole period of the contract, however difficult it might in practice be to apply it.

The reasons given by Mitter, J., in his judgment in *Baijnath Singh* v. *Shah Ali Husain* (1), independently of the decision of the [242] Privy Council in *Rai Balkishen Das* v. *Raja Run Bahadur Singh* (2), on which he also relied, conclusively show in our opinion that s. 74 of the Indian Contract Act, 1872, does not apply to cases of two rates of interest. That was a case in which the borrower agreed to pay the principal on the 14th of December, 1883 with interest at 2 per centum per mensem, and that if the money were not paid on the 14th of December, 1883, the principal should bear interest at the rate of 4 per centum per mensem from the date of the loan, the 14th of December, 1881.

Further, the illustrations to s. 74 suggest to our minds that the section was not intended to apply to a case in which interest should be payable periodically, and in our opinion the wording of the section precludes its application to any case of alternative rates of interest.

There is much conflict in the decisions on the question as to whether section 74 of the Indian Contract Act, 1872, does or does not apply to a contract to pay enhanced interest. In *Banuari Das* v. *Muhammad Mashiat* (3), *Baij Nath Singh* v. *Shah Ali Husain* (1), *Basavayya* v. *Subbarazu* (4), *Umar Khan Muhammad Khan Deshmukh* v. *Salekhan* (5), and by Tyrrell, J., in *Narain Das* v. *Chait Ram* (6), it was held that s. 74 of the Indian Contract Act, 1872, does not apply to agreements to pay on default a higher rate of interest from the date of the agreement. In some of the above cases the Judge were not unanimous on the question of the applicability of s. 74 of the Indian Contract Act, 1872, and in some of the judgments in the cases above referred to the decision of their Lordships of the Privy Council in *Rai Balkishhen Das* v. *Raja Run Bahadur Singh* (2) was treated, and, as we shall later on show, rightly, as an authority for holding that s. 74 of the Indian Contract Act, 1872, does not apply to an agreement to pay alternative rates of interest.

[243] In H. *Mackintosh* v. *C. Crow* (7), and by Banerjee, J., in *Kalachand Kyal* v. *Shib Chander Roy* (8), it was held that s. 74 of the Indian Contract Act, 1872, did not apply, and in *Dullabhdas Devchandshet* v. *Lakshman Das Swarupchund* (9) it was doubted whether s. 74 did apply to agreements to pay a higher rate of interest from the date of default.

In *Moya Ram* v. *Naubat* (10) it was held that s. 74 of the Indian Contract Act, 1872, did not apply to a condition in a bond that the sum due under it should be paid without interest by monthly instalments, and that in the event of any default in payment of two instalments, interest should be thenceforth charged on the amount due at the rate of 24 per centum per annum.

(1) 14 C. 248. (2) L. R. 10 I. A. 162=10 C. 305. (3) 9 A. 690.
(4) 11 M. 294. (5) 17 B. 106. (6) 6 A. 179. (7) 9 C. 689.
(8) 19 C. 392. (9) 14 B. 200. (10) 5 A. W. N. (1885), 62.

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In *Mackintosh* v. *Hunt* (1) it was held that s. 74 of the Indian Contract Act, 1872, did not apply to a contract to pay the principal sum on a given date by which the borrowers agreed :—" Should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent. per mensem."

In the following cases in which it has been decided in India that a contract to pay a higher rate of interest from the date of the contract on default in payment of a lower rate cannot be, or should not be, enforced by reason of s. 74 of the Indian Contract Act, 1872, it was held that the stipulation to pay a higher rate of interest was a penalty, and consequently that s. 74 of the Indian Contract Act, 1872, applied. The cases to which we refer are *Ram Lal* v. *Sada Sukh* (2), *Muthura Persad Singh* v. *Luggun Kooer* (3), *Sungut Lal* v. *Baij Nath Roy* (4), *Kalachand Kayal* v. *Shib Chander Roy* (5).

There is, so far as we are aware, no case in which it has been decided that s. 74 of the Indian Contract Act, 1872, applies to an agreement to pay a higher rate of interest in future on default being made in payment of a lower rate of interest.

[244] As in nearly all, if not in all, the cases in which it has been held that s. 74 of the Indian Contract Act, 1872, applied to contracts to pay a higher rate of interest from the date of the contract on a default being made in payment of a lower rate, s. 74 was apparently held to apply because the stipulation as to enhanced interest was considered to be a stipulation for a penalty, it is necessary to consider what is the origin in India of this doctrine as to a penalty as regards agreements to pay alternative rates of interest. We think that there can be no doubt that it is a doctrine imported from England, and that the principle as understood in England has not been applied in India in its integrity, and has, if we are to be guided by the decision of the Courts in England as to what is a penalty, been disregarded and not applied by Courts in India in cases in which it would have been applied in England.

In considering the question of what is a penalty in cases relating to interest according to the decisions in England, it must be borne in mind that a high rate of interest does not of itself, according to those decisions, constitute a penalty. The principle applied in England in cases of alternative rates of interest can be better illustrated than understood. The following illustration shows the application of the English doctrine of a penalty in cases of interest. It is this, we quote from Mayne on Damages, 4th ed., p. 139 :—" If a mortgagor agrees to pay 5 or 6 per cent. interest, and the mortgagee agrees to take less, say 4 per cent, if it is paid punctually, that is a perfectly good agreement; but if the mortgage interest is at 4 per cent., and there is an agreement that if it is not paid punctually 5 or 6 per cent. interest shall be paid, that is in the nature of a penalty which the Court will relieve against." To the mind of any one but a lawyer dominated by the English doctrine as to penalties, it would appear that the object and intention of the mortgagor and the mortgagee were in each of those cases the same, and that the same rule should be applied to each. In England where the Courts have long held that in the first case the contract is to be enforced according to its terms, and that in the other case what was stipulated for was a penalty which was to be

(1) 2 C. 202. (2) 4 A W.N. (1884), 280. (3) 9 C. 615.
(4) 13 C. 164. (5) 19 C. 392.

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relieved against, [245] it may be presumed that lenders and borrowers in making their contracts had contracted on the basis of those decisions and that their contracts should be read and interpreted in the light of those decisions. It appears to us that the case is otherwise in India, where it can hardly be presumed that native money-lenders and borrowers have studied with care the law relating to penalties in England. It also appears to us that before introducing from England into these Provinces, in which few understand or have ever heard of the technicalities of English law or English conveyancing, a principle by which a contract is not to be interpreted and enforced according to the clearly expressed intention of the parties, we must see how far, if at all, that principle originated in, or is consistent with, common sense. On the latter point we have already indicated what our opinion is. We shall see later on what some others have said on the subject.

The earliest reported decision of a Court in England on this question, as to how agreements providing for the payment in a given event of a higher rate of interest instead of a lower are to be construed, which we can find in the library of this Court, is that in *Marquis of Hallifax* v. *Higgens* (1), decided in 1689. The report is short and we give it in full. "Money lent on a mortgage at five pounds per cent.—the mortgagor covenants to pay six pounds per cent. if he made default for the space of sixty days after the time of payment. The Court decreed that from default made, he should pay six pounds per cent. and that this covenant was the agreement of the parties and not to be relieved against as a penalty.'

The next decision is that in the case of *Domina Holles* v. *Wyse* (2), decided in 1693. The report of that case is as follows :—

"The plaintiff lent the defendant money on a mortgage at £ 5 per cent. interest, but if not punctually paid (every six months), then to answer interest at £ 6 per cent., per annum. There being a great arrear of interest, the question was, whether it should be computed after the rate of £ 5 or £ 6 per cent. Decreed the defendant [246] should pay but £ 5 per cent. and the Court looked upon the reservation of £ 6 per cent., but as a *nomine pœnæ*, to oblige the defendant to the more punctual payment. But the case of Lord Hallifax was cited, where interest, reserved at £ 6 per cent., but if duly paid, agreed to accept £ 5 per cent., and because not punctually paid interest allowed at £ 6 per cent., per annum." It is impossible for us to say whether Lord Hallifax's case is correctly reported at page 134 of 2 Vernon's Reports or the facts of it correctly stated in the report of *Domina Holles* v. *Wyse* at page 289 of the same volume.

The next case is that of *Strode* v. *Parker* (3), decided in 1693. The report of that case is as follows :—

"The bill being to foreclose a mortgage, the interest by the deed was to be £ 5 per cent. per annum, and made payable half-yearly, and if not paid by the space of two months after the time of payment, then to pay after the rate of £ 5-10 per cent. per annum for increase of interest, the interest being run greatly in arrear; the question was, after what rate the interest should be computed upon the redemption of the mortgage. The Court decreed interest to be computed at the rate of £ 5 per cent., per annum only, and took a difference where the interest was reserved at £ 6 per cent., but to be reduced to £ 5 per cent., if paid half-yearly ; there if the party will have the benefit of lowering or reducing the interest, he must comply with the times of payment ; and so decreed in the Lord Hallifax's case ;

(1) 2 Vernon, 134. (2) 2 Vernon, 289. (3) 2 Vernon, 315.

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but where the interest is to be increased, if not paid at the day, that is but in the nature of a penalty and relievable in equity. *Quœre tamen*, for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon compliance with the times of payment, or to be advanced in default thereof, seems only to be a difference in expressing one and the same thing." We wonder whether the fact that the interest had run greatly into arrear in the case of *Domina Holles* v. *Wyse* (1), and in that of *Strode* v. *Parker* (2), influenced the Court in holding that the agreement in each of those cases to pay interest at an increased rate was a stipulation *nomine pœnœ*.

[247] In *Brown* v. *Barkham* (3), Lord Parker, L.C., in 1720 said:—"since this proviso obliging the party to pay £ 6 per cent., on default of paying £ 5 within three months after due, is generally looked upon as a penalty and *in terrorem*, and to be relieved against, if only a very short time has happened, though it may not be relievable against in case of a long arrear of interest."

In *Walmesley* v. *Booth* (4), which was a case relating to a bond obtained by an attorney of his client, Lord Hardwick, L.C., in 1740 said:—"Another case which the present one has been compared with has been that of mortgages, where the Court will not suffer hard clauses to be inserted in them, and therefore though the Court will allow a mortgage to be made in this manner, that £ 5 per cent., may be reserved, with a proviso, that if the interest be paid within a certain time after it is due, that the mortgagee will accept 4 per cent. and that shall be good; yet if a mortgage is made in this manner, that 4 per cent. is only reserved for interest with a proviso that if the mortgagor does not pay such interest within a certain time after it is due, he shall pay an interest of 5 per cent., such proviso will not be good; and that has several times been determined. The borrower is considered as a servant of the lender, and to be under his power, and therefore the Court will not suffer hard terms to be put upon him. That is a case something similar to the present one, and so is the case of marriage brokage bonds. In these sort of cases 'tis on the account of the public that the Court relieves; and 'tis on that account that it ought to relieve in the present case." Why the public should have been more interested in relief being given when the contract was to pay £ 6 per centum interest if default in paying £ 5 were made, than when the contract was to pay £ 6 per centum interest with a proviso that if £ 5 per centum interest were paid punctually it should be accepted in lieu of the £ 6 per centum interest, it is difficult after such a lapse of time to understand. Lord Hardwick, L. C., in 1747, on the petition of the Marquis of Powis, in the case of *Nicholls* v. *Maynand* (5), gave effect to that view of the law.

[248] In *Seton* v. *Slade* (6), Lord Eldon, L. C., in 1802, said by way of illustration of the fact that in equity time was not regarded as of the essence of a contract:—" So in the instance of a mortgage with interest at 5 per cent. and a condition to take 4, if regularly paid, or at 4 per cent. with a condition for 5, if not regularly paid. At law you might in that case recover the 5 per cent., for it is the legal interest. But this Court regards the 5 per cent. as a penalty for securing the 4; and time is no farther the essence, than that if it is not paid at the time, the party may be relieved

(1) 2 Vernon, 289.
(2) 2 Vernon, 315.
(3) 1 P. Williams 652.
(4) Barnardiston's Reports, 478.
(5) 3 Atkyns, 519.
(6) 7 Ves. Junior, 273.

from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition as if the 4 per cent. had been paid: that is, by paying him interest upon the 4 per cent. as if it had been received at the time." If Lord Eldon is correctly reported, he at any rate was prepared to apply a consistent rule, but that is not the rule in England as to contracts to pay or accept alternative rates of interest.

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We shall next refer to two of the judgments in *Wallis* v. *Smith* (1) although that was not a case as to interest. It was a case in which, if it had arisen in India, and had to be decided here, it would probably have been held that section 74 of the Indian Contract Act, 1872, applied. The principal importance of that case, so far as the present case is concerned, consists in the criticism, by Sir George Jessel, M.R., in his judgment, of the judgments of Lord Eldon and Mr. Justice Heath in *Astley* v. *Weldon* (2), and of the fact that we can ascertain what the views of two eminent equity lawyers and Judges of modern times were as to the unreasonableness of construing a document otherwise than according to the intention of the parties plainly expressed in it, and of holding that when parties said in plain and unambiguous language in their deed that in the event of interest at a lower rate not being paid, interest at a higher rate should be paid they did not mean it as a contract, but merely as a stipulation *nomine pœnæ*, from the performance of which the defaulter was to be relieved. Sir George Jessel at pp. 260 and 261 of the report in 21 Ch. Div., [249] quotes the following passage from the judgment of Mr. Justice Heath in *Astley* v. *Weldon* (2):—"It is a well-known rule in equity that if a mortgage covenant be to pay £ 5 per cent. and if the interest be paid on certain days, then to be reduced to £ 4 per cent., the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay £ 4 per cent., and if the party do not pay at a certain time, it shall be raised to £ 5 per cent. then the Court of Chancery will relieve," and said as to it:—"It was settled so early as that; I am sorry it was so settled, because anything more irrational than the doctrine I think can hardly be stated. It entirely depended on form and not on substance." At page 266 Sir George Jessel said:—"I think it necessary to say so much because I have always thought, and still think, that it is of the utmost importance as regards contracts between adults—persons not under disability, and at arm's length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character. One notable exception in old times was the usury law, now repealed, to prevent people bargaining as to the rate of interest they would pay for the loan of money. There have been many other laws in modern times, such as the Factory Acts and the Mines Regulation Acts, and so on, but they are all statutes; Judges have no right to say the people shall not perform their contracts which they have entered into deliberately, and put a different meaning on the contracts from that which the parties intend."

This is what Lindley, L.J., said at pp. 274 and 275 of 21 Ch. Div.—"The case is now reduced to this, that there is a stipulation as to payment by Smith to Wallis of the sum of £ 5,000 by way of liquidated damages, upon any substantial breach by Smith of that agreement, and

(1) 21 Ch. Div. 243.   (2) 2 Bos. & P. 346.

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we have to consider whether this stipulation is to be treated as meaning what it says, or as meaning nothing at all or next [250] to nothing. In order to determine that we must look a little into the authorities. Now the authorities have been carefully examined by the Master of the Rolls, and there are only one or two to which I will advert, but they all seem to proceed on the principle that the object is to ascertain the intention of the parties. You are to ascertain the intention of the parties by what they said—that is plain enough—but you are to ascertain the intention of the parties not only by what they said, but by what the Court sees to be the consequence, and by what the Court may or may not consider to be absurd or oppressive, or thought to be so in former times. Take the common case of a money bond. It meant what it said. Take the ordinary case of a covenant to pay £ 5,000 if £ 500 was not paid by the day named, the parties meant what they said; but effect has long ceased to be given to what was intended. Whether relief was given on the theory of oppression, or on the theory that the parties could not have meant what they said—that it was too absurd—or whether relief was given by reason of the usury laws, I do not know—it is an antiquarian research which I have not prosecuted. But it has long been settled that where a person agrees to pay a larger sum, if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have." It may be doubted whether if Dean Swift had been a lawyer he could have penned any more sarcastic condemnation of the English doctrine of penalties.

In our opinion the judgment of Frere and Holloway, JJ., in 1865 in *Adanky Ramachandra Row* v. *Indukuri Appalaraju Garu* (1) was and is deserving of greater attention than it has apparently received. Referring to the Courts in England they said, at page 458 :—" We may safely say that the tendency of Courts of Equity, as well as Courts of Law at the present day, is to interfere as little as possible with the expressed intention of the contracting parties." And at page 462 :—" We have sufficiently indicated our opinion as to the policy of relieving parties from the effects of their own stipulations. That policy has been condemned by nearly every eminent [251] Judge who has had occasion to consider the subject, and arose at a period at which the views of the legislature were very different to what they now are."

Such, so far as we have been able to ascertain, is the English doctrine of penalties as applied to contracts relating to the payment of enhanced interest.

It will have been observed that in the two earliest English cases to which we have access in which the doctrine of a penalty was applied to contracts to pay a higher rate of interest on default of paying a lower rate, namely those of *Domina Holles* v. *Wyse* (2) and *Strode* v. *Parker* (3) the principle was applied simply on the ground that the stipulation was one *nomine pœnæ*. In *Brown* v. *Barkham* (4) Lord Parker, L. C., put the application of the principle on the ground that such a stipulation was generally looked upon as a penalty and *in terrorem*, but he apparently thought that the principle should not be applied when there was a long arrear of interest. He may have thought that in such a case the debtor would have become reconciled to the situation, or that his case was hopeless, and such relief as equity could give would not save him. Lord

(1) 2 M.H.C.R. 451.
(2) 2 Vernon, 289.
(3) 2 Vernon, 315.
(4) 1 P. Williams, 652.

Hardwick, L. C., in *Walmesley* v. *Booth* (1) seems to have thought that between a mortgagor and a mortgagee in the inception and formation of a contract of mortgage, a fiduciary relationship, analogous to that between an attorney and his client, existed, and apparently considered that contracts between a borrower and a lender were to some extent similar to "marriage brokage bonds," and that it was in the interests of the public that a debtor should not be compelled to perform his contract to pay a higher rate of interest on default of paying a lower rate. Lord Elden, L. C., in *Seton* v. *Slade* (2) justified and explained the principle on the ground that equity did not regard time as of the essence of the contract. Sir George Jessel, M. R., and Lindley, L. J., obviously regarded the principle as irrational and rediculous, and as one the application of which in England could only be justified on the ground of its antiquity.

[252] If a contract, the object of which is to ensure by a provision as to alternative rates of interest, the due and prompt payment of the principal and a lower rate of interest, is to be regarded as a penalty and relieved against, we may ask why do not the Courts in this country apply the same principle to money bonds or mortgages, in which it is agreed that the principle shall be repaid by periodic instalments, and that should default be made in paying an instalment, the balance of the principal shall at once become due and repayable? Is not time as much the essence of the contract in one case as in the other? Is not the provision to ensure prompt payment as much a stipulation *in terrorem* in one case as in the other? Is the hardship, if it be one, of a borrower being compelled to perform his contract any less a hardship in the one case than in the other? The hardship which may result by the non-payment of principal or interest on the agreed and specified date to a man who lends his capital or part of it, was apparently overlooked by those who were responsible for the evolution of this doctrine of a penalty. The borrower might not have had notice when the contract was made of the loss or damage which might result to the lender by reason of the non-performance of the contract to pay at the due date, and consequently the damages for the breach of contract which could in such a case be legally awarded might prove to be an utterly inadequate compensation. A money-lender cannot now-a-days be regarded in the eye of the law, as formerly he may have been, as *hostis humani generis*, and as long as his contract is not unconscionable or tainted with fraud, we fail to see why the other contracting party should not be bound by it.

It is not necessary in this case to consider that other branch of the English doctrine of penalties upon the application of which such cases as that of *Kemble* v. *Farren* (3), *Dimech* v. *Corlett* (4) and *Madhub Chunder Roy* v. *Lukhee Jellance* (5), were decided. Section 74 of the Indian Contract Act, 1872, probably provides the rule to be applied in that class of cases in India. The English doctrine, [253] so far as it applies to cases of alternative rates of interest, which we are considering, appears to us to be a doctrine which is irrational and which was bequeathed to people in England by a school of English Judges, eminent, no doubt, in the law, but overprone to making agreements for parties which the parties had not made and did not intend to make for themselves.

In this country the usuary laws were repealed by Act No. XXVIII of 1855, and we cannot but regard the English doctrine to which we are

(1) Barnardiston's Reports, 478. (2) 7 Ves. Junior. 273.
(3) 6 Bing. 141. (4) 12 M.P.C. 199. (5) 9 W.R.C.R. 212.

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referring, and every modification of it so far as agreements to pay interest are concerned, as entirely at variance with section 2 of Act No. XXVIII of 1855. Holding this view it may be suggested that we are inconsistent in expressing the opinion, that when an agreement to pay a particular rate of interest is shown by evidence to be unconscionable, the Courts in India can and should grant relief. We see no such inconsistency. An agreement may, by way of example, be proved to be unconscionable by showing a gross inadequacy in the consideration, and that the party sought to be charged with the burden of the contract, was not fully aware of the consequence which might result from his executing it. Such an agreement and such facts would in our opinion raise a violent presumption that a fraud had been perpetrated on the borrower. We entirely agree with the view of the law expressed by Sir A. Collins, C. J., and Parker, J., in *Appa Rau* v. *Suryanarayana* (1), in which they said "We think the true principle of decision is that a Court should not interfere to protect persons who, with their eyes open, choose knowingly to enter into even somewhat extortionate bargains, but that it is only when a person has entered into such a bargain in ignorance of the unfair nature of the transaction, advantage having been taken of youth, ignorance, or credulity, that a Court of Equity is justified in interfering."

It would in most cases be impossible for a Court upon a mere examination of a mortgage-deed and without any evidence as to the value of the security, the nature of the title of the mortgagor, &c., to predicate that at the date of the contract an agreement to **[254]** pay alternative rates of interest, or interest which might appear at first sight to a Judge, who had never had any occasion to borrow money, or who had always had good security to offer, to be excessively high, was even unreasonable. It might be that no sane man, knowing the uncertainty of the title and the value of the security, would risk lending his money on terms more favourable to the borrower. In our opinion in such cases it is for the person who seeks to be relieved from the performance of his contract to establish by clear evidence his right to such relief. In *Darjan Singh* v. *Muhammad Abdul Ali Khan* (2), it was held, in reference to an agreement for a higher rate of interest to be paid on default in payment of a lower rate "a Court would only be justified in interfering with contracts of this kind, if, under all the circumstances of the case, the relief should as a matter of equity, be granted; in other words, if the bargain were an unconscionable one."

We shall now briefly refer to those cases in India in which it has been held without reference to section 74 of the Indian Contract Act, 1872, or to anything outside the written contract showing that it was reasonable or unreasonable, that a contract to pay a higher rate of interest on default being made to pay the principal moneys with certain interest, or a lower rate of interest, cannot, or should not be, enforced. *Kuar Lachman Singh* v. *Pirbhu Lal* (3), *Bihari Lal* v. *Musammat Juni* (4), *Khurram Singh* v. *Bhawani Bakhsh* (5), *Kharag Singh* v. *Bhola Nath* (6), *Narain Das* v. *Chait Ram* (7), (*per* Stuart, C. J., *contra* Tyrrell, J.), *Bichook Nath Pandey* v. *Ram Lochun Singh* (8), and *Rasajibin Davlaji* v. *Sayana bin Sagdu* (9), were all cases in which the English

(1) 10 M. 203. (2) 6 A. W. N. (1886) 31.
(3) N.W.P.H.C.R. 1874, 358. (4) N.W.P.H.C.R. 1875, 108.
(5) 3 A. 440. (6) 4 A. 9. (7) 6 A. 179.
(8) 11 B.L.R. 135. (9) 6 B.H.C.R.A.C. 7.

doctrine of a penalty was applied to contracts to pay a higher rate of interest from the date of the contract upon default being made in payment of a lower rate.

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Pava Nagaji v. *Govind Ramji* (1) was a case in which the doctrine of a penalty was applied to a contract by which [255] apparently a higher rate of interest was to run from the date of default. *Motoji bin Ratnaji* v. *Shekh Husen* (2), *Chuhar Mal* v. *Mir* (3), and *Bansidar* v. *Bu Ali Khan* (4), were cases in which the principal was payable without interest if paid on the due date, but if default were made it was agreed that interest should be paid. In these three cases the doctrine of a penalty was applied. It is to be observed that in the case of *Motoji bin Ratnaji* v. *Shekh Husen* (2), the Court appears to have incorrectly assumed that the contract provided for alternative rates of interest.

Sham Lal v. *Banni Begam* (5), *Darjan Singh* v. *Muhammad Abdul Ali Khan* (6), and *Appa Rau* v. *Suryanarayana* (7), were cases in which a higher and alternative rate of interest was held not to be penal.

We shall now refer to the decision of their Lordships of the Privy Council in *Rai Balkishen Das* v. *Raja Run Bahudur Singh* (8), and endeavour to ascertain whether it can be regarded as an authority on the question, as to whether an argument that a higher rate of interest shall be payable as from the date of the contract upon default in payment of a lower rate is to be regarded as a stipulation for a penalty against which relief is to be given, or as a contract to be performed. It is obvious on even a cursory consideration of their Lordships' judgment in that case that they did not act on the view as to the difference between an agreement between parties and a decree drawn up and made in accordance with an agreement of compromise made by parties expressed in the judgment of West and Nanabhai, JJ., in *Baiprasad* v. *Dharnidhar Sakharam* (9). Their Lordships did not base their observations as to whether stipulations in the decree before them were penalties or not, upon the fact that the alternative rates of interest were in fact decreed, but based their observations upon the construction of the [256] contract which was embodied in the decree. Those observations constituted in part the reasons for the decree which their Lordships passed, and we are bound to consider that they were, in the opinion of their Lordships, pertinent. The Reporter at page 162 of L.R., 10 I.A., states that "The question upon which the Courts below differed was as to the rates at which and the dates from which interest was to be allowed to the appellant under the terms of the decree. It related to the construction of the terms of compromise embodied in that decree." At page 163 their Lordships said:—The determination of the questions which arise in the appeal depends upon what is the proper construction to be put upon the 3rd clause of a decree of the Subordinate Judge of Gya, dated 29th March 1873, in a suit in which Rai Narain Das was plaintiff, and respondent, Raja Run Bahadur Singh, was one of the defendants. That decree was obtained by Rai Narain Das in pursuance of a sulehnamah or compromise between the parties to the suit."

By the second clause the plaintiff was to get interest on the decretal money at the rate of eight annas per cent per mensem from the defendants, and the defendants were to pay annually Rs 30,000 of principal and

(1) 10 B.H.C.R. 382. (2) 6 B.H.C.R.A.C. 8. (3) 2 A. 715.
(4) 3 A. 261. (5) 2 A.W.N. (1882) 95.
(6) 6 A.W.N. (1886) 39. (7) 10 M. 203.
(8) L.R. 10 I.A. 162=10 C. 305. (9) 10 B. 437 (*note*).

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interest to the plaintiff, and out of such instalments the plaintiff was to deduct what might be due for interest and credit the balance to principal. The third clause as quoted by their Lordships in their judgment was as follows:—"If the first instalment be not paid on the 30th Bhadon, 1281 fasli, and two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree, and realize his entire decretal money, with interest at the rate of Re. 1 per cent. per mensem, from defendants and their properties. In case of default the decree-holder shall be entitled to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of Re. 1 per cent. If the first instalment be not paid on the 30th Bhadon, 1281 fasli, then the decree-holder shall have the power to realize the principal with interest at the rate of Re. 1 per [257] cent. per mensem from the date of this sulehnamah, to which your petitioners, defendants, shall have no objection. If at any time within the term defendants desire to pay any sum over and above Rs. 30,000, the plaintiff shall have no objection to receive the same." The first instalment, which fell due on the 25th September 1874, was not paid on that date. It was paid on the 31st August 1875, before the second instalment had become due, and the decree-holder appropriated Rs. 8,720 of that instalment to the payment of interest at the rate of Re. 1 instead of eight annas per month. Subsequently an application for execution of the decree was made to the Subordinate Judge of Gya, and from his order on that application there was an appeal to the High Court at Calcutta. On the 29th July 1878, the High Court in appeal affirmed the decision of the Subordinate Judge. According to the judgment of their Lordships at page 165, the Judges of the High Court stated that, in their opinion, the view taken by the Subordinate Judge of the arrangement between the parties was correct, and that the intention evidently was that no two instalments should be outstanding at the same time, and that, provided the debtor pay up the first instalment after due date, but in sufficient time to guard against a second instalment becoming overdue whilst the first remained unpaid, he was to be allowed to do so on payment of a double rate of interest as a penalty, but that, if he went further, and allowed two instalments to be actually due and unpaid at one and the same time, the arrangement would fall to the ground, and the whole amount of the decree would be realizable in a lump sum." That judgment dealt with the first of the three contingencies which their Lordships held to have been provided for in the third clause of the decree. The decree of the High Court was not appealed to Her Majesty in Council. Their Lordships at page 165 referring to that judgment of the High Court said:—Independently of the fact that no appeal was preferred against that decision, their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The sulehnamah was an agreement fixing the rate [258] of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others." Their Lordships obviously did not consider themselves debarred from expressing ther opinion that the stipulation to which they were referring as contained in the sulehnamah was to be regarded as a contract to be performed, and not as a stipulation for a penalty by the fact that the sulehnamah had merged in the decree, or by the fact that the decree upon which they were commenting had become final. At page 168 their Lordships say that, "According to article 3 of the decree of 1873, three contingencies were in the contemplation

of the parties." The first of those contingencies their Lordships had already dealt with in their judgment, holding that it was the non-payment of the first instalment on the due date, and the allowing of two instalments to be in arrear at the same time. As to the third contingency, which was that relating to default being made in the payment of the first instalment on the 25th September 1875, their Lordships said at page 168:—"Upon the third the parties have put their own construction, and have voluntarily settled upon the basis of that construction, which their Lordships cannot say was wrong. The decree-holder is bound by it, and cannot, in the settlement of accounts, recover interest at 12 per cent. in respect of the default in payment of the first instalment from the date of the sulehnamah to the date of the realization of that instalment except upon the amount of the instalment, interest upon the remaining portion of the debt during that period being calculated at 6 per cent. per annum. In determining upon what amount interest at 12 per cent. per annum, is to be allowed in consequence of a default in payment on the due date of the second or any subsequent instalment, the decree-holder is not bound by the construction put by him upon the 3rd clause, nor by any admission or settlement in respect of the default made in payment of the first instalment. The wordings of the second and third contingencies respectively are very different. The second is clear and explicit. It declares that in case of default the decree-holder shall be entitled to take out execution and realize interest on the entire decretal money from the date of such default to the [259] date of realization, at the rate of Rs. 1 per cent. per mensem." What their Lordships meant is made still clearer by their decree. It is obivous that the decree-holder was contending in the appeal to Her Majesty in Council that he was entitled in the taking of accounts to have interest allowed at the rate of 12 per centum from the date of the sulehnamah on the whole amount remaining unpaid from time to time of the decretal principal sum of Rs. 2,38,000 after giving credit, as they were made, for payments which were first to be applied in discharge of interest and the balance in reduction of the principal. Their Lordships by their decree limited the 12 per centum interest to the amount of each instalment after the first, for the period during which such instalment was due and unpaid, and allowed the 12 per centum interest on the first instalment from the date of the sulehnamah to the date of its realization, and applied payments as they were made, first in discharge of interest and the balance to the satisfaction of the principal. Although their Lordships considered the third clause of the decree in all its bearings, and certainly as to the first and second of the three contingencies provided for, expressed their opinion that the stipulation for payment of interest at 12 per centum instead of at 6 was not a penalty, they said nothing which suggested that in their opinion that stipulation as to interest in the third contingency, which was that if the first instalment was not paid on the 25th September 1875, the decree-holder should have power to realize the principal of the first instalment with interest at the rate of Rs. 1 per cent. per mensem from the date of the sulehnamah, was a penalty, or other than a contract. The stipulations as to all these contingencies would according to the English doctrines as to penalties be penalties. The stipulation as to the third contingency would apparently be held by some authorities in India to be a penalty, whilst that as to the second contingency would apparently be held by the same authorities not to be a penalty. It is doubtful what construction those authorities would put upon the stipulation as to the first contingency, but as appears from page 165 of L. R. 10 I. A.,

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the High Court at Calcutta had held on the 29th of July 1878, that the stipulation as to interest in the first contingency was a penalty. [260] The passage which we shall now quote from page 170 of L. R., 10 I.A., apparently had immediate reference to the stipulation as to interest in the second contingency. It further shows that their Lordships, although dealing with a decree drawn up on a compromise, thought that they were entitled to consider whether the stipulation which we are now referring to was one of contract or was a penalty to be relieved against. The passsage is as follows :—"It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." So, we may observe, is the substitution of a higher rate of interest, as from the date of a contract for a lower rate of interest on default in paying the latter, a substitution of one rate of interest for another in a given state of circumstances.

In our opinion the decision of their Lordships of the Privy Council in *Rai Balkishen Das* v. *Raja Run Bahadur Singh* (1) is a clear authority that on questions of interest we are not to treat stipulations in contracts substituting, in a given state of circumstances, a higher for a lower rate as penalties, but are to interpret them, as other parts of a written contract should be interpreted, according to the expressed intention of the parties. That view of the law is in opinion consistent with common sense.

In conclusion, our opinion is that the agreement as to a higher rate of interest in this case is an agreement to be performed, and from the performance of which no case has been pleaded or proved to entitle the defendants to relief. With this expression of our opinion the case will go back to the Bench which made the reference.

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15 A. 261 (P.C.)=6 Sar. P.C.J 378=17 Ind. Jur. 167.

[261] PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.
[*On appeal from the High Court at Allahabad.*]

PALAKDHARI SINGH (*Plaintiff*) *v.* THE COLLECTOR OF GORAKHPUR AND ANOTHER (*Defendants*).

[16th and 17th November and 10th December, 1892.]

Evidence afforded by prior records.

Where the main question was whether, in fact, the heir to an estate, a minor in possession through the manager under the Court of Wards, had been, as the plaintiff alleged him to have been, put forward by false personation, a divisional Court of appeal decided in favour of the defence and dismissed the suit.

Pending this decision, a Full Bench (2) disposed of questions of law as to the admissibility in evidence in this suit of the judgment and record in a prior suit; in which it had been found, as a fact, that there had been at one time, in

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(1) L.R. 10 I.A. 162=10 C. 305.
(2) The Collector of Gorakhpur *v.* Palakdhari Singh, 12 A. 1.

existence an heir born of the parentage which the defence in this suit alleged to be that of the minor defendant.

1892 DEC. 16.

PRIVY COUNCIL.

15 A. 261 (P.C.) = 6 Sar. P.C J. 378 = 17 Ind. Jur. 167.

It was disputed in the present suit whether the minor defendant was the same individual whom his alleged mother, the defendant in the former suit (there being the same plaintiff in both suits), stated to be her son; also, whether, if that identity were proved, the suit would be barred as *res judicata*.

This latter question was decided in the negative by the Full Bench, which held the judgment in the former suit not to be conclusive upon the present one; but also held the record to be admissible. There was no appeal from that decision; and on an appeal from the decree of the divisional Court, the Judicial Committee affirmed, on the facts, the decree made

[N.B.—See in this connection 12 A. 1 (F.B.) *supra*.]

APPEAL from a decree (15th April 1889) of the High Court, reversing a decree (14th September 1887) of the Subordinate Judge of Gorakhpur.

In this suit the plaintiff claimed title by inheritance to, and possession of, the Bansgaon villages and estate in Gorakhpur, under the management of the first defendant, the Collector of the District for the Court of Wards, the Collector appearing also as guardian of the second defendant, a minor when the suit was instituted. The claim was that the plaintiff, a collateral relation, was the heir, and that the minor defendant, being really one Radha Kishen, son of Narsing Sewak, was not the son, or heir, of Hanuman Singh, the last owner of Bansgaon, who died on the 24th May 1872

[262] The plaint alleged that Hanuman Singh died childless, leaving a widow, Pan Kuar, who died in 1879. It referred to a judgment delivered in a suit between the present plaintiff and Pan Kuar in 1874, to the effect that a posthumous son and heir, named Dalip Narain Singh, had been born of Pan Kuar to Hanuman Singh, and stated that this supposed son had disappeared. A pedigree table was annexed, from which it appeared that the plaintiff would have been the next heir to Hanuman Singh if no child had been born of his widow. A declaration that the minor defendant was not Dalip Narain was claimed. Written statements alleged that the minor was the son and heir, denying the personation alleged. The issues raised the question whether the defendant was the Dalip Narain, whom Pan Kuar alleged to be her son, born on the 31st January 1873, or was Radha Kishen.

The first Court found that the boy whom the Court in the judgment of 1874 recognized as Dalip Narain, son of Pan Kuar, was not the minor defendant in the present suit, who was, in fact, as the Court believed, Radha Kishen.

The High Court, on appeal, reversed this finding.

A Division Bench found that Pan Kuar had a child in 1873, which the law presumed to be the child of her then deceased husband; that the evidence was in favour of the view that the present minor defendant was Dalip Narain who was so born; and dismissed the suit.

The former suit, above referred to, decided in 1874, was brought by the present appellant against Pan Kuar, claiming the property, and in it the issue whether Dalip Narain was the son of Hanuman, was decided in the affirmative, with the result that the suit was dismissed. During the hearing of the appeal in the present suit, a question as to the admissibility, as evidence in it, of the judgment and record of the suit of 1874 was referred by the Division Bench to a Full Bench. The result of that reference is reported in *the Collector of Gorakkpur and another* v. *Palakdhari Singh* (1), where

(1) 12 A. 1.

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[263] the facts of the case are stated. They also appear in their Lordships' judgment.

On this appeal,

Mr. *H. Cowell* and Mr. *W. A. Raikes*, for the appellant, argued that the evidence showed that the minor defendant was Radha Kishen, and a stranger to the estate. There had been a failure to prove that he was born, as he alleged, a son and heir to Hanuman Singh in 1873.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the respondent, the Collector of Gorakhpur, argued that the appellant, on whom lay the burden, had failed to prove that the minor was not the son of Hanuman by his wife Pan Kuar; whereas the respondent had succeeded in proving that he was such son.

Mr. *H. Cowell* replied.

Their Lordships' judgment was delivered by Sir R. Couch.

JUDGMENT.

The suit in this case was brought by the appellant against the respondent, as manager on the part of the Court of Wards of the Bansgaon estate, and against another defendant, described in the plaint as "Radha Kishen, who calls himself Dalip Narain Singh, under the guardianship of the Collector." The appellant sought to recover possession of the Bansgaon estate, of which Hanuman Prasad Singh was formely the owner. He died on the 24th May 1872, leaving a widow, Pan Kuar. The appellant is the grandson of Drigpal Singh, a brother of Mahpal Singh, the grandfather of Hanuman; and if Hanuman died childless the appellant would be the heir to the estate, subject to the life estate of the widow, Pan Kuar. On the 9th June 1873 the appellant brought a suit against Pan Kuar, the plaint in which alleged that Hanuman died childless, leaving only Pan Kuar his widow; that the property left by him devolved upon the plaintiff as a near heir, and that the defendant had only a life interest; that the defendant (Pan Kuar) having procured a male child of unknown parentage, gave out that it was brought forth by her although she had not been pregnant at the time [264] when Hanuman died. The defendant pleaded that she was pregnant when Hanuman died, and after his death Dalip Narain Singh was born. The issues settled were,—Is Dalip Narain the son of Hanuman or not? In case the birth of the child is not proved, whether the plaintiff is entitled to inheritance or not? The case was tried by the officiating Subordinate Judge of Gorakhpur, and judgment was given on the 23rd January 1874. In it the Court decided the first issue in favour of the defendant, and it being unnecessary to decide the second gave no opinin upon it. The suit was dismissed with the costs. Palakdhari, the present appellant, appealed to the High Court at Allahabad, which, on the 7th December 1874, affirmed the decree of the lower Court, and dismissed the appeal. The judgment contains the following passages:—Mr. Justice Turner says, "Furthermore, no sufficient motive is shown to exist to induce her (Pan Kuar) to be a party to a fraud. By setting up a son she loses her estate in her husband's property, and is reduced to a right of maintenance. She is not shown to have had any personal animosity to the appellant." Mr. Justice Brodhurst says, "Very clear and positive evidence would be required to establish a claim such as has been instituted by the plaintiff-appellant in the present case; but the evidence he has adduced in support of it is exceedingly weak and unreliable; and although he asserts that the defendant-respondent has never given birth to a child,

he is unable to furnish any clue as to whence sheobtained the infant which she alleges is her own, and which she certainly has had with her since some seven or eight months subsequent to her husband's decease. The respondent, on the other hand, has, in support of her allegations, produced as valid proof as could, under the circumstances, have been expected of her whilst this case was pending in the lower Court."

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In 1874 Pan Kuar left Bansgaon and went to live at Sarebri with her father and mother taking the child with her. In 1877 she made an application to the Collector of Gorakhpur that the child which she alleged to have been born of her should, under Act XIX of 1870, be placed under the Court of Wards. This application had [265] not, for some reason not apparent, been disposed of when in October 1879 Pan Kuar died in the house at Sarebri. Her father was dead, but her mother, Ati Kuar, survived her. Sarebri is 72 miles distant from Bansgaon. On the 5th February 1880 the appellant presented a petition to the Court of the Subordinate Judge in which he described himself as "paternal uncle and guardian of the minor Babu Dalip Narain Singh," and asked for a certificate of guardianship and administration of the property of the minor, under Act XL of 1858. The petition refers to the previous litigation and to the Court having declared the minor to be the son of Hanuman Singh. On the 1st July 1880 the appellant presented another petition, in which he said that the certificate case was thrown out on his application, and asked to be appointed manager of the property of Hanuman, on the ground that the child called Dalip Narain Singh, who was declared by the Court to be the son and heir of Hanuman, was missing, and that the two boys who had been set up as Dalip Narain Singh were fictitious persons. On the 3rd July Ati Kuar presented a petition in opposition asking that Palakdhari's application might be disallowed, and that she might be appointed manager. On the same day the officiating Judge of Gorakhpur ordered that the Collector might "take the property of Dalip Narain Singh, the minor son and heir of Hanuman Singh, under his management." Ati Kuar appealed, but, having died in April 1881, this appeal abated, and her application to the Subordinate Judge was finally dismissed for the same reason on the 23rd August 1882. On the 12th March 1883 Rukmani Sewak Singh, the grandson of the eldest brother of Har Sewak Singh, the father of Pan Kuar, applied to the Subordinate Judge of Gorakhpur for a certificate of the guardianship and management of the property of Dalip Narain Singh. The application was opposed by the Collector, who stated in his petition of objection that the identity of the minor, whom the appelicant wished to set up as Dalip Narain Singh, had been questioned by the other members of the family. The application was rejected by the Judge on the 11th June 1883, on the ground that the estate had been for nearly three years in charge of the Collector, to the great advantage of the minor, and the Collector was ordered to remain [266] in charge. No notice is taken in the judgment of the statement that the identity of the minor had been questioned.

In the suit which is the subject of this appeal and will be afterwards referred to, the appellant was examined as a witness, and in his evidence he said that when Pan Kuar died "two minors came forward to claim the property. One of them was a resident of zila Chapra, and the other belonged to Azamgarh. Both these persons proclaimed themselves to be Dalip Narain Singh. I then discovered that the boy from Azamgarh was the son of Narsingh Sewak, and that the people of Sarebri wished to make him out to be Dalip Narain Singh. I cannot tell with certinty the year

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in which this event happened, but approximately it was in 1880. Then I commenced inquiring in all directions about the particulars of Radha Kishen. From those inquiries I learnt that this defendant now present in Court is Radha Kishen, the son of Narsingh Sewak." This appears to be the origin of the Collector's statement that the identity of the minor had been questioned. Matters being in this state, the Board of Revenue directed the Collector to nominate the owner of the property, and he took steps to enable him to do so. The case of the Chapra claimant was disposed of by a Sub-Divisional Officer, Mr. MacLeod, who, on the 21st January 1884, reported that he was not proved to be Dalip Narain Singh. Regarding the identity of the boy at Azamgarh, by which was meant Sarehri, that village being in the Azamgarh district, Pandit Sundar Lal, Deputy Collector to the Collector of Azamgarh, was by an order of the Collector, dated the 10th March 1884, ordered to make a local inquiry. He made his report on the 15th March 1884. It begins by stating that on the day the order was communicated to him, the Collector directed the parties, *i.e.*, Rae Rukmani Sewak Singh and Babu Palakdhari Singh, to be present on the spot on the day fixed for the inquiry, and that he took the precaution of obtaining their signatures with a view to obviate any future objections on the score of ignorance of the date fixed for the inquiry ; that in spite of this, however, neither Babu Palakdhari Singh nor any representative on his part was present on the spot, so he had to hold the inquiry in [267] the presence of Rae Rukmani Sewak Singh only. The appellant, in his evidence before referred to, said :—"The inquiry into the identity of Dalip Narain Singh made by the Collector of Azamgarh was not made in my presence, but, on the contrary, the officer just mentioned caused me and my vakil to be turned out." Their Lordships do not believe this. If the Deputy Collector had acted so, the appellant or his vakil would certainly have complained to the Collector about it. The report continues :—"In order that the inquiry might be as complete and independent as possible, I was not content with examining the witnesses offered by Rae Rukmani Sewak Singh, as that would have been objectionable, but selected the witnesses myself from among the residents of mauza Sarehri and of some of the adjoining mauzas, as well as from among the servants of Rae Narsingh Sewak, Rae Rukmani Sewak, and the late Musammat Ati Kuar, the grandmother of Dalip Narain Singh. These witnesses were summoned through the agency of the police, and located in a place under proper supervision. The result of the inquiry has been to satisfy me fully that the boy produced is Dalip Narain Singh, son of Babu Hanuman Parshad Singh and Musammat Pan Kuar, and not of Radha Kishen, son of Rae Narsingh Sewak Singh." Narsingh Singh was an uncle of Pan Kuar and of Rukmani Sewak. The report then states that 38 witnesses were examined on oath, and among them were the residents and zemindars of mauza Sarehri and of adjoining mauzas, and that all agreed that the boy was Dalip Narain Singh, son of Hanuman and Pan Kuar, and that Radha Kishen, the eldest son of Narsingh Singh, died at Allahabad the year before during the bathing fair. It then gives the Deputy Collector's reasons for his conclusion, which is given at the end, where he says, "In conclusion, I beg to state that the result of the local inquiry held by me has thoroughly satisfied me that the boy is Dalip Narain, the son of Musammat Pan Kuar, and that Radha Kishen died a year ago at Allahabad."

On the 15th September 1886 the appellant brought the present suit. The plaint sought to recover possession of the property. It alleged that

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Pan Kuar did not give birth to a son; that the boy [268] named Dalip Narain Singh was brought and kept by her clandestinely in her house and was the son of another person; that shortly after the decision of the High Court on the 17th December 1874, Pan Kuar caused the said boy to disappear, and from that time it was not known what had become of that boy, and that the plaintiff received that information in 1885. The issues settled were "1. Whether the defendant in the present case is the same Dalip Narain Singh whom Pan Kuar, widow of Hanuman Singh, had alleged to have been born of her, or whether he is dead, and the defendant in this case is in reality Radha Kishen, son of Narsingh Sewak? 2. If the first part of the above issue is proved, is the present case barred as *res-judicata*?" This second issue was decided in the plaintiff's favour by a Full Bench and there is no appeal from that decision. On the application of the plaintiff's pleader's an issue was added, "Whether, after the death of Hanuman Singh, any son was born of Musammat Pan Kuar or not?" The Subordinate Judge found that the defendant was Radha Kishen and said it was unnecessary to record a finding on the 3rd issue. The High Court on appeal found that Pan Kuar had a child, and it appeared to their Lordships during the hearing of this appeal that this finding could not be contested. The important question is whether the defendant is Radha Kishen. Upon this the onus was strongly upon the plaintiff, especially when it was established that Pan Kuar had a son. Many witnesses were examined for the plaintiff, but it is stated in the judgment of the High Court that the learned counsel who represented him there relied upon nine witnesses with regard to this issue. They all deposed to the defendant who was present in Court being Radha Kishen. The first is Ram Sewak Singh. He said:—"There was no Dalip Narain Singh in mauza Sarehri." This is at variance with the statement in the plaint that there was a boy named Dalip Narain Singh but not the son of Pan Kuar. He also said:—"When Pan Kuar went to Azimgarh from this district, no boy accompanied her . . . . I do not know whether there was any boy or not when the former suit was being litigated in this Court" Either this statement is false or he was not competent to [269] prove that there was no Dalip Narain Singh. Another witness is Jagdeo Singh, a cousin of Radha Kishen, who deposed that the defendant was Radha Kishen, and said that Radha Kishen never went to Allahabad, which it was proved he did. Ram Sewak Singh had said that Radha Kishen went to Benares and not to Allahabad. The remaining witnesses also deposed to the defendant being Radha Kishen. The High Court has commented unfavorably upon their evidence, and at the best it is of a description which in the Courts in India is regarded with much distrust. Four of the plaintiff's witnesses, Ram Bharose Singh, Nageshar Parshad Singh, Mahadeo Singh, and Sehdeo Singh, deposed that the defendant had a stamp on his arm; two said on his right arm. The defendant and Rukmani Sewak were called as withesses by the Court. They both denied that the defendant had any mark on his arm, and the latter said that the members of his family had stamps on the left and right arms. It is remarkable that upon this the defendant was not required to show his arms, especially as the Subordinate Judge appears from his judgment to have examined his armpits. Only one of these witnesses, Sehdeo Singh, is among the nine relied upon before the High Court, which may account for no notice being taken there of the evidence of the mark. The omission to have the arms examined weakens the appellant's case. The defendant gave evidence of the death of Radha Kishen at Allahabad, which

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if satisfactorily proved would have been decisive. It is remarkable that none of the witnesses who were examined by the Deputy Collector were called to prove the death.

Their Lordships do not think it necessary to discuss this evidence. Having regard to the previous proceedings, they are of opinion that the appellant has not satisfactorily proved that he was entitled to recover possession of the property and that his suit should be dismissed.

They will humbly advise Her Majesty to affirm the decree of the High Court, reversing the decree of the Subordinate Judge and [270] dismissing the suit, and to dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Ranken Ford, Ford,* and *Chester.*

For the respondent:—The Solicitor, India Office.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

WUTZLER AND ANOTHER (*Plaintiffs*) *v.* SHARPE (*Defendant*).*
[27th June, 1893.]

Easement—Right of way—Easement of necessity—Act XV of 1877, s. 26—*Act IV of* 1882, s. 8—*Easements "annexed"—Act V of* 1882, ss. 2, 5, 13, 19—44 *and* 45 *Vict.*, *Chap.* 41, s. 6—*Act I of* 1872, s. 114, *Illustration (g)—Presumption against plaintiff from refusal to produce title deeds.*

The plaintiffs were owners of an hotel and the defendant of certain adjacent property. The two properties had at one time been united, and at that time the manager of the hotel on behalf of the owner used to obtain water for the purposes of the hotel from a certain spring by means of a road which ran over land which subsequently became the defendant's. There was another, but smaller and much less convenient path from the hotel to the spring. The plaintiffs became owners of their portion of the property in 1886, and the defendant of his portion in 1888. The plaintiffs continued to use the above-mentioned road through the defendant's property for the purpose of getting water from the hotel until 1889, when the defendant refused to permit them any longer to use the road. The plaintiffs accordingly sued the defendant for a declaration of their right of way over the said road; but refused to put in evidence the deed under which they became owners of the hotel property.

Held upon these facts that the plaintiffs were not entitled to any right of way over the land in question. Owing to the non-production by the plaintiffs of their title deeds, it must be presumed as against them that the evidence afforded thereby would be unfavourable to their claim, and no right of way in favour of the plaintiffs could be shown to arise otherwise either as an easement of necessity or as an easement the intention to grant which might be inferred. *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1), considered. *Maharani Rajroop Kuar* v. *Syed Abul Hossein* (2); *Kay* [271] v. *Oxley* (3); *Polden* v. *Bastard* (4); *Worthington* v. *Gimson* (5); *Hinchcliffe* v. *Earl of Kinnoul* (6); *Morris* v. *Edgington* (7); *Barkshire* v. *Grubb* (8); and *Bayley* v. *G. W. R. Co.* (9), referred to.

[F., 28 M. 495 (497) = 15 M.L.J. 25; R., 18 B. 616 (630); 16 C.P.L.R. 156 (160); 9 Ind. Cas. 764 = 9 M.L.T 274 = 4 M.W.N. (1911) 274 (275); 17 Ind. Cas. 966 (967) = 6 C L J. 417; P.L R 1900 p. 177.]

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* Second Appeal No. 66 of 1891 from a decree of H. B. Punnett, Esq., Officiating District Judge of Saharanpur, dated the 1st of September 1890, confirming a decree of C. Steel, Esq., Subordinate Judge of Dehra Dun, dated the 11th of February, 1890.

(1) 8 C. 956.
(2) 7 I.A. 240.
(3) L.R. 10 Q. B. 360.
(4) L.R. 1 Q.B. 156.
(5) 2 E. and E. 618 = 29 L.J.Q.B. 116.
(6) 5 Bing. N. C. 25.
(7) 3 Taunton 24.
(8) 18 Ch. D. 616.
(9) 26 Ch. D. 434.

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THE facts of this case are very fully stated in the judgment of the Court.

Mr. *C. Ross-Alston*, for the appellants.

Babu *Parbati Charan Chatterji*, for the respondent.

JUDGMENT.

EDGE, C.J., and AIKMAN, J.—The suit out of which this second appeal has arisen was brought by H. Wutzler and J. Guibert, who describe themselves in their plaint as proprietors of the Charleville Hotel, Mussoorie. The defendant, who is appellant here, is described in the plaint as "Major Sharpe, owner of the Vicarage." The plaint was presented to the Court of the Subordinate Judge of Dehra Dun on the 7th of October 1889. Omitting the formal heading and the verification, the plaint was as follows:—

"Plaintiffs state as follows:—

"1. That plaintiffs and their predecessors-in-title have peaceably and openly through their servants used the road marked S.S. in annexed map, as a road to the spring in Captain Lee's ground, for the purpose of fetching water for the use of the Hotel, as of right and without interruption for more than 20 years.

"2. That the defendant closed the road from 19th to 22nd April last, and from 27th September up to date, and denies that plaintiffs have a right of way over it.

"3 Plaintiffs pray for a declaration that they have a right of way over the said road."

It is obvious from the wording of the plaint that it was framed on s. 26 of Act No. XV of 1877 (The Indian Limitation Act, 1877). From the fact that the plaintiffs did not, under section 59 of the Code of Civil Procedure, produce any title-deed in Court when the plaint was filed or enter any title-deed in any list added [272] or annexed to the plaint, it is further obvious that the plaintiffs did not sue upon any title-deed or intend to rely on any title-deed as evidence in support of their claim. The plaint did not allege or claim any right of way with ponies or mules.

The defendant did not tender any written statement, nor did the Subordinate Judge require, under s. 112 of the Code of Civil Procedure, any written statement from the defendant.

The Subordinate Judge proceeded under ss. 117, 118 and 119 of the Code of Civil Procedure, and examined one of the plaintiffs and the defendant, and it then appeared that the plaintiffs were claiming a way to and fro over the defendant's land for their servants on foot and with ponies and mules for the carriage of water from a spring known as Captain Lee's Spring to the Charleville Hotel, and that they further claimed the way as one of necessity. The defendant entirely denied that the plaintiffs were entitled to any right of way whatever over his land. The *onus* of proof was upon the plaintiffs. No amendment of the plaint was made. The Subordinate Judge proceeded to try the suit on the basis of the more extensive right of way which the plaintiff who was examined had in such examination orally claimed. The defendant required the plaintiffs to produce their title-deeds, but the plaintiffs refused to produce, and did not produce any title-deed. The Subordinate Judge declined to order the plaintiffs to produce any title-deed.

We think it necessary for a right understanding of the procedure in the trial of the suit and of the findings of the Subordinate Judge to set out

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his judgment. That judgment, omitting the formal heading and the signature of the Subordinate Judge, was as follows:—

JUDGMENT.

"Messrs. Wutzler and Guibert, the proprietors of the Charleville Hotel, Mussoorie, claim a private right of way for their *pakhal* animals over a piece of road (S.S. marked purple on exhibit No 1, a map the accuracy of which is admitted), running through the grounds of Major Sharpe. Major Sharpe denies that the plaintiffs have any right of way whatever.

[273] "After taking the statements of the parties, I framed the following issues:—

"1. Is Mr. Wutzler barred by any defect in his title to the Charleville Hotel from bringing this suit?

"2. Has the proprietor of the Charleville enjoyed a right of way as of right and without interruption over the disputed bit of road for 20 years?

"3. Has no right of way accrued as an easement by reason of the Charleville property and the Happy Valley having been within the last six years one property?

"4. Must. Mr. Wutzler practically of necessity go *this* way to enjoy the full right to get water from Captain Lee's Spring?

"It may be as well first to decide what the facts of the case are.

"There seems to be no dispute as to the following facts The Charleville, Happy Valley, Major Sharpe's, and other estates were originally all owned by Mr. Hobson.

"The Mussoorie Bank got possession of them all in 1881.

"In 1888 Major Sharpe got his part of the estate from the Bank by purchase. The bit of road runs through his estate.

"The defendant is much aggrieved at the action of the Mussoorie Municipality, which seems at first to have considered that Major Sharpe was interfering with a public right of way and to have promised Mr. Wutzler (an offer subsequently withdrawn), when he complained to the Board, to pay half his legal expenses in asserting the right, but afterwards to have discovered that the right was a private one. This, however, seems to me to have no bearing whatever on the case. I have no doubt whatever that the members of the Board who have been examined have honestly arrived at the opinion they hold in the matter, and they are not the men to dishonestly distort facts in any way. Whatever the Board may have done does not affect the private rights existing between Mr. Wutzler and Major Sharpe. It is also clear that another road down to the spring (a zigzag from E. on the map [274] Nos. I to X) has recently, in January 1889, been repaired by the Municipality. I have been over all the roads. The Charleville Hotel is, it seems, supplied with water from two springs, the one to which this road goes down and one out beyond Herne Dale. Mr. Wutzler and Mr. Treherne, a former manager, state that neither of these springs in the hot weather supplies (considering that water is taken from them for many other houses also) sufficient water by itself for the Hotel, the requirements of which are large. This is not seriously challenged by the other side, which brings no evidence on the point, and Mr. Wutzler's evidence is somewhat (of course one can't say certainly) confirmed by what I saw when I inspected them. They seemed small springs and the one behind the General's is high up the hill. I have no doubt whatever that it is in-

the hot weather, and even I should say all the year round, absolutely necessary for the Hotel people to go down to Captain Lee's Spring to get sufficient water. There seem to be no other springs anywhere near. The parties mention none.

"Down to this spring there are four roads. With one of these we have nothing to do. It runs behind Pleasure View and the Theatre at the end of the Happy Valley through Captain Murray's land. He strongly asserts that it is a private road, saying he made it, and no one challenges his statement. The other three roads are the one in dispute leading from a walnut tree grove in the corner of the Happy Valley to Undercliff Cottage, one running from the Deanery gate to Undercliff Cottage, and the zigzag above referred to. These three roads it has been agreed to call A, B, and C respectively. With regard to road B we need not consider it, as Major Sharpe says it runs through his property, and he is as ready to dispute Mr. Wutzler's right of way over it as he is his right over A.

"The main dispute in this case is whether the zigzag way is one which can be used by Mr. Wutzler or not. There is evidence on the one side to the effect that it is impossible for mules laden with *pakhals* to get up it, while on the other hand there is the evidence of Captain Lee, who says he has seen mules laden with *pakhals* [275] go up, and that of a bhishti, who says he has taken them up there, while it is urged that the Municipality would not have repaired the road unless animals could get up.

"The only way to decide such a point was by an inspection of the spot. I have walked up the road C; though it has been repaired by the Municipality, it is even now practically inaccessible. From the state of it now, I am of opinion, that before it was repaired it must have been merely a '*pugdandi*' or foot-path, such as are common in the hills down to springs and capable of being used only by men on foot. The money spent on it by the Municipality has, I think, been practically wasted; the road must soon fall out of repair, and there does not appear to be any chance of the Municipality repairing it again. Without going so far as to say that a mule with very small *pakhals* might not struggle up, I without the slightest hesitation say that it is practically impossible for Mr. Wutzler to get the large quantity of water he wants up that hill. If I were living in the Deanery at the top of the zigzag and had no other way down to the spring and no other spring to go to, I should not send animals down them; I should send bhishtis down. It would be cheaper, as the animals would be killed. Mr. Wutzler requires so much water, and to keep his hotel going has to consult ways and means so much, that it is out of the question his getting all his water by bhishtis. In concluding my notice of the facts of the case I can only draw attention to Captain Murray's evidence, which is thoroughly trustworthy, as his land adjoins the spot in dispute, and he has lived near there for over thirty years while his *bona fides* is above suspicion.

"Having now considered the facts, I proceed to take up the issues *seriatim*.

"As Mr. Wutzler is shown to be in possession of the Charleville and recently (*i.e.*, since 1886) been in the habit of sending his *pakhal* animals by the way in dispute, it was incumbent on the defendant, who denied his ownership (s. 90, Indian Evidence Act), to prove that Mr. Wutzler was not the owner.

[276] "He accordingly called for Mr. Wutzler's title-deeds. Mr. Wutzler said he could get them, but would take his legal representa-

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tive's advice. Mr. Melville on his behalf objected,—a natural objection in this country, where deeds are imperfectly drafted, and in Mussooree, in which it is said you can find a legal flaw in the title-deeds of every house in the place. He said he had not seen the deeds, but he was not going to allege that there had been any express grant of the right of way.

"Anant Narain said he did not want to contest Mr. Wutzer's right to the hotel, though he might be only the manager, but he wanted to contest the right of way. For all he knew there might be a special clause in the title-deeds, showing that this right of way was not granted.

"Now it has been held by the High Court in———that in a case like this, where reasonable objections exist on other grounds to the production of documents and when the party wishing them to be produced has no definite knowledge of what they contain, they may not be called for merely in the hope that something favourable to the person calling for them may be discovered. I therefore refused to insist on their production. Mr. Webb has sworn he sold the Charleville to Messrs. Wutzler and Guibert, and the other side have absolutely no evidence whatever that these gentlemen are not the owners of the Charleville.

"On the first issue then I find that Mr. Wutzler is not shown to be unable by any defect in his title in the dominant tenement to bring this suit.

"On the second issue I find for the defendant. Up to 1886 the two tenements were united in the same ownership. The easement then cannot be said to have existed as of right, and no easement has been acquired by prescription.

"The fourth issue I find in favour of the plaintiff. The necessity seems to me to be clearly apparent, and it would amount to much more than a mere inconvenience to Mr. Wutzler to have to send his mules down the zigzag. He would, I think, have to shut [277] up his hotel. As the owner of the properties sold Mr. Wutzler the hotel, and I find that in Mr. Hobson's time and during the time Mr. Treherne managed the Hotel for the Bank, the *pakhal* ponies had always gone down by the way in dispute, I find that the grant of the easement is capable of being presumed by implication of law arising out of the severance of tenements, although it must be taken that no mention of it was made in the title-deeds.

"In coming to this decision I have been much assisted by a ruling brought to my notice by Mr. Melville—that in *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1). I have above stated that in this case I find an easement of necessity exists.

"Mr. Melville urges that, even if I did not find that, still the principle laid down in that case, that the right of way, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance and in this case if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. In this I agree with him. See my remarks on the state of the road before it was improved by the Municipality.

"It has been urged by Anant Narain that no claim of an easement by necessity or by implied grant is claimed in the plaint, but a litigant in this country cannot be bound too hard and fast by the pleadings. In this case too the exact legal nature of the right only became apparent as the case

(1) 8 C. 956.

progressed, and in the plaint I notice that paragraph 3 claims 'a right of way' merely, not defining what sort of right of way.

"The third issue I also decide in favour of the plaintiff.

"I find therefore that Messrs. Wutzler and Guibert have a private right of way for their *pakhal* animals and bhishtis over road A, and I order that Major Sharpe pay them their costs."

From the decree based upon that judgment the defendant appealed to the Court of the District Judge. The judgment of the [278] then Officiating District Judge was, omitting merely formal parts, as follows :—

JUDGMENT.

"Plaintiffs and defendant in this case are now owners of different portions of a property which was joint and united down to 1886, when plaintiff and his partner bought the Charleville Hotel. Plaintiff now resides in the Hotel and occupies it as manager, and he sues defendant for a declaration of right of way for his mules loaded with *pakhals* (big leather bags to hold water), to pass over a portion of defendant's property down to and up from a well of water. Defendant denied the right of way. The lower Court has found that there was an easement of necessity and decreed plaintiffs' claim, and this order is appealed here.

"The first ground of appeal taken here was that plaintiffs could not sue unless they produced the title-deeds to the property. Now an easement is, under s. 4 of the Easements Act, one which the owner or occupier of the dominant tenement is entitled to enjoy. I am therefore of opinion that plaintiff was entitled to sue without producing any title-deeds since he was in possession of the Charleville Hotel, the more so as no notice was duly served on him by law requiring him to produce those deeds.

"Secondly, it is urged that plaintiffs have not proved their right to take water from Captain Lee's spring. But that has not been denied, nor was any question put to Captain Lee on the subject, though he was a witness in the case.

"We must come to the main point in the case, which is as to the easement claimed being one of necessity, *viz.*, in the words of the Calcutta High Court in *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1), whether the easement is necessary for the enjoyment of the Charleville Hotel 'in the state in which it was at the time of severance.' Now it is abundantly evident from the evidence on the record that the Charleville Hotel requires more water than it can get from the only other spring within a practicable distance from it. Hence it is a necessity that it should [279] get water from this spring. There are only two ways in which it can get to this spring; one is by the pathway in dispute, and the other is by a road which is called the zigzag in the judgment of the lower Court and goes from E. to N E. on the map.

"The evidence before the lower Court on this point produced entirely by the defendant is somewhat conflicting, but the weight of that evidence is certainly against the practicability of this road for mules laden with *pakhals*. The lower Court inspected the spot and has recorded its emphatic opinion on the point. I am therefore not inclined to go against that opinion, backed up as it is by the weight of evidence. The learned Counsel for the appellant has stated that his client knows nothing of any local investigation, and it is a pity that notice was not given of that to

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the defendant. At the same time, since the investigation was a mere inspection of the roads, I do not consider that notice was necessary. I find therefore, upholding the decision of the lower Court on the point, that the easement in this case was one of necessity.

"The only other point raised in appeal was that the road stops short at the Pavilion on the map and is not continued to meet any other public road. I do not consider that this would affect the right of way. Plaintiff may be stopped at any other part of this road to the path in dispute, but that will not affect his having the right of way over it

"One other point raised is that the decision is against the claim which was one of right of way exercised for 20 years. It would have been better had the plaint been amended, but since the issues were fixed so as to try the merits of the case under s. 147, Civil Procedure Code I do not consider it necessary to return the plaint for amendment. The question was not argued for appellant, and the right of way claimed in the latter portion of the plaint is not specified.

"For the above reasons I would dismiss this appeal with costs."

[280] From the decree based upon that judgment of the Officiating District Judge, this second appeal has been brought by the defendant, who challenges the correctness of the conclusions of law of the Courts below, and in any event disputes the right of the plaintiffs to a decree on a case not stated in their plaint and to a relief not included in the prayer of the plaint.

Although the findings of fact of a Court in first appeal must, when there is evidence on the record in support of them, be accepted as final by a Court hearing an appeal from an appellate decree, yet the correctness of the conclusion of law from the facts found can be considered in second appeal.

The first observation to be made is that a right of way for the plaintiffs' servants with ponies or mules was not specifically claimed in the plaint, but apparently that was the right which the Courts below considered to be established and intended to decree.

As the case is one of considerable importance to the parties, we shall consider whether on the facts found the plaintiffs have in law any right of way at all over the path in question.

In order to do this it is necessary for us to state concisely what the facts admitted and what the facts found, disentangled from the inferences of law drawn by the lower Courts, appear to be.

The Charleville Hotel property, in connection with which the right of way is claimed as an easement, the defendant's property, over which the right of way is claimed, and some other properties adjoining belonged at one time to a Mr. Hobson. In 1881 the Mussoorie Bank got possession of those properties, but how or under what title does not appear by the findings. It also appears from the findings that the Charleville Hotel was for some time managed for the Mussoorie Bank by a Mr Treherne, and that during Mr. Treherne's time as Manager, and previously when Mr. Hobson was owner of the properties, ponies carrying *pakhals* for the supply of water to the Charleville Hotel had gone to and for between the Hotel and Captain Lee's spring by the path over which the right of way is claimed. The Charleville Hotel property was sold to the [281] plaintiffs by the Mussoorie Bank in 1886. In 1888 the Mussoorie Bank sold to the defendant the land over which the way is claimed. From 1886 the plaintiffs have carried on the Charleville Hotel as a hotel. On two occasions in 1889 the defendant closed the path in question. We think the result of

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the finding is that sufficient water for the use of the Charleville Hotel could not be obtained, at any rate in the hot weather, from any source or sources in the neighbourhood other than Captain Lee's spring. Leaving out of account two admittedly private paths or roads, over which the plaintiffs have no right of way, there is in addition to the way in dispute a path referred to in the judgment of the Subordinate Judge as the "zigzag," over which water for the use of the Charleville Hotel could be carried from Captain Lee's spring. The zigzag is a public path and is very steep. As we understand the findings of fact, the plaintiffs could, by using the zigzag, procure sufficient water for the use of the Hotel, but at much greater expense than by using the way in dispute, as the zigzag is, according to the findings, unsuitable for use by ponies or mules carrying *pakhals*, although it could be used by bhishtis carrying water.

The Subordinate Judge declined to find that a mule with very small *pakhals* could not pass up from Captain Lee's spring over the zigzag. The Officiating District Jūdge did not on that point express any dissent. Even if the plaintiffs are not entitled to use the way in dispute, the Charleville Hotel is not cut off from access to Captain Lee's spring, as sufficienet water for the use of the Hotel can be brought to the Hotel from Captain Lee's spring by bhishtis passing over the zigzag, which is a public path; but it is much less expensive and more convenient to have the water carried in *pakhals* on ponies or mules over the way in dispute. There can therefore be no absolute necessity for the using of the way in dispute by the plaintiffs. The question is merely one of expense, affecting the profitable working of the Hotel.

We must now ascertain what are the conclusions of law to be drawn from those facts. No question was apparently raised in either of the Courts below as to whether since 1886 the Charleville Hotel [282] has been so much extended as to materially increase the quantity of water required for the use of the Hotel and necessarily the number of ponies or mules employed for carrying water from Captain Lee's spring to the Hotel. The Counsel for the defendant, appellant in this appeal, asserted that since 1886 the Hotel had been largely extended, and the burden materially increased; but as that question was not raised in either of the Courts below, we do not think that we should now refer an issue on that question for trial, particularly as each Court was apparently allowed to deal with the case on the basis of there having been no material increase in the requirements of the Hotel, so far as this question is concerned, since the Charleville Hotel property was purchased by the plaintiffs in 1886.

On the facts found, the case of right of way acquired by a twenty years' user on which the plaintiffs relied in their plaint entirely failed. There was no severance of ownership until 1886.

Mr. Hobson, and after him the Mussoorie Bank, used the way in right of their ownership of the two properties. The way could not be said to have been enjoyed by Mr. Hobson and the Mussoorie Bank "claiming title thereto as an easement and as of right" within the meaning of s. 26 of Act No. XV of 1877. There can be no claim as of right within the meaning of that section unless there is a several owner of the servient tenement.

When the plaintiffs refused to produce their title-deeds their vakil stated to the Subordinate Judge that the plaintiffs did not allege that there had been any express grant of the right of way claimed. No express grant of any right of way was proved. Owing to the non-production of the

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plaintiffs' title-deeds, it cannot be assumed that there are any words in those title-deeds from which a grant of the right of way claimed for any purpose could be inferred.

As there was no severance until 1886, and as the plaintiffs admittedly have in their possession the title-deeds relating to the Charlleville Hotel property it would be impossible to presume that the right of way claimed was created by a grant which is lost.

[283] The plaintiffs, if they are to succeed in establishing any right of way over the defendant's land, can consequently only do so by proving that the easement which they claim is an easement of necessity, or an easement which, in some other way on the facts found, and notwithstanding their refusal to produce their title-deeds, it must be presumed that they acquired on the transfer of the property to them in 1886.

Act No. V of 1882 (the Indian Easements Act, 1882) does not apply in this case, as it was first made applicable to these provinces by Act No. VIII of 1891 on the 6th of March 1891, on which day it first came into force so far as these provinces are concerned. S. 2 of Act No. V of 1882 enacts that nothing in the Act contained shall be deemed to derogate from "(c) any right acquired, or arising out of a relation created, before the Act came into force."

So far as we are aware the only legislative enactments under which an easement might have been acquired in these provinces in 1886 were Act No. XV of 1877 and Act No. IV of 1882. As Act No. V of 1882 did not extend to these provinces until the 6th of March 1891, section 3 of that Act had not in 1886 repealed, so far as these provinces were concerned, s. 26 of Act No. XV of 1877; but, as we have already shown, s. 26 of Act No. XV of 1877 cannot be applied in this case.

We shall now consider Act No. IV of 1882. In doing so we must bear in mind that the plaintiffs have, by their refusal to produce their title-deeds, prevented us from ascertaining whether there is anything in those title-deeds which would preclude us from inferring that it was intended that a right of way over the path in question should pass to them.

We must now see how far, if, at all, s. 8 of Act No. IV of 1882 (The Transfer of Property Act, 1882) affects the question before us. Section 8 of Act IV of 1882, so far as is material for present purposes, is as follows:—

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the [284] interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

"Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth, * * * and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith."

As. s. 8 of Act No. IV of 1882 applies without limitation to all "the easements annexed thereto," and as easements coming within the meaning of those words do not pass on a transfer of property if "a different intention is expressed or necessarily implied," and as we have not in this case the deed of transfer on the record, and consequently cannot ascertain whether such different intention was expressed or is necessarily to be

implied, it is necessary to discover, if we can, what the words "the easements annexed thereto" mean, so as to see what easement, if any, may pass independently of s. 8 of Act No. IV of 1882.

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Act No. IV of 1882 does not contain any definition of the word easement. The definitions of easements contained in Act No. V of 1882 are not available in this case, as that Act did not come into force in these provinces until the 6th of March 1891, after the rights of the parties to this litigation had been acquired. "Easement" is not defined in Act No. I of 1868 (The General Clauses Act, 1868).

Under s. 8 of Act No. IV of 1882 the easements which may pass on a transfer of land or a house are "the easements annexed thereto." What meaning the Indian Legislature intended to express by the use of the word "annexed" in s. 8 of Act No. IV of 1882, we are unable to ascertain. It is not in this connection at least an ordinary term of law, and Act No. IV of 1882 does not define it. "Annexed" as a term of law is not to be found in Wharton's Law Lexicon, nor does it appear in Stroud's Judicial Dictionary as a term which has received a judicial interpretation in [285] the Courts in England. According to Webster's Dictionary "annex" as a verb means—

"1. To join or attach; usually to subjoin; to affix; to append."

"2. To join or add, as a smaller to a greater."

"3. To attach or connect, as a consequence or condition; *viz.*, as to annex a penalty to a prohibition, or punishment to guilt."

We may assume from Dr. Whitley Stokes' Introduction to Act No. IV of 1882, in his edition of the Anglo-Indian Codes, that the Statute 44 and 45 Vict., Chap. 41, was before the Legislature in India or its advisers when Act No. IV of 1882 was passed; yet the Indian Legislature for some reason did not think it advisable to use in s. 8 of Act No. IV of 1882 the plain language of section 6 of 44 and 45 Vict., Chap. 41, which could be understood by every one possessed of a knowledge of the English language, lawyer and layman alike. Possibly it was not intended to extend to India the broad principles of what appear to us to be the justice, equity and good conscience to be found in s. 6 of 44 and 45 Vict., Chap. 41. The latter section, so far as is material for purposes of comparison, is as follows:—

"(2) A conveyance of land having houses or other buildings thereon, shall be deemed to inculde, and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all out-houses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the lands, houses, or other buildings conveyed, or any of them, or any part thereof."

"(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject [286] to the terms of the conveyance and to the provisions therein contained."

Whether it was intended by s. 8 of Act No. IV of 1882 to apply the broad principles of justice, equity and common sense to be found in the sub-ss. (2) and (4) of s. 6 of 44 and 45 Vict., Chap. 41, which we have

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just quoted, we do not know and are unable to ascertain from an examination of s. 8 of Act No. IV of 1882.

The same word "annexed" is used in the illustrations to s. 5 of Act No. V of 1882. As Act No. IV of 1882 and Act No. V of 1882 were passed in the same session of the Indian Legislature and received the assent of the Governor-General on the same day, namely, on the 17th February 1882, we might expect that some light as to the meaning of a word common to the two Acts might be obtained by a comparison of those Acts.

Clause (*b*) of s. 13 of Act No. V of 1882, referring to an easement in other immoveable property of a transferor or a testator who transfers or bequeaths immoveable property to another, enacts "(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took place, the transferee or legatee shall, unless a different intention is expressed or necessarily implied be entitled to such easement. Turning to s. 5 of Act No. V of 1882 which defines the terms "apparent" and "continuous" to be found in s. 13, and which consequently must be read with clauses (*b*), (*d*) and (*f*) of s. 13, we find "5. Easements are either continuous or discontinuous, apparent or non-apparent. A continuous easement is one whose enjoyment is, or may be, continued without the act of man. A discontinuous easement is one that needs the act of man for its enjoyment.

Illustrations.

"(*a*) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

[287] "(*b*) A right of way annexed to A's house over B's land. This is a discontinuous easement."

Thus we have in the illustrations (*a*) and (*b*) which we have quoted two rights described respectively in each illustration as "annexed" to a house, and further, each right is described as an "easement." If the words "annexed" and "easements" are used with the same common meaning in s. 8 of Act No. IV of 1882, and in s. 5 of Act No. V of 1882, we have in cases not falling within s. 19 of Act No. V of 1882, this extraordinary result that on a transfer of a house an easement, whether it was continuous or discontinuous, apparent or non-apparent, so long as it was one of "the easement annexed" to the house, would by virtue of s. 8 of Act No. IV of 1882, pass to the transferee, "unless a different intention is expressed or necessarily implied," and yet when we turn to Act No V of 1882, which more exclusively and exhaustively deals with easements, we find that the same easement, if it was not continuous and apparent, although it was necessary for enjoying the subject as it was enjoyed when the transfer took effect, and although it was an easement annexed to the house, would not under s. 13 of Act No. V of 1882, pass to the transferee. Yet we presume that the Legislature could not have intended that in cases not falling within s. 19 of Act No. V of 1882, an easement which would not on a transfer of property pass by virtue of s. 13 of Act No. V of 1882, might pass by virtue of s. 8 of Act No. IV of 1882. In s. 19 of Act No. V of 1882, which applies to the transfer or devolution of a heritage which at, and prior to, the time of the transfer or devolution was a dominant heritage, the same generic word "easement" is used and is, by the illustration to that section applied to a case in which "A" has certain land to which a right of way is "*annexed*................"

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In order to guard against its being suggested that we have carelessly read ss. 5 and 13 of Act No. V of 1882, it is necessary to point out that, although the only apparent object of s. 5 was to provide definitions, by inclusion and exclusion, of the words "continuous" and "apparent" used in s. 13, none of the [288] illustrations to s. 5 seem to be strictly applicable to any easement provided for by s. 13. For instance, illustrations (*a*) and (*c*) to s. 5, which are respectively illustrations of continuous easement and of an apparent easement, assume the existence of a dominant and a servient tenement and a several ownership, but clauses (*b*), (*d*) and (*f*) of s. 13 apply to easements, necessary for enjoying the subject or the share, which were apparent and continuous at and before the time when a several ownership and a dominant and servient tenement were created by the transfer, bequest, or partition, as the case might be. However, although the illustrations to s. 5 are not apposite to the cases provided for by s. 13, the meaning of s. 5 is obvious.

It is obvious from what we have pointed out that from a comparison of Act No. IV of 1882, and Act No. V of 1882, confusion and not light is obtained as to the meaning to be attached to the word "annexed" as used by the Legislature. It is also obvious that if Act No. V of 1882 applied in this case and were to be considered as the governing Act and as limiting, so far as easements are concerned, s. 8 of Act No. IV of 1882, no right of way over the path in question passed to the plaintiffs as an incident of the transfer, unless the way was an easement of necessity as distinguished from an easement apparent and continuous and necessary for the enjoyment of the Charleville Hotel property, as that property was enjoyed when the transfer took effect in 1886.

It may be that such a way as that which Blackburn, J., held in *Kay* v. *Oxley* (1) was capable of being considered as appurtenant might be one of the "easements annexed" within the meaning of s. 8 of Act No. IV of 1882. In *Kay* v. *Oxley* (1) Blackburn, J., dissented from the proposition that there can be no using and enjoying by the common owner of two closes of a way over one of them to the other as a way appurtenant. We quote from page 365 of the report what Blackburn, J., said on the subject:—

"Mr. Herschell says that where a man is occupier of two adjoining places of land, and uses both for the convenience of [289] himself as the actual occupier of both, anything that he may do on the one is *prima facie* not a right appurtenant to the other, and would not pass as appurtenant; and that when he passes across the one close to the other he exercises the right of going from one to the other merely for his convenience as the occupier of the two, and that he does not *prima facie* enjoy or occupy the way as appurtenant to the other, and that the way would not pass as a right enjoyed or as appurtenant. But though that may *prima facie* appear to be the case, yet if there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of the road having been so enjoyed and occupied only during the time he had unity of possession or unity of seisin prevents it being enjoyed as appurtenant."

It is further obvious that even if the way claimed was at the time of the transfer to the plaintiff of the Charleville Hotel property one of the

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easments annexed theret to, whatever those words mean in s. 8 of Act No. IV of 1882, we would not be entitled to hold that any easement passed by virtue of that section to the plaintiffs as a legal incident of the property, as the plaintiffs have by refusing to produce their title-deeds prevented us from ascertaining whether a "different intention is expressed or necessarily implied" in the coveyance to them, and it is only when a different intention is not expressed or necessarily implied in the transfer of property that "easements annexed thereto" pass by virtue of s. 8 of Act No. IV of 1882.

As we understand s. 8 of Act No. IV of 1882, there must be nothing in the conveyance which would negative the right to the way claimed. Consequently when a person claims a way, except possibly a way of absolute necessity, as having passed by virtue of a transfer of property, it is incumbent on him to put the conveyance in evidence.

When, as in the present case, the person claiming a way refuses to put in evidence the conveyance to him, the Court may act on the [290] principle of illustration (*g*) of s. 114 of Act No. I of 1872, and presume that evidence which could have been and was not produced, would have been, had it been produced unfavourable to him.

Section 8 of Act No. IV of 1882 canot be regaded as exhaustive of the easements which may pass on a transfer of property otherwise than by express words of grant or under general words of grant. In no posssible meaning of the word "annexed" as it is used in s. 8 of Act No. IV of 1882 could an easement of necessity which first came into existence as a consequence of a transfer of a house or land be said to have been one of the "easements annexed thereto," which must mean in any sense of those words easements which at and prior to the transfer were existing easements. We could not credit the Legislature with the intention of excluding by s. 8 of Act No. IV of 1882 in those territories to which Act No. V of 1882 did not extend a right of way as an incident to a transfer where such way was one strictly of necessity.

We must now consider what a way as an easement of necessity is, and how and under what circumstances it arises as an incident of property or as an incident of a transfer of property. For this purpose Act No. V of 1882 is not available to us except as showing what the Legislature enacted should be an easement of necessity in the territories to which that Act was made applicable.

As we understand the authorities, a right of way arising on a grant or lease of land as an easement of necessity, is a way which in law is necessarily implied to be granted, or reserved on the severance of land when the property, whether it be land simply or land with a building upon it, granted or leased or the property reserved out of a grant or lease cannot be enjoyed by a way over land of the grantee or lessee in the one case, or over land of the grantor or lessor in the other. A way of necessity would in the former case necessarily pass as incident to the grant or lease, and in the other case arises as incident to the reservation. In Williams' Notes to Saunders' Reports, Vol. 1, at page 570, Ed. of 1871, it is said: "So where [291] a man having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a *way* to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the lands and *reserves* the close to himself. 2 Rol. Abr. 60, pl. 17, 18, S.C. Cro. Jac. 170, *Clarke* v. *Cogge*, Owen 122; *Jorden* v. *Atwood*, 6 Mod. 3: *Staple* v. *Heydon*, 8 T. R. 56; *Howton* v. *Pearson*, Willes' Rep., 72, 73, n (6). This

principle seems to be the foundation of that species of way which is usually called a way of *necessity*."

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Rolle's Abridgment is not in this Court's library, and we quote from page 140 of Gale on Easements, 6th edition.

Easements of this nature are thus described in Rolle's Abridgment:—

"'If I have a field enclosed by my own land on all sides, and I aliene this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant, and the grantor shall assign the way where he can best spare it. So, too, if the close aliened be not entirely enclosed by my land, but partly by the land of strangers for he cannot go over the land of strangers. Quœre.' The chapter of Rolle in which these sections occur is headed: 'In what case one thing shall pass by grant of another.—Incidents.'—And the first pl. is: 'The grant of a thing passes everything included therein, without which the thing granted could not be had.' Pl. 16 is: 'If a man grant or reserve wood, that implies liberty to take and carry it away,' thus evidently treating it as a necessary implication of the intention of the grantor, as in the case of all other incidents which the law attaches to grants."

The illustrations (*a*) and (*b*) to s. 13 of Act No. V of 1882 are consistent with the view of the law as to ways of necessity to be gathered from the passages in Roll's Abridgment and Williams' Notes to Saunders' Reports, which we have quoted above. It is [292] evident on the facts found in this case that the way claimed here cannot be regarded in law strictly as an easement of necessity for the sufficient reason that the plaintiffs, although at very much greater expense, can procure from Captain Lee's spring sufficient water for the use of the Charleville Hotel by bhishtis passing to and fro over the "zigzag" which is a public path. If Act No. V 1882 applied to this case it would be plain from an examination of s. 13 of that Act and the illustrations to s. 13 that no easement of necessity over the defendant's land exists, so far as the plaintiffs are concerned.

As the Courts below, on the authority of *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1), held that on the facts which they found the plaintiffs had proved an easement of necessity, it is necessary to consider whether prior to 6th of March 1891 there could have been in these provinces as a necessary incident to a transfer a way of necessity other than a way which would be strictly an easement of necessity under circumstances similar to those mentioned in clauses (*a*), (*c*) and (*e*) of s. 13 of Act No. V of 1882.

Act No. V of 1882 did not apply in the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1). If the learned Judges in that case had considered that s. 13 of Act No. V of 1882 read with s. 5 of that Act correctly embodied the principles of law which existed independently of that Act, they could not have held that a way over the path and ghat in that case might pass as an easement apparent and continuous and necessary for the enjoyment of the defendant's tenement in the state in which it was at the time of the severance. As their Lordships of the Privy Council held in *Maharani Rajroop Koer* v. *Syed Abdul Hossein* (2), that Act No. IX of 1871 did dot exclude or interfere with titles and modes of acquiring easements existing independently of that Act, it follows that Act No. XV of 1877

(1) 8 C. 956.

(2) 7 I.A. 240.

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does not exclude modes of acquiring easements existing independently of that Act, and we are consequently entitled to see whether on general principles a way which [293] is not strictly an easement of necessity, but which was a made and visible path and was used at the time of the transfer, and was, and is, necessary to the enjoyment of the land or house transferred in the state in which it was at the time of the severance, is capable of passing as an incident to the transfer and can be inferred to have passed in this case.

We have been able to obtain little assistance on this point from the decisions of the Courts in India. In *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1), it was apparently assumed by the Calcutta High Court that such a way would pass as a quasi-easement of necessity. We know of no other decision of a Court in India throwing any light on this particular question. We shall now examine some of the cases decided in England relating to the acquirement of easements of ways by implication or as incidental on a grant. In referring to decided cases on this subject it is necessary to bear in mind that there can be here no suggestion of a lost grant, and as the plaintiffs have not put any title-deed in evidence that those cases in which a grant of a right of way has been inferred from the use of particular or general words in deeds of conveyance, or in wills, can throw no light upon the legal questions to be decided in this case.

It is difficult to deduce any clear and uniform rule from the decisions of the Courts in England on this particular question.

In *Polden* v. *Bastard* (2), in Ex. Ch., Erle, C.J., in 1865, said—

"There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention [294] that they should pass. This right to go to a well and take water is not a continuous easement, nor is it an easement of necessity." In the judgment of Erle, C.J., in *Polden* v. *Bastard*, Pollock, C.B., Willes, Byles, and Keeting, JJ., Bramwall and Pigott, B.B., concurred.

In *Worthington* v. *Gimson* (3), in which on a partition of two farms which belonged to two persons as joint owners the question to be decided was, whether on the partition by conveyance of the farms to separate owners in severalty there was an implied grant of the right to use a way which had been regularly used for many years by the occupier of one of the farms over the other. It did not appear whether there was a hard or visible track. It was held there was no implied grant of a right to use the way. In that case Crompton, J., in 1860, after approving of the distinction drawn in Gale on Easements between apparent and continuous easements on the one side and ways on the other, said (at page 626 of 2 E. and E) : "It is said that this way passed as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous

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(1) 8 C. 956.

(2) L.R. 1 Q.B. 156.

(3) 2 E. and E. 618 = 29 L.J.Q.B. 116.

innovation if the jury were allowed to be asked to say from the nature of a road whether the parties intended the right of using it to pass." 1893 JUNE 27.

On the other hand, there are some cases from which it may be inferred that a necessary implication of an intention to grant a right to use a way arises when parts of a building are so constructed for use that they cannot conveniently and usually be used except by using a way over other premises which at the time of the grant belonged to the grantor and were then in his possession or came into his possession before the grant was to take effect. The case of *Hinchliffe* v. *Earl of Kinoul* (1), which was decided in 1838, [295] was one in which Earl Grosvenor, in 1819, who was entitled, in reversion expectant on a ground lease which would determine in 1824, to a messuage and an adjoining passage, granted a lease of the messuage to the plaintiff for a term to commence on the expiration of the ground lease. In 1822 Earl Grosvenor granted a lease of the passage to Lord Hampden for a term to commence on or about the expiration of the ground lease. At the time when the lease of the messuage was granted to the plaintiff in 1819 the messuage had a coal shoot opening into the passage. The occupants of the messuage had long used the passage for the purpose of filling the coal cellar. The jury found that the coal shoot was necessary for the convenient and beneficial use and occupation of the messuage, and that the coal shoot could not be used without passing and repassing over the passage. On that finding the Court of Common Pleas held that the plaintiff was entitled by the legal operation of the lease to a right of way over the passage for the purpose of using the coal shoot. Tindal, C. J., in his judgment in that case said : " Since therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819 as incidental to the enjoyment of that which was the clear and manifest subject-matter of demise, it becomes unnecessary to consider the question argued at the bar before us how far the same right might or might not pass to the lessees under the express words used in the lease itself as 'an appurtenant unto the said piece or parcel of ground, messuage, or tenement, erections, buildings, and premises belonging or appertaining.'"

APPELLATE CIVIL.

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In *Morris* v. *Edgington* (2), which was decided in 1810, the facts were as follows. The defendant had granted a lease of a public house to the plaintiff. The greater part of the leased premises was on the west side of a gateway of the defendant, which led to a yard of the defendant. A portion of the leased premises, being the tap room of the public house, was on the east side of the gateway. By the lease the gateway and the yard were expressly reserved to the defendant, but it granted a right of way to the [296] plaintiff through the defendant's yard to some cellars at the back of the yard, but no right of way to the tap room was expressly granted. Access to the tap room might be had either by entering that part of the public house to the west of the gateway from the public street by a door and passing through the coffee room and thence out and across the gateway to the tap room, or by passing through the gateway direct from the public street to the tap room. On entering the gateway the door of the tap room and a finger board pointing to the tap room could be seen. On the finger board were the words "To the tap room." The defendant shut the gate in the gateway at nightfall, and thus caused the plaintiff some loss of custom. For that obstruction of the direct way from the street to the tap room and the consequent damage, the plaintiff brought his action and got a verdict, which the Court of Common Pleas

(1) 5 Bing. N.C. 25.

(2) 3 Taunton 24.

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refused to set aside. It was there contended that the express grant of the right of way to the coal cellars excluded any implied grant of a right of way direct from the street through the gateway to the tap room. In delivering his judgment Mansfield, C. J., said: "I say nothing of what is a way of necessity. I know not how it has been expounded. But it would not be a great stretch to call that a necessary way without which the most o nvenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for any one to go to the tap room through the gateway than through the coffee room, and it is much more convenient to carry out beer through the gateway than through the coffee room. Can it then be doubted that the intent was to give the same use of the way over the gateway as the lessor before used to have? * * * * * The argument founded in the expression of the special right of way goes too far; for, if it deprives the plaintiff of this way it deprives him of all ways to the tap room." It is rightly said of that case by the learned editor of Gale on Easement, 6th edition, at page 113: "This case is not conclusive on the point" (of an implied grant of a way as apparent continuous) "as it sufficiently supported by the principle that, some way being necessary, the most usual and convenient should be taken. [297] But the dictum of Sir J. Mansfield is of great importance." That view is apparently based upon a dictum of Park, B., in the course of the argument in *Pheyse* v. *Vicary* (1). In that case Parke, B., said: "Is the way contended for by the plaintiffs to be construed as of absolute necessity for access to property in its strict sense, as in the older cases, or as necessary to the convenient enjoyment of his dwelling house with reference to its condition at the time the testator had the use of it, as put in *Morris* v. *Edgington* by Sir James Mansfield, who says: 'it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had.' One or other of the ways there in question was essential to the use of the house, and the Court ruled that the most convenient of them was that way of necessity to which the party was entitled." With the fullest respect for the opinion of so eminent a lawyer as Lord Wensleydale, we think it may be doubted if Sir James Mansfield could have intended to base his decision on the way through the gateway from the street being an "easement of necessity" by which the tenant's customers should go to, or return from, the tap room, as in that case it might be doubtful if there could be another way for the tenant's customers' use from the coffee room across the gateway to the tap room, with the result that a customer of the public house who might be in the coffee room and who desired to carry away a pot of beer, would have to go from the coffee room into the public street, and thence through the gateway to the tap room instead of passing directly from the coffee room across the gateway to the tap room.

The English cases which we have cited afford examples of the difficulty of deducing a certain rule on this question from the decisions in England.

Although the more recent decisions in England show that where in consequence of a severance of unity of possession such general words of grant as "together with all ways now used or enjoyed therewith" [*Barkshire* v. *Grubb* (2), *Kay* v. *Oxley* (3)] or as "with all [298] rights, members, or appurtenances to the hereditaments belonging,

(1) 16 M. and W. 484. (2) 18 Ch. D. 616. (3) L.R. 10 Q.B. 360.

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or occupied, or enjoyed as part, parcel, or member thereof" [*Bayley* v. *G.W.R. Co.* (1)] are used the distinction between a continuous easement and a discontinuous easement does not apply and a right to use any made and visible road over other land of the grantor which at the date of the grant was in fact used for access to the land conveyed passes under such general words, yet we are not aware of any authorities in England in which it was necessary to decide, and in which it was decided, that a way without any express or general words in a conveyance and apart from any structural peculiarities of a building indicating that for the use of the building, a way must have been intended to pass, would pass on a severance as an apparent and continuous easement. In *Bayley* v. *G.W.R. Co.* (1) Fry, L.J., appeared to have been prepared to go further than we think any English Judge had previously gone. He there said (at p. 457 of the report): "If one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that, if two tenements belonged to several owners, there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre, either 'with all rights usually enjoyed with it,' or 'with all rights appertaining to Blackacre,' or *probably the mere grant of Blackacre itself without general words*, carries a right of way over Whiteacre." We do not suppose that Fry, L.J., intended to suggest by the illustration that he would hold that a mere grant of Blackacre itself without any general words would carry a right of way over Whiteacre unless it either appeared on the production of the conveyance or was admitted by the parties concerned that the conveyance contained nothing from which a contrary intention should be implied.

In our opinion an examination of the authorities does not support the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor* (2), that a way under the circumstances of that case might pass [299] by implication on a severance as an apparent and continuous easement.

We are not prepared to hold that in this case, in which the plaintiffs who had to make out their title to a way over the defendant's property, and who could have produced, but refused to produce, their title deed, any right of way whatever over the property which now belongs to the defendant passed to them by implication or as incidental on the transfer to them of the Charleville property in 1886.

In conclusion, we may say that in these provinces in which strict rules of conveyancing based on cases decided in England are little understood, and are consequently seldom followed, the principle of justice, equity, and good conscience embodied in sub-ss. (2), (4) and (5), read together, of s. 6 of 44 and 45 Vict., Chap. 41, should be applied by us in this case, and that we should hold, as we do, that the plaintiffs, have failed to make out a right to use any way whatever over the defendant's land. If the plaintiffs' title deeds would show that we might in justice, equity, and good conscience hold that a way over the defendant's land passed by implication or as incidental on the transfer to them in 1886 of the Charleville property, they have only themselves and their legal adviser to blame for the result of this litigation.

We allow the appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

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(1) 26 Ch. D. 434.

(2) 8 C. 956.

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REVISIONAL CRIMINAL.

15 A. 299= 13 A.W.N. (1893) 142.

15 A. 299=13 A.W.N. (1893) 142.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Burkitt, and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* RAM BARAN AND OTHERS.* [14th July, 1893.]

Act XLV of 1860, *s.* 395—*Dacoity—Forcible removal of cows by Hindus from the possession of Mahammadans.*

Where a large body of Hindus acting in concert and apparently under the influence of religious feeling attacked certain Muhammadans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such [300] cattle to their lawful owners, *Held* that the offence of which the Hindus were guilty was dacoity under s. 395 of the Indian Penal Code, and not merely riot.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *J. E. Howard*, for the applicants.

The Public Prosecutor (for whom Mr. *A. H. S. Reid*), for the Crown.

JUDGMENT.

EDGE, C.J., BURKITT and AIKMAN, JJ.—Rambaran Rai, Durga Rai, son of Ram Baran Rai, Bhajan Rai, Durga Rai, son of Lappan Rai, Aggia Rai, Billar Rai, Khedu Rai, and Abhai Rai were convicted by a Magistrate of the first class of offences under ss. 147, 325 read with 149 and 353 of the Indian Penal Code. For the offence under s. 147 they were severally sentenced to six months' rigorous imprisonment; for the offence under s. 325 each was sentenced to three months' rigorous imprisonment, and for the offence under s. 353 they each received a sentence of three months' rigorous imprisonment. They appealed to the Sessions Judge of Azamgarh and he dismissed their appeals. They then presented an application for revision to this Court. That application was rejected, but the Judge before whom it came directed that these men should have notice to show cause why their sentences should not be enhanced. The legality of the convictions cannot now be questioned; the only question is as to what sentences the convicts ought to receive. In order to come to a conclusion as to whether the sentences passed on these men were adequate or inadequate, it is necessary for us to see what were the facts which were found and upon which the convictions were had. The facts were shortly these :—

On the 9th of January, in the present year, one Pir Bakhsh and some others were driving forty-two head of cattle along a public road known as the Ghosi-Ghazipur road. The cattle were being driven to be sold to some Commissariat contractors, no doubt with the intention that they should ultimately be slaughtered for Commissariat purposes. When these men arrived near the village of [301] Bhadisa a large number of people came up, drove the men in charge of the cattle away and seized and carried away the cattle. Information was given at the thana, and on the following day the Sub-Inspector accompanied by some constables and chaukidars and others went in search of the stolen cattle and found them being driven towards the jungle by three Ahirs. The Sub-Inspector and his

* Criminal Revision No. 296 of 1893.

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men took possession of the cattle, and shortly after they had taken possession of them, these eight men who have been convicted, and a considerable crowd of others, who have not been convicted or arrested, came upon the scene armed with *lathis*. They attacked the Sub-Inspector and his assistants and succeeded in beating them off. They broke the wrist of one of them and cut open the head of another. We may mention that one of those who were injured was one of the men from whom the cattle had been taken on the 9th of January. The persons who rescued the cattle from the custody of the police drove them away, and, so far as appears, the cattle have never yet been restored to the possession of their lawful owners. It has been argued by Mr. *Howard*, not that the offences of which these men have been convicted were not committed by them, but that we should take into account that the persons who attacked the police and took from their custody the stolen cattle were actuated by a religious motive which made them take away the cattle to prevent their being slaughtered.

The Indian Penal Code is a statute of the Legislature applicable to Muhammadans, Hindus, Christians and all other sects alike. It is necessary in every civilized state that in order to protect the lives and property of the members of the community penal laws should exist and be enforced, and should be enforced no matter whether the person who commits an offence against them is a Christian, or a Muhammadan, or a Hindu or member of any other religious denomination. Penal laws are made for the protection of all classes alike, and they do not recognise any exception in the case of any particular denomination. A theft or a dacoity would not be any the less a theft or a dacoity if committed by members of one denomination upon the members of another; for example, no Christian or [302] Muhammadan could plead in a Court of Justice that he was not liable to be punished for theft because he acted under the incentive of some religious motive, if the facts showed that theft had in reality been committed. There must, in all states in which law and order are to abide, be penal laws equally enforceable against every denomination; and it is further necessary, unless we are to return to barbarous times, that persons who choose to wage a species of civil war on their neighbours should be adequately punished, not only as a punishment to themselves, but as a warning to debtor others from committing similar offences. A cow is an animal which in this country a Muhammadan is entitled to hold as his property and over which he is entitled to exercise all the lawful rights of an owner, and so long as that Muhammadan in dealing with his own property does not, in the exercise of his rights of ownership, commit an offence against the Indian Penal Code, the law must and will protect him in the exercise of his rights. Similarly the law will protect a Hindu or a member of any other denomination in the exercise of his rights of property. If a Muhammadan, a Hindu or a Christian or a member of any other denomination commits an offence against the Penal Code, the law can be put in force against him by the process of the Criminal Court and by that process only. If he does not commit an offence in exercising his rights of property the law does not allow any one to interfere with him in the exercise of those rights, and people who take upon themselves either to take the law into their own hands, or to override or exceed the law, must expect the punishment which the law awards for criminal acts.

We have not the slightest doubt that the persons who took from Pir Bakhsh and his companions by force on the 9th of January those

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forty-two head of cattle committed the offence of dacoity under s. 395 of the Indian Penal Code. We have the authority of Mr. Justice Tyrrell for saying that his judgment in the *Queen-Empress* v. *Raghunath Rai* (1) was a judgment based solely on the facts found in that case. We have also his authority for saying **[303]** that he never ruled that it is not theft to deprive a man of his property under the influence of religious prejudices and that in his opinion such a deprivation is theft, and might according to circumstances be dacoity. Mr. Justice Tyrrell informs us that in that case he was dealing with the facts found by the Court below and his jûdgment must be so read.

As to what happned on the 10th of January we have not the slightest doubt that these men were properly convicted of offences under ss. 147, 325 and 353 of the Indian Penal Code, and further we are satisfied that on the facts found these men did commit the offence of dacoity under s. 395 of the Indian Penal Code on the 10th of January, and that they could each and all of them have been legally sentenced for that offence to transportation for life. On the 10th of January they took out of the custody of the police, who were holding them for the benefit of the lawful owners, the cattle which had been the subject of a dacoity committed on the 9th of January. The offences which these men committed on the 10th of January were offences of a most serious description. They were offences, the repetition of which must be prevented by the strong arm of the law. On the 10th of January these men were in fact waging a kind of civil war; they were taking by force from lawful custody cattle which did not belong to them, and they were resisting the civil power in the execution of the duty of that civil power.

The jurisdiction of the Magistrate who decided this case was, by reason of ss. 32 and 34 of Act No. X of 1882, a limited jurisdiction so far as the awarding of punishment was concerned, and we sitting here in revision are limited in our jurisdiction by the jurisdiction which the Magistrate could himself have exercised. We wish it to be understood that the sentences which we shall pass in revision here do not in our opinion adequately represent our sense of the gravity of the offences of which these men have been convicted. People must be made to know that the Criminal Courts or the Civil Courts can be applied to for protection or vindication of their rights and that they must not take the law into their own hands.

[304] In this case we enhance the sentence for the offence under s. 353 of the Indian Penal Code to one of two years' rigorous imprisonment; we enhance the sentence for the offence under s. 147 of the Indian Penal Code to one of one year and nine months' rigorous imprisonment, and we do not interfere with the sentence of three months' rigorous imprisonment passed under s. 325 of the Indian Penal Code. We direct that these sentences shall apply to each of these eight men, and shall not run concurrently, but shall be consecutive.

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(1) 12 A.W.N. (1892) 120.

15 A. 304 (P.C.)=20 I.A. 108=6 Sar. P.C.J. 7=17 Ind. Jur. 320.

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FEB. 11.

PRIVY
COUNCIL.

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(P.C.)=
20 I.A. 108=
6 Sar. P.C.J.
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PRIVY COUNCIL.

PRESENT :

On the hearing of the appeal: Lords Hobhouse and Macnaghten, Sir B. Peacock, Sir R. Couch and Mr. Shand (Lord Shand).
On the delivery of the judgment : Lords Watson, Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On Appeal from the High Court at Allahabad.*]

BHAGHWATI PRASAD (*Plaintiff*) *v.* RADHA KISHEN SEWAK PANDE AND ANOTHER (*Defendants*). [20th November, 1890, and 11th February, 1893.]

Equitable charge on property purchased—A charge created in favour of the lender of the purchase-money.

By the acts of the parties, and their relations to one another, money borrowed by an agent for a principal for the purchase of property was rendered a charge upon the latter in the principal's hands, he being the real purchaser.

The lender of money, which he advanced to the nominal purchaser of property, who was the agent of the real purchaser, made the advance with the knowledge that it was for the principal's purposes, the latter only using the agent's name in the purchase. The nominal purchaser then executed a deed purporting to hypothecate the property as security for the load. The lender, not having been paid, obtained a money-decree against the nominal purchaser, and, bringing the property to a Court sale, bought it himself. He could not, however, obtain entry of his name in the collectorate books, on the opposition of the real purchaser, and a suit brought by him for a declaration of his title, and his right to possession, against the nominal purchaser, was dismissed.

Afterwords, in the present suit, which the lender brought against both the real and the nominal purchasers, it was *held* that although, in regard to the previous [305] judgment, it might be difficult to decide that the deed itself constituted a valid hypothecation, the facts of the case were sufficient to show that the lender of the money was entitled to a declaration that the advance of money for the purchase formed an equitable charge upon the property against the real purchaser.

[F., and Appr., 13 M.L.J. 228 ; R., 26 M. 686 (725) (F.B.) ; D., 33 C. 985=4 C.L.J. 219.]

[N.B.—See in this connection 9 A. 681=7 A.W.N. (1887) 229, whereon this appeal has arisen.]

APPEAL from a decree (3rd June 1887) (1) of the High Court reversing a decree (9th September 1885) of the Subordinate Judge of Gorakhpur.

In this appeal an order of revivor was made, the appellant Sarju Prasad having died, after the hearing, but before the delivery of the Committee's judgment. The appellant's minor son, Bhagwati Prasad, under the guardianship of his mother, Musammat Parbati Bibi, was substituted by the order, for the deceased, Sarju Prasad. The appeal arose out of a suit brought by the latter on the 9th of January 1885 against Bir Bhaddar Sewak Pande, the respondent's predecessor in estate, with whom Nandan Tewari was joined as co-defendant. The plaint stated that under a bond, dated 3rd of December 1871, after a deduction of what had been already realized, a sum of Rs. 12,336-3-6, consisting of Rs. 7,518-3-0, principal and Rs. 4,818-0-6, interest was due to the plaintiff ; who was, by an hypothecation, entitled to a charge to that amount on shares in

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(1) 9 A. 681.

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villages purchased by Bir Bhaddar in 1871, the principal having been part of the purchase money borrowed from the plaintiff for the occasion.

The right to maintain a charge on the property was the question on this appeal.

In execution of a money decree, *Mewa Ram* v. *Bir Bhaddar*, of the 7th of December, 1864, shares in villages, Kudai Ram and five others, in Gorakhpur were brought to a judicial sale. Before Rs. 5,000, which Bir Bhaddar borrowed of Sarju, was paid into Court, the shares were sold on the 20th of November, 1871. The share in Kudai Ram was bought by the decree-holder, and the shares in the other villages were bought nominally by Nandan Tewari, who, to pay the purchase-money, borrowed Rs. 9,000 from Sarju, executing to him a bond and mortgage of the village shares so bought, dated the 3rd of December, 1871.

[306] The money not having been repaid, Sarju obtained against Nandan an *ex parte* decree, dated the 20th of August, 1874, on the document of 1871, for Rs. 9,000 principal, and Rs. 3,314 interest. Meanwhile, in September, 1873, one Bulram Sewak Pande, bringing a suit for part of the village shares which Nandan had nominally purchased, paid Rs. 6,136 into Court, to the credit of Nandan. This sum Sarju caused to be attached, and this was all that he obtained as the result of the above transactions. For, although he got confirmation of the sale to him of the village shares, which he himself bought at the Court sale that took place in execution of his decree of the 20th of August, 1874, he did not get possession of the property which he had bought. The Commissioner of revenue, on the ground that the decree against Nandan was only against a nominal, and not a real owner of the villages, cancelled the Collector's order for the entry of Sarju's name in the collectorate books.

Sarju thereupon sued Nandan for possession of the village, with cancellation of the order of the Revenue Court. His suit, however, was dismissed, and the dismissal was confirmed by the High Court on the 10th of May, 1882, the courts regarding the puchase by Nandan as fictitious.

The present suit followed on the 9th of January, 1885, against both Bir Bhaddar and Nandan. Bir Bhaddar alleged in defence that as the plaintiff had obtained a decree against Nandan on the document of the 3rd of December, 1871, and had issued execution on that decree, there could be no renewal of proceedings in reference to the loan. Also he alleged that the claim against him was not supported by proof of Nandan's having had authority to mortgage. Nandan claimed to have the suit held barred against him under s. 13, Civil Procedure.

The Subordinate Judge, Shah Ahmad-ulla, having fixed issues with reference to the points in the written statements, held that the suit was maintainable against Bir Bhaddar alone, against whom he decreed the claim.

This decision was reversed on an appeal by Bir Bhaddar by a Division Bench of the High Court, (STRAIGHT and TYRRELL, JJ.). **[307]** The reason given in the judgment of the Senior Judge for dismissing the suit against Bir Bhaddar was that, although he would have been liable had there been no prior suit upon the document of the 3rd of December, 1871, the plaintiff's having taken proceedings thereupon against Nandan alone, as the person responsible, had made a difference. According to what was in the Court's opinion the law as to the relative liability of principal and agent to third parties, the right to sue upon the hypothecation had been merged in the decree of 1874. Having first sued and got

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a decree against the agent, the plaintiff could not bring a suit against the principal on the same cause of action. The Judge also adverted to the treatment of the bond of 1871, as partly satisfied in execution to the extent of Rs. 6,136, to which amount credit had been given.

The judgment is reported in I. L. R., 9 All. 681.

Mr. *W. A. Raikes* and Mr. *J. R. Dunlop Hill*, for the appellant, argued that Bir Bhaddar, the principal defendant, though not actually a party to the document of hypothecation of 1871, was cognizant at the time of its having been executed, while there was no doubt that the money had been taken for his benfit. The result of the litigation had been that Sarju Prasad had not been repaid; while Bir Bhaddar had obtained both the money and the shares in the villages. On this state of things, notwithstanding the decision of the 10th of May, 1882, as to the hypothecation having been ineffective, Bir Bhaddar could not resist the plaintiff's case that the property had been charged with the debt to him.

They referred to *Shib Lal* v. *Ganga Prasad* (1), *Kelly Doss Mitter* v. *Gobind Chander Paul* (2).

The respondents did not appear.

Judgment having been reserved, and afterwards deferred on account of the decease of the appellant, Sarju Prassad, their Lordships' judgment was delivered on the 11th of February, 1893, by SIR R. COUCH.

JUDGMENT.

[308] On the 7th of December, 1864, one Mewa Lal obtained a decree for money against Bir Bhaddar, the predecessor of the respondents, and one Sat Narain, in execution of which certain shares in certain villages were sold on the 20th of November, 1871, and were purchased by Nandan Tewari for Rs. 12,325, of which Rs. 9,000 were borrowed by him from Sarju Prasad, the father of the appellant, in addition to Rs. 5,000 previously borrowed. By a deed of hypothecation, dated the 3rd of December, 1871, Nandan Tewari mortgaged the purchased shares of the villages to Sarju Prasad to secure the payment of the Rs. 9,000 and interest. The loan not having been paid, a suit was brought by Sarju Prasad against Nandan Tewari, and a decree was obtained for payment of the money and an order that the decree should be executed against the property hypothecated. At a sale by auction in execution of this decree on the 20th of August 1874, Sarju Prasad became the purchaser of the prpoerty. He thereupon obtained mutation of names from the Collector of the district, but the Commissioner on appeal by Bir Bhaddar and two other persons who were interested reversed this order, and directed that they should be recorded as the real owners of the property, the sale to Nandan Tewari being regarded as of an *ism farzi* character only. Thereupon Sarju Prasad brought two suits against Bir Bhaddar and the two other persons to recover possession of the property by cancelment of the Commissioner's order. The record in the present suit is very imperfect, and contains only the original decree and an appeal in one suit; but there is a written statement of Bir Bhaddar, and what is called a petition, which is apparently a written statement, also by him. Both are dated the 30th of July, 1880, and are substantially the same. In the petition Bir Bhaddar states as follows:—" Nandan Tewari is my *karinda* (agent). When my property was put up for sale in the execution of Mewa Lal's decree, and the 21st of November, 1871, was fixed for sale,

(1) 6 A. 551. (2) 1 Marshall 569.

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I, with a view to purchase it, as advised by the plaintiff himself, borrowed Rs. 5,000 of the plaintiff on the day of the sale, on a bond dated the 18th of November, 1871, to deposit the earnest money, and purchased the property in the name of Nandan Tewari. Afterwards, in order to deposit the balance of the consideration money, another [309] bond for Rs. 9,000 was executed in plaintiff's favour. As Nandan Tewari was a fictitious purchaser, the plaintiff therefore got the last mentioned document executed in his (Nandan Tewari's) name according to his choile. Nandan Tewari was never the actual purchaser. Neither he nor the plaintiff has ever been put in possession."

The Lower Court found that Nandan Tewari was only a nominal purchaser, and that the real purchaser of the property was Bir Bhaddar, and dismissed the suit. The High Court, on appeal, being dissatisfied with the grounds of this judgment, required the Subordinate Judge to examine Sarju Prasad and submit his evidence to the High Court, which was done. Thereupon the High Court, in its judgment, held that Sarju Prasad "was necessarily aware that Nandan Tewari was a sham purchaser only at the auction sale of the 3rd of December, 1871, and that when he elected to sue him alone as the real and single obligor of the bond for Rs. 9,000, and as the actual owner and representative of the estate bought with this money, he did so with full kowledge of the true and different facts of the case, and that therefore his present action to prove that Nandan Tewari was the real and *bona fide* purchaser and proprietor must fail," and it affirmed the decree of the Court below. This judgment was given on the 10th of April, 1882.

On the 9th of January, 1885, the present suit was brought by Sarju Prasad against Bir Bhaddar and Nandan Tewari, seeking to recover Rs. 7,518-3-0 balance of the Rs. 9,000, after deducting sums which had been realized, and Rs. 4,818-0-6. interest, from Bir Bhaddar personally, and also against the property hypothecated in the bond. The first Court made a decree for Sarju Prasad, which has been reversed on appeal by the High Court.

After the judgment in the former suit, it might be difficult to hold that the deed executed by Nandan Tewari. was a valid hypothecation of the property, and it is not necessary to decide that question. The facts admitted by Bir Bhaddar and also found by the Court in the former suit between these parties are sufficient to show that the appellant, as the representative of Sarju Prasad, is [310] entitled in equity to have it declared that the sums claimed with interest are a charge upon the property.

Their Lordships will humbly advise Her Majesty that an order be made in terms of the following minutes:—Discharge the decrees of both Courts below. Declare that the sum of Rs. 12,336-3-6, together with interest Rs. 864-9-0, awarded by the decree of the Subordinate Judge, amounting in all to the sum of Rs. 13,200-12-6, together with interest on the said sum of Rs. 12,336-3-6 at the rate of 8 annas per cent. per mensem from the date of the decree of the Subordinate Judge, is well charged upon the properties named at the foot of the plaint in favour of Sarju Prasad. Liberty for the appellants as the representative of Sarju Prasad, to apply to the High Court for the realization of the amount due in respect of the said charge by sale of the said properties charged, in the event of the said amount not being paid within six months of the date of Her Majesty's order made hereon. Order the appellant to pay the costs

of Nandan Tewari in the first Court, and the respondents as the representatives of Bir Bhaddar to pay to the appellant the costs incurred by Sarju Prasad in both Courts below. 1893 FEB. 11.

The respondents as the representatives of Bir Bhaddar will pay the costs of this appeal. PRIVY COUNCIL.

Solicitors for the appellants: Messrs. *Ochme, Summerhays and Co.*

Appeal decreed.

15 A. 304 (P.C.) = 20 I.A. 108 = 6 Sar. P.C.J. 7 = 17 Ind. Jur. 320.

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15 A. 310 (P.C.) = 20 I.A. 90 = 6 Sar. P.C.J. 344 = 17 Ind. Jur. 430.

PRIVY COUNCIL.

PRESENT:

The Lord Chancellor, Lords Watson and Morris, Sir Richard Couch and the Hon'ble George Denman.

Petition for leave to appeal from a judgment of the High Court at Allahabad.

IN THE MATTER OF MACCREA.
[13th May, 1893.]

Refusal of leave to appeal from a judgment and conviction under the Indian Penal Code —General rule as to refusal of leave to appeal in criminal cases—Misdirection of a jury not of itself a ground.

Although in very special and exceptional circumstances, leave to appeal to Her Majesty in Council may be granted in a criminal case, no countenance was given to the view that an appeal would be allowed merely on the ground that the Judge trying the case had misdirected the jury.

[311] There was no reason to believe that there had been any misdirection by the Judge, or that he had, as he was alleged by the petitioner to have done, misconstrued, in charging the jury, a section of the Penal Code. Not only on the latter ground, but on the broader ground above stated, the petition was rejected.

[R., 2 A.L.J. 718; 2 L.B.R. 237.]

[N.B.—For the early stage of the case, see 15 A. 173 = 13 A.W.N. (1893) 71.]

PETITION for special leave to appeal from a judgment and conviction (13th June, 1892), of the High Court in Criminal Sessions, under ss. 511 and 420, Indian Penal Code.

The petitioner was convicted, on the above date, of (1) an attempt to cheat and fraudulently induce the Comptroller-General to deliver to him, or to Asad Ali, a Government Promissory Note for Rs. 500, and to pay the accused interest thereon; (2) conspiring with Asad Ali with that object; (3) abetting an attempt by Asad Ali to cheat. He was sentenced to two years' rigorous imprisonment.

The High Court refused an application, made on the 1st December, 1892, under s. 32 of the Charter of 1866, that the case might be declared a fit and proper one for appeal to Her Majesty in Council, on the ground that the jury had been misdirected, to the effect, that the acts shown in evidence amounted to an attempt at cheating within the meaning of the sections above mentioned.

The charge related to a lost Government Note for Rs. 500, No. 9764, with arrears of interest thereon from 1865, which had been alleged to belong to the estate of one Mirza Husain Ali, brother of Asad Ali; it was, in effect that the petitioner had attempted to cheat, at Lucknow, by

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writing to the Comptroller-General, and doing other acts, between the 17th of June and the 20th of October in the year 1891, attempting dishonestly to induce the Comptroller to pay the accrued interest to the petitioner, or Asad Ali, and to deliver a duplicate of the note to one or the other of them.

The petition stated that there was no evidence that an application had ever been made to the Comptroller, for the arrears of interest, or for the duplicate to be delivered, upon which he could act.

[312] All that was done was, according to the petition, that inquiries had been made at the Public Debt Office whether the note was outstanding or not: the petitioner had caused letters of administration to the deceased to be issued, which recited that note No. 9764 belonged to his estate, and had requested the police to investigate the alleged loss, producing to them a copy of the lost note, sending also a copy of the same, as a copy of the letters of administration, to the *Exchange Gazette* for publication.

It was stated in the petition that KNOX, J. directed the jury that, besides being satisfied as to the petitioner's intention to cheat, they must be satisfied, before they could convict him, that he had done acts towards cheating sufficiently important, and sufficiently near to the act of cheating intended and contemplated.

Also that upon this question they must consider whether those acts were sufficient to excite reasonable apprehension that the act attempted would be carried out, with the intention to cheat. A subsequent application for leave to appeal to the Queen in Council was refused, the Judges drawing a distinction between the phrase "attempt to commit" used in the English law in connection with crime, and the word "attempt" as defined in the Indian Penal Code.

The Court was of opinion that in the s. 511 the word "attempt" was used in a sense that would comprehend the acts of the accused.

Mr. *H. Cowell* and Mr. *A. H. Bodkin* for the petitioner, submitted that leave should be granted on the ground that substantial and grave injustice had been done to him by reason of an erroneous construction of s. 511 of the Penal Code by the Judge who tried the case. A conviction had taken place in the absence of any evidence that there had been an attempt to cheat. The jury should have been instructed to consider whether there had been any act done by the petitioner which actually began the execution of an intention to cheet. The Penal Code did not render a man punishable, under ss. 511 and 420, for acts which merely tended towards such beginning, or which showed that, unless interrupted, he might possibly begin such execution. A clear distinction existed and was [313] recognised by the Code between preparation to cheat, and attempts to carry it out. See ss. 393, 399, 402, as to the former, and s. 307, (*c*) and (*d*) as to the latter. Even if, as the Judge appeared to have said the Penal Code used the word "attempt" in a sense different to that attributed to it by English law, still it was not intended by the Code to obliterate the distinction between acts which amounted to preparation for, and acts which amounted to beginning the execution of an offence. So far as what the petitioner had done, went, no act of his had rendered it possible for the Comptroller-General to deliver up any property in his control. Many other things would have had to be done before the delivery would have taken place, and before the offence would have been completed. As to what constituted attempts reference was made to:—

The Empress v. *Riasat Ali* (1); *The Queen-Empress* v. *Dhundi* (2); *In the matter of Francis Cassidy* (3); *R.* v. *Eagleton* (4); *R.* v. *Cheeseman* (5).

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It was submitted that this erroneous construction had the effect of creating a new offence unknown to the Code; of general importance; inasmuch as s. 511 applied to nearly every offence under it. Thus, it was contended, there had arisen a case of that substantial and grave injustice, referred to in their Lordships' judgment *in re Abraham Mallory Dillet* (6), which removed the petition from the effect of the rule forbidding appeals from ordinary convictions.

Also were cited :—

Macleod v. *The Attorney-General for New South Wales* (7).

Attorney-General of N. S. Wales v. *Bertrand* (8).

Their Lordships' judgment was delivered by LORD HERSCHELL.

JUDGMENT.

THE LORD CHANCELLOR—Their Lordships are of opinion that leave to appeal ought not to be granted in this case.

[314] The ground upon which leave is asked is that the petitioner being indicted under the 511th section of the Indian Penal Code for an attempt to cheat, there was no evidence of an attempt to cheat, but only of preparation for such an attempt.

S. 511 provides that "whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence" shall be punished in the manner therein directed.

The facts are that the petitioner had obtained, with a fraudulent intent, as must be taken to be the fact after the finding of the jury, letters of administration to be granted, which recited that a certain lost Government promissory note was the property of one Asad Ali, and that further he had with fraudulent intent sent those letters of administration to the Public Debt Office as the foundation for an application for payment of the money.

The learned Judge who tried the case laid down in his charge to the jury that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned Judge clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence.

The jury found the petitioner guilty. Their Lordships see no reason to believe that there was any misdirection on the part of the learned Judge, or that there has been a miscarriage of justice. But they do not desire to dispose of the petition simply upon that ground. If there be any foundation for this application it rests upon this :—that the learned Judge did not in his charge to the jury correctly construe the 511th section of the Penal Code, or that he left the case to the jury when there was no evidence to go to the jury. In their Lordships' opinion, if they were to sanction an appeal in the present case, it would be very difficult to refuse leave to appeal in all cases in which it could be established that there had been a misdirection by the Judge who tried the case. [315]

(1) 7 C. 352. (2) 8 A. 503. (3) 4 B.H.C.R. Cr. C. 17.
(4) 1 Dearsly 376, 515. (5) Leigh & Cave, 142. (6) 12 Ap. Ca. H.L. 459.
(7) (1891) A.,C (8) 4 Moore P.C.N.S. 474.

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There are, no doubt, very special and exceptional circumstances in which leave to appeal is granted in criminal cases, but it would be contrary to the practice of this Board, and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be shown that the learned Judge had misdirected the jury.

Petition rejected.

Solicitors for the petitioner: Messrs. *Ranken Ford, Ford,* and *Chester.*

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15 A. 315 = 13 A.W.N. (1893) 108.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

UDIT NARAIN SINGH AND ANOTHER (*Defendants*) *v.* JHANDA (*Plaintiff*).*
[27th April, 1893.]

Civil Procedure Code, ss. 566, 567—Reference of issues for determination—Transfer.

Where an appellate Court has made an order of reference under s. 566 of the Code of Civil Procedure, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal elsewhere.

[F., 10 A.L.J. 89 = 15 Ind. Cas. 862 (863).]

THE plaintiff in this case sued in the Court of the Munsif of Mahaban to recover possession of certain immoveable property from the defendants by redemption of a mortgage given by the plaintiff's predecessor-in-title. The defendants pleaded that the amount alleged by the plaintiff to be due on the mortgage was not correct; that they had been in adverse possession for more than 12 years; that the share to which the plaintiff was entitled was much less than that claimed, and that under the terms of the mortgage the suit was premature. The Munsif gave the plaintiff a decree for redemption of a $\frac{1}{6}$th share of the property claimed on payment of a sum of Rs. 200-10-4 with interest. The defendants having appealed, the District Judge referred to the Court of first instance an issue as to whether it was a condition of the morgtage that profits were to be taken in lieu of interest, and directed the Court to take an [316] account of how much was in fact due by the mortgagor, plaintiff. While this reference was still pending in the Court of the Munsif, the District Judge transferred the appeal to the Court of the Subordinate Judge, and he, on return being made by the Munsif to the District Judge's order of reference, decreed the appeal and the plaintiff's suit as against the two principal defendants with costs.

From this decree the defendants appealed to the High Court.

Munshi *Madho Prasad*, for the appellants.

Mr. *D. Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—The District Judge acting under s. 566 of the Code of Civil Procedure referred to the Court of first instance certain issues for trial. Before the return to the order was made, the District Judge transferred the appeal to the Court of the Subordinate Judge.

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* Second Appeal, No. 1290 of 1890, from a decree of Babu Ganga Saran, Subordinate Judge of Agra, dated the 20th September 1890, modifying a decree of Babu Raj Nath Prasad, Munsif of Mahaban, dated the 22nd January 1890.

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15 A. 315 = 13 A.W.N. (1893) 108.

The only question which we need determine is whether the District Judge had under such circumstances power to make that order of transfer. We are of opinion that he had not. The last paragraph of s. 566 shows that the return is to be made to the appellate Court, that is, to the appellate Court which referred the issues for trial. By the first paragraph of s. 567 a memorandum of objections may be presented to the appellate Court and the last paragraph of s. 567 enacts that "after the expiration of the period fixed for presenting such memorandum the appellate Court shall proceed to determine the appeal." There again the appellate Court is the Court referred in s. 566. It is a very wholesome principle that the Court which considered it necessary to refer issues for trial under s. 566 should be the Court to dispose of the case on the return. We set aside the order of transfer to the Subordinate Judge and the decree of the Subordinate Judge on appeal, and we direct the District Judge to restore the appeal to the file of pending appeals in his Court and to dispose of it according to law. Costs here and in the Court of the Subordinate Judge will abide the result.

Appeal decreed.

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15 A. 317 = 13 A.W.N. (1893) 101.

[317] APPELLATE CRIMINAL

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MAKHAN.* [29th April, 1893.]

Act XLV of 1860, s. 411—*Dishonest retention of stolen property—Property belonging to different owners—Separate convictions.*

Where a person was found in possession of stolen property identified as belonging to different owners, but it did not appear that he had received such property at different times: *Held* that he could not properly be tried and convicted under s. 411 of the Indian Penal Code, separately in respect of the property identified by each owner. *Ishan Muchi* v. *The Queen-Empress* (1) approved.

MAKHAN was committed to the Sessions Court at Meerut, charged with an offence under s. 411 read with s. 75 of the Indian Penal Code and was convicted under s. 411 and sentenced by the Sessions Judge to two years' rigorous imprisonment, including three months' solitary confinement.

It was proved that a theft had occurred in the house of the complainants, Bihari Lal and Sri Ram, and that subsequently, on Makhan's house being searched by the police, property belonging to these complainants and other persons was found there.

In respect of one piece of the stolen property so found, namely, a shawl belonging to another complainant, Makhan was tried and convicted by a Magistrate and was sentenced to nine months' rigorous imprisonment, which imprisonment he was undergoing at the time of the Sessions trial.

In the present case Makhan was charged with the possession of other property found on the same occasion in his house.

The prisoner appealed to the High Court on the ground, which he had pleaded in the Court below, but had failed to substantiate by any

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* Criminal Appeal No. 271 of 1893.

(1) 15 C. 511.

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evidence, that the property in respect of the possession of which he had been convicted belonged to him.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

The appellant was not represented.

JUDGMENT.

[318] AIKMAN, J.—The prisoner Makhan appeals against his conviction by the learned Sessions Judge of Meerut for an offence punishable under s. 411, Indian Penal Code. It appears from the record that on the 5th of September 1892, the prisoner's house was searched by the police in the presence of witnesses and certain property found to have been stolen was found in his possession. Amongst that stolen property was a shawl. For the dishonest possession of that shawl the prisoner was convicted by a Magistrate of the first class on the 7th of November 1892, and sentenced to nine months' rigorous imprisonment under the provisions of s. 411, Indian Penal Code, which imprisonment he is now undergoing. The conviction against which he now appeals is in respect of the dishonest possession of certain other stolen property belonging to a different complainant which was found in his possession at the same time as the shawl. In my opinion this second conviction cannot be sustained. The mere fact that property stolen on two different occasions from different persons is found at one and the same time in the possession of an accused person is not of itself sufficient to prove that that accused person has committed two different offences under s. 411, Indian Penal Code, as it is quite possible that the property, though stolen on two different occasions, may have been received from the same thief at one time, *Vide Ishon Muchi* v. *The Queen-Empress* (1). I am therefore constrained to allow this appeal. I set aside the conviction of and the sentence passed on Makhan by the Sessions Judge on the 22nd of February 1893.

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15 A. 318 = 13 A.W.N. (1893) 119.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

AJUDHIA PRASAD AND ANOTHER (*Applicants*) *v.* NAND LAL SINGH AND OTHERS (*Opposite parties*).* [6th May, 1893.]

Civil Procedure Code, s. 311—Execution of decree—" Decree-holder."

The term " decree-holder " in s. 311 of the Code of Civil Procedure is not limited to the decree-holder who instituted the execution procedings, but [319] may include a decree-holder who is entitled to come in and share in the proceeds under s. 295 of the Code. *Lakshmi* v. *Kuttunni* (2) approved.

[Diss., 4 C.W.N. 542 ; R., 15 Bom. L.R. 244 (248) ; 19 Ind. Cas. 475 (477).]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Pandit *Sundar Lal*, for the applicants.

Mr. *Scott Howell*, for the opposite parties.

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* Application No. 55 of 1892, under s. 622 of the Code of Civil Procedure, for revision of an order of H. F. Evans, Esq., District Judge of Shahjahanpur, dated the 13th July 1892.

(1) 15 C. 511.

(2) 10 M. 57.

JUDGMENT.

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AIKMAN, J.—This is an application under s. 622 of the Code of Civil Procedure for revision of an appellate order of the District Judge of Shahjahanpur from which no second appeal lies to this Court. The following are the facts of the case. The applicants held three decrees against the property of certain judgment-debtors. One Dharam Das held a decree against the same property, on which decree he took out execution. The applicants have applied for execution of their decrees praying that under s. 295 of the Code the sale-proceeds of the property, after satisfying the decree of Dharam Das, which was passed on a prior incumbrance, might be given to them. Their application was granted. The property, which is said to be worth over 1,000 rupees, was sold for less than 300 rupees. The sale-price was, however, sufficient to nearly satisfy the decree of Dharam Das, who also had other security for his money. He was not therefore interested in setting aside the sale. The applicants, under the provisions of s. 311 of the Code, moved the Court to set aside the sale on the ground of material irregularity. If, as is alleged, there was material irregularity which resulted in the property fetching so low a price that there was nothing over for the applicants after satisfaction of Dharam Das's claim, it is quite clear that the applicants did suffer substantial injury by reason of this irregularity. The Munsif granted the application and set aside the sale. From this order the auction-purchaser appealed to the District Judge. The District Judge being of opinion that the words "the decree-holder" in s. 311 applied solely to the decree-holder at whose instance the execution-proceedings were instituted, held that the applicants were not entitled to put in an application under s. 311 of the Code of Civil Procedure, and set aside the **[320]** Munsif's order as having been passed without jurisdiction. The learned District Judge in support of this view relied on a ruling of this Court, *Man Kuar* v. *Tara Singh* (1). The facts of that case were quite different from those in the present case. In that case the application was made not by a decree-holder, but by a judgment-debtor, to set aside the sale of the property of another judgment-debtor, and the Court held, following the clear words of the section, that only a judgment-debtor whose property has been sold under Chapter XIX, can apply to set aside the sale, and as the applicants there were judgment-debtors whose property had not been sold, the Court held that they were not entitled to apply under s. 311 of the Code of Civil Procedure. The learned District Judge speaks of the applicants in the case he relied on as not having previously applied under s. 295. From this expression it is clear he has misunderstood the facts of the case. The applicants in that case being judgment-debtors could not apply under s. 295 which refers only to applications by decree-holders. It has been held by the Madras High Court in the case of *Lakshmi* v. *Kuttunni* (2), that the words "decree-holders" in s. 311, indicate any decree-holder who is entitled to share in the proceeds of a sale under s. 295, and the view of the Madras High Court is apparently endorsed by the Bombay High Court in the case of *Sorabji Edulji Warden* v. *Govind Ramjee* (3). I entirely concur in the view taken by the Madras High Court. I can find nothing in the wording of the section to limit the meaning of the words the "decree-holder," in s. 311 to the decree-holders who instituted the execution-proceedings. In my opinion these words are quite wide enough to cover

(1) 5 A.W.N. (1885) 124. (2) 10 M. 57. (3) 16 B. 91.

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the case of a decree-holder who is entitled to come in and share in the proceeds of the sale under s. 295. It is but just that this should be so, for whereas the decree-holder who instituted the proceedings might, as in the present case, sustain no substantial injury from an irregularity in the sale-proceedings, other decree-holders entitled to share in the proceeds might be most seriously prejudiced, and it would be inequitable to deny them the power of obtaining relief. For the above [321] reasons, I am of opinion, that the Munsif had jurisdiction to entertain the application of the applicants. I set saide the order of the District Judge, and direct him to restore the case to his file and dispose of the appeal according to law. The costs of this Court will be the costs in the cause.

Cause remanded.

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15 A. 321 = 13 A.W.N. (1893) 109.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Blair.

MUHAMMAD AZIZ-UD-DIN AHMDA KHAN (*Defendant*) *v.* THE LEGAL REMEMBRANCER TO GOVERNMENT, N.W.P. AND OUDH (*Plaintiff*).*
[9th May, 1893.]

Muhammadan Law—Sunnis—Waqf—Relinquishment of possession on the part of the waqf essential.

According to the law of *Sunni* Muhammadans it is essential to the validity of a *waqf* that the *waqf* should actually divest himself of possession of the *waqf* property.

Hence where a Sunni Muhammadan executed and registered what purported to be a deed of *waqf*, but never acted upon it and retained possession until his death of the property dealt with by the deed, which property subsequently passed to his two sons by inheritance.

Held that no valid *waqf* of the property mentioned in the said deed was constituted.

[Diss., 14 Bom.L.R. 295 = 14 Ind.Cas. 988 (989); R., 15 Ind.Cas. 36 (38); 2 N.L.R. 158 (161).]

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

The Government Pleader, Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

TYRRELL and BLAIR, JJ.—The appellant was defendant in a suit brought under s. 539 of the Code of Civil Procedure in respect of an alleged endowment made in June 1882, by the defendant's father. The latter died on the 27th of February 1886. The plaintiff's case was that under a registered deed made on the 1st of June 1882, the appellant's father set apart the income of his village Para up to the limit of ninety rupees a month after the payment of the [322] Government revenue to be spent on the poor. The deed is No. 63 of the record. It makes the following statements,—that the writer owned the village Para and had possession of it exclusively, that he had disposing capacity, and made an endowment (no person being mentioned as the object) of the

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* First Appeal No. 8 of 1891 from a decree of H. F. Evans, Esq., District Judge of Moradabad, dated the 29th September 1890.

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property to the extent of ninety rupees a month nett profits for the use of the poor and the needy. It was provided that if the income fell short of ninety rupees a month the charity would be limited in proportion, if the profits exceeded ninety rupees a month the excess was to be credited to the fund. Now it has been found, and it is not disputed, that the appropriator having registered this deed took it home and never carried his recorded intentions into effect. We are told that he destroyed the document. It has not been produced on either side at this trial. It has been found that the appropriator never spent any portion of the income of the village Para under the terms of the deed. He retained the possession and exclusive enjoyment of Para and all its income till he died. He never made over possession or use to either of his sons whom he had designated as *mutawallis*. In fact the whole transaction was a paper transaction only. It never took effect. Notwithstanding these facts and findings, the lower Court decided that, although the Nawab did not act on or effectuate the provisions of the trust-deed, "as a question of law I hold that the trust was not in consequence invalidated or rendered null and void." Therefore the learned Judge decided on the issue of the revocability of the *waqf* that it "was not acted on by the executant, but that it is nevertheless altogether valid and in force." This is the main issue, and it was argued as such here to-day. We are not called on therefore to determine whether the deed is not bad for want of terms of impropriation and for uncertainty as to its objects. The one question is :—Is this deed, as amongst *Sunnis*, so valid by virtue of its execution only that this action to compel the execution of the trust would lie? The learned Judge below seems not to have considered the effect of the appropriator's conduct in never giving possession and in making no change whatever with regard to the property dealt with. We have been referred to authorities for the proposition that seisin, either formal or constructive, is [323] essential to the validity of the *waqf*. The point is dealt with on page 115 of the Tagore Lecture on Muhammadan Law, Part II, for 1874, where the author sums up in the following sentences :—"Thus the appropriation becomes valid, that is, absolute, according to the various opinions of the three great lawyers; according to Abu Hanifa, in consequence of the appropriator's declaration, and the Magistrate's subsequent decree; according to Abu Yusuf, by his simple declaration, and, according to Muhammad, by his declaration and delivery to a procurator. It passes out of the possession of the appropriator." Again in Hamilton's Hidaya on page 232 (edition of 1870) it is written that "alienation of the article appropriated is completed by a decree of the Magistrate and the declaration of the appropriator or the consignment of it to a procurator. It is reported by Kadooree, from Hanifa, that the appropriator's right of property is not extinguished, except where the Magistrate so decrees, or where the appropriator himself suspends it upon his decease by declaring, 'when I die this house in appropriated to such purpose,' and so forth. Abu Yusuf alleges that his right of property is extinguished upon the instant of his saying:-- 'I have appropriated' and such also is the opinion of Shafi, because that is a dereliction of property in the same manner as manumission. Muhammad says that it is not extinguished until he appoint a procurator and deliver it over to him; and decrees are passed upon this principle." A case lately came before a Full Bench of the Calcutta High Court, *Bikani Mia* v. *Shuk Lal Poddar*, (1) in which the Comparative authoritive of Abu

(1) 20 C. 116.

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Yusuf on questions of Muhammadan law amongst *Sunnis* is discussed, and the majority of the Full Bench decided that the authority of Abu Yusuf is to be postponed to that of Muhammad. This latter's exposition of the law which has just been cited supports the appellant's case. We find therefore that in respect of this *waqf*, the income of which was never employed for the declared purpose, the appropriator having retained exclusive proprietary possession, which possession passed by inheritance under the Muhammadan law to his two sons, the defendants, there was never a valid and operative *waqf*, but an [324] inchoate endowment only, which stopped short at the written and registered declarations of the defendants' father, from which he at once receded before he had put it out of his power to do so by divesting himself of the property. On behalf of the respondent we have heard the learned Government pleader who failed to show us any authority, either of Muhammadan law or of case-law, in support of his proposition, which is practically the law as laid down by Abu Yusuf. He referred us to Baillie on Muhammadan law, p. 552, from which he tried to show that all the essential conditions of a *waqf* are fulfilled in this case, and he also pointed to a judgment reported in 16 Weekly Reporter at p. 116 (*Doyal Chund Mullick* v. *Syud Keramut Ali*). We do not find in the 1st Chapter of the 9th book of Baillie on Muhammadan law any authority against the contention which we have stated above on behalf of the appellant, and the judgment in *Doyal Chund Mullick* v. *Syud Keramut Ali* was made with reference to *Shia* and not to *Sunni* Muhammadans. The learned Judge of Moradabad decreed the case against both the defendants. One confessed judgment, and the other, Muhammad Aziz-ud-din Ahmad Khan, alone appealed. We allow his appeal, and set aside the decree of the Court below so far as he is concerned, and decree his appeal with costs of both Courts.

Appeal decreed.

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15 A. 324 = 13 A.W.N. (1893) 140.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Aikman.

BALWANT RAO (*Plaintiff*) *v.* MUHAMMAD HUSAIN (*Defendant*).*

[9th May, 1893.]

Civil Procedure Code, s. 411—Sale of property for purpose of realizing Court fees erroneously supposed to be due to Government—Such order ultra vires *and no necessity to bring a suit to set it aside—Jurisdiction.*

An order for sale and a sale under such order are *ulta vires* and nullities when in fact there was no jurisdiction in the Court to make the order. *Ram Lall Moitra* v. *Bama Sundari Dabia* (1) referred to.

[F., 16 A. 5 (9); R., 19 A. 308 (309); 26 A. 346 = 1 A.L.J. 53 = A.W.N. (1904) 35; 163 P.L.R. 1901.]

[325] THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

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* Second Appeal No. 82 of 1891 from a decree of A. B. Patterson, Esq., Commissioner of Jhansi, dated the 11th October 1890, reversing a decree of Babu Baldeo Prasad Deputy Commissioner of Jhansi, dated the 18th April 1890.

(1) 12 C. 307.

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15 A. 324 = 13 A.W.N. (1893) 140.

JUDGMENT.

EDGE, C.J. and AIKMAN, J.—This appeal has arisen in a suit brought by a usufructuary mortgagee for possession. The suit was brought against Narain Sakha Ram the mortgagor and Muhammad Husain. Narain Sakha Ram in 1883 presented an application to the Deputy Commissioner of Jhansi for leave to sue as a pauper. He sought to get a decree for possession of property which included that in the present suit. Narain Sakha Ram's application to sue as a pauper was rejected. In 1884 Narain Sakha Ram brought a regular suit on the full Court-fee to recover the property which he had sought to sue for as a pauper. That suit was brought in the Court of the Deputy Commissioner. The Deputy Commissioner dismissed the suit. Narain Sakha Ram appealed to the Commissioner of Jhansi *in forma pauperis*. The Commissioner set aside the decree of the Deputy Commissioner, and remanded the suit under s. 562 of the Code of Civil Procedure. On the remand the Deputy Commissioner decreed the claim. The defendant in that suit appealed and the Commissioner of Jhansi modified the decree of the Deputy Commissioner by decreeing Narain Sakha Ram's claim in respect of one hundred bighas only. At the foot of the decree of the Deputy Commissioner on the remand, there was an entry that Rs. 404 were due to Government as Court-fees, and still more curious was the fact that Narain Sakha Ram was described in the decree as a pauper plaintiff. The decree of the Commissioner made no reference to any Court-fees due to Government. In fact none were due. The suit in which the decrees were made was a suit instituted on a full Court-fee stamp. The order in the appeal of Narain Sakha Ram having been made under s. 562 of the Code of Civil Procedure no fees remained payable by Narain Sakha Ram to Government. If he had appealed on a full Court-fee it would under s. 13 of the Court Fees Act of 1870 have become repayable to Narain Sakha Ram. The trial of the suit on remand had to take place on the [326] original Court-fee, which had been paid. There was when the final decree was made not one farthing due to Government by Narain Sakha Ram. Some Government pleader, being of a different opinion apparently applied to the Assistant Commissioner for an order to sell Narain Sakha Ram's hundred bighas which he had obtained by his decree in satisfaction of the Rs. 404 (four hundred and four) alleged to be due as Court-fees. The Assistant Commissionor made an order, the property was sold and was purchased by Muhammad Husain, the second defendant here, a pleader, who had been concerned for one of the parties in the litigation. The case stands thus. There was no first charge in respect of Court-fees under s. 411 of the Code of Civil Procedure on the land. Narain Sakha Ram, then plaintiff, had not sued as a pauper, there were no Court-fees due to Government to be calculated and there were no Court-fees that the Government could seek to recover by sale or otherwise. There was consequently no jurisdiction in any Court to make an order of sale. Further, and in any event, the Assistant Commissioner had no jurisdiction to make any order as to sale. His was not the Court which had jurisdictiou to try the suit and the suit had not been brought in his Court. The order for sale was from every point of view *ultra vires*. The mortgage to the present plaintiff was made on the 25th of October, 1885. The first Court decreed the claim in this suit, the second Court dismissed the suit on the ground that the plaintiff here had not asked for a decree setting aside the sale, and also on the view that s. 411 of the Code of Civil Procedure applied. The plaintiff brought this appeal. The sale having

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been made under an order, which, having been made absolutely without jurisdiction, was, as against Narain Sakha Ram and his mortgagee who had taken an interest prior to the sale, absolutely void, there was no necessity to ask as a relief in this suit that the sale should be set aside. We are confirmed in that view by the decision in *Ram Lal Moitra* v. *Bama Sundari Dabia* (1). Further if it was necessary as part of the decree in this suit to set aside the sale, the plaintiff here would have been entitled to that relief as subsidiary to the main relief he asked for in the suit. [327] However, it was not necessary to ask for any such relief. We cannot understand the conduct of Muhammad Hussain, pleader. We agree with the first Court that, being the pleader of Narain Sakha Ram, he must have known at the time he purchased of the mortgage to the present plaintiff. We are asked on behalf of the respondent to refer an issue as to the title of Narain Sakha Ram, to grant the mortgage. Narain Sakha Ram cannot dispute his own title to grant the mortgage, he is estopped. Muhammad Husain took no interest under the sale which was void. If he took any interest at all, he would have to stand in the shoes of Narain Sakha Ram. It is unnecessary to make any reference. We decree the appeal with costs in this Court and the lower appellate Court and restore and confirm the decree of the first Court.

Appeal decreed.

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15 A. 327 = 13 A.W.N. (1893) 110.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Blair.

PHUNDO (*Defendant*) v. JANGI NATH AND OTHERS (*Plaintiffs*).*
[10th May, 1893.]

Civil Procedure Code, s. 13—Res judicata—Soundness in law of previous decision immaterial—Hindu law—Adoption—Baqqals.

Where a judicial decision pleaded as constituting *res judicata*, in all other respects fulfils the requirements of s. 13 of the Code of Civil Procedure, and no appeal has been preferred against it within limitation, it is immaterial whether such decision is or is not sound law. *Parthasaradi Ayyangar* v. *Chinnakrishna Ayyangar* (2) dissented from.

Semble that *Baqqals* do not belong to the regenerate classes, and therefore the rule of law which forbids a Hindu to adopt a boy whose mother he could not have married, does not apply to them.

[F., 19 Ind. Cas. 244 (245); R., 28 C. 318 (323); 11 C.L.J. 461 (471) = 6 Ind. Cas. 554 (559); 14 C.P.L.R. 109 (110); 1 C.W.N. 687 (690); 5 O.C. 181 (182); 8 O.C. 37 (43); 9 O.C. 243 (245); 57 P.R. 1907 (F.B.) = 66 P.W.R. 1907; 44 P.R. 1908; D., 32 C. 849 = 1 C.L.J. 476 = 9 C.W.N. 466.]

THE facts of this case are as follows:—

On the 13th of February, 1876, one Bhika Mal, who was the step-brother of the defendant-appellant's, Musammat Phundo's, deceased husband, Dwarka Das, mortgaged certain houses to one Baij Nath, the father of the plaintiffs-respondents, alleging that he was the adopted son

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* First Appeal, No. 83 of 1891, from a decree of Babu Abinash Chandra Banerji, Judge of the Court of Small Causes (exercising the powers of a Subordinate Judge) of Agra, dated the 28th March, 1891.

(1) 12 C. 307. (2) 5 M. 304.

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of the said step-brother. On the 18th of July 1882, Baij Nath brought a suit upon that mortgage against Bhika [328] Mal and Musammat Phundo, to recover the sum of Rs. 18,019 from Bhika Mal personally and from the mortgaged property. In that suit Musammat Phundo pleaded that "Bhika Mal was neither the adopted son of Dwarka Das nor did he live jointly with him." An issue was framed on this plea and the Court recorded a finding to the following effect:—"The evidence of Mutto Misr and Kanhia Lal, witnesses Nos. 9 and 10 for the plaintiff, tends to show that Bhika Mal, step-brother of Dwarka Das, was adopted by the latter as his son according to the rites prescribed by Hindu law. The pleader for Musammat Phundo could not cite any texts of Hindu Law or authority to show that the adoption by a Hindu of his step-brother by a different mother is illegal. The adoption of Bhika Mal by Dwarka Das was, therefore, valid according to the Shastars," the Subordinate Judge then went on to say:—"The evidence aforesaid shows that the relatives near and distant of Dwarka Das and Bhika Mal, all took the latter to be the legally-adopted son of the former," and again:—"The weight of reliable evidence, then, establishes to moral certainty that Bhika Mal has for more than 20 years past been in possession of the estate of his step-brother, Dwarka Das, as his adopted son, without any protest or demur on the part of his widow or their relatives; that such possession of his was adverse against her, and that she has lost all right to the estate of her late husband by reason of the operation of s. 28 of the Limitation Act."

From the decree in that suit Musammat Phundo did not appeal, and it became final as against her. Baij Nath executed the decree which he obtained against the hypothecated property, and, the sale proceeds of that property proving insufficient to satisfy the decree, proceeded to attach other property of Bhika Mal's which was not hypothecated. Musammat Phundo filed an objection to this attachment, that the property was her's, inherited from her husband, and that objection was allowed and the property released.

On the 19th of May 1885, the decree-holder, Baij Nath, brought the present suit for a declaration that the property released from attachment as above-mentioned was the property of Bhika Mal, as [329] adopted son and heir of Dwarka Das, and that it did not belong to Musammat Phundo. To this suit both Bhika Mal and Musammat Phundo were made defendants. The Subordinate Judge, holding that the suit was barred by reason of s. 244 of the Code of Civil Procedure, dismissed it *in limine*, but that decision was reversed by the High Court, and the case remanded for trial on the merits.

The Subordinate Judge before whom the case came on remand re-framed the issue and on the finding that the main issue in the suit on which all the other depended, namely, that of the adoption of Bhika Mal, was *res judicata*, decreed the plaintiff's claim with costs.

The defendant, Musammat Phundo, appealed to the High Court.

Mr. *D. Banerji*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

TYRRELL and BLAIR, JJ.—This was a suit brought by the respondents under s. 283 of the Code of Civil Procedure, in respect of an order made by a Court in execution-proceedings raising an attachment in favour of Musammat Phundo. The Court below decreed the plaintiff's claim,

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and Musammat Phundo appeals. The suit of the plaintiff's succeeded upon a finding that Musammat Phundo's only plea had been concluded by the decree in a former suit between the parties, and that the question she now seeks to raise against the legal possibility of one Bhika Mal having been adopted by his half-brother Dwarka Das, falls under the disability of s. 13 of the Code of Civil Procedure. It cannot be denied that this very question was tried and decided against Musammat Phundo in the previous suit. It was then found that, inasmuch as Dwarka Das could have married the mother of Bhika Mal before she made the marriage of which Bhika Mal was the issue, there was no legal bar to the adoption. It was further found that the adoption was operative, and had been recognised with the result of the exclusion of Mussamat Phundo from all title in and possession of her father Dwarka Das estate, for much more than 12 years. The Subordinate [330] Judge therefore held that Musammat Phundo's mouth was closed in the present suit on the question of Bhika Mal's adoption, and overruled her claim to be the heiress of her father, Dwarka Das, in lieu of Bhika Mal, who, if her case could be proved, would be a stranger to the inheritance. Musammat Phundo has brought this appeal, and her learned counsel contends, on the strength of the ruling of the Madras High Court in *Parthasaradi Ayyangar* v. *Chinnakrishna Ayyangar*, (1) that the decree in the former suit is no bar to the trial in this suit of the issue of the legality of Bhika Mal's adoption. We are satisfied that the rule of s. 13 of Act No. XIV of 1882, forbids the re-opening of this question, which was a matter in issue decided directly in the former suit between the parties. We have no doubt, that the former decretal finding on the legal point, though ever so erroneous, would be binding on parties who did not get rid of it by appeal. But, assuming for argument's sake that the legal issue on the alleged invalidity absolute of the adoption is open to determination in this suit, we should still see no reason for coming to a different conclusion upon this point from that which was reached in the former trial. The rule relied on in favour of the appellant which is to be found in paragraph 118 of Mayne's Hindu Law, edition 1883, does not apply in our opinion to the unregenerate classes, amongst whom, according to the authorities cited in that paragraph, the adoption of Bhika Mal by Dwarka Das would not have been forbidden, Dwarka Das and Bhika Mal belonging to a family of "*Baqqals*." The appeal fails and is dismissed with costs.

Appeal dismissed.

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15 A. 331 = 13 A.W.N. (1893) 120.

[331] APPELLATE CIVIL.

Before Mr. Justice Burkitt.

BAGESHRI DIAL (*Decree-holder*) *v.* MUHAMMAD NAQI (*Judgment-debtor*).* [10th May, 1893.]

Act IV of 1882, *s.* 90—*Meaning of the term "legally recoverable."*

A decree-holder having obtained separate decrees against his judgment-debtor on two unregistered bonds each for a sum of less than Rs. 100, hypothecating

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* Second Appeal, No. 380 of 1892, from a decree of P.C. Wheeler, Esq., District Judge of Jaunpur, dated the 18th December 1891, confirming a decree of Maulvi Amjad-ul-lah, Munsif of Mariahu, dated the 21st March 1891.

(1) 5 M. 304.

one and the same property, took out execution on one bond and brought to sale the hypothecated property, which was purchased by a third party. The sum for which that property was sold was only sufficient to satisfy one decree ; and the decree-holder accordingly, within three years from the date when the latter of the two bonds fell due, applied for a decree under s. 90 of the Transfer of Property Act.

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15 A. 331 = 13 A.W.N. (893) 120.

Held that under the above circumstances there was a balance legally recoverable otherwise than out of the property sold and that the decree-holder was therefore entitled to a decree under s. 90. *Musaheb Zaman Khan* v. *Inayatullah*(1) referred to.

[Appr., 6 O.C. 30 (32) ; R., 20 A. 386 (388) ; 19 A.W.N. 72 ; 1 Ind. Cas. 799 (800); D., 31 A. 373 (377)=6 A.L.J. 451; 19 A.W.N. 208 (209).]

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Munshi *Jwala Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BURKITT, J.—In this case it appears that the decree-holder, appellant, Bageshri Dial had obtained from the judgment-debtor, respondent, Syed Muhammad Naqi, two unregistered bonds each for a sum of money under Rs. 100, hypothecating one and the same property as security for the loans. The mortgagee instituted suits on both the bonds and on each obtained a decree directing the sale of the hypothecated property in default of payment of the sum due. Execution was taken out on one decree and the property was sold and purchased by a party other than the decree-holder. The purchase money was found sufficient to satisfy one only of the decrees. The decree-holder now comes to Court and, alleging that there is no mortgaged property left from which he can recover the debt due on the decree now under execution, asks for a decree under s. 90 of the Transfer of Property Act. For certain reasons which it is unnecessary here to discuss further, the District Judge has [332] refused the application. As to the decision of the District Judge, I may briefly say the great distinction between the case he cites and the present case is, that in the former the decree-holder was the purchaser. Such is not the case here. In s. 90 of the transfer of Property Act the conditions on which a decree under that section can be passed is that the balance sought to be recovered by that decree is one legally recoverable from the judgment-debter otherwise than out of the property sold. Those words "legally recoverable," have been considered by this Court in the case of *Musaheb Zaman Khan* v. *Inayat-ullah* (1), and are interpreted to mean "that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold, or a balance the recovery of which is not barred by limitation, *e.g.*, the suit might have been brought at a period of time when, if the plaintiff was relying on his personal remedy against the defendant his suit for the personal remedy would be barred by time, although within time as a suit for sale on the mortgage."

Now, applying the above ruling to the present case, I have got to see whether the appellant's personal remedy against the judgment-debtor was barred at the time the suit was instituted. The facts are these: the bond sued on was dated the 25th of September 1885, and being payable after four months it became due on the 24th of January 1886. The suit

(1) 14 A. 513.

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was instituted on the 19th of January 1889, and as that date is less than three years after the due date of the bond, it follows that on that date the plaintiff's, now decree-holder's, personal remedy, as explained in the case cited above, was not barred as against the defendant, now judgment-debtor. That being so, I hold that the amount, a decree for which is now sought, is legally recoverable from the respondent otherwise than out of the property sold. It follows therefore, that the appellant is entitled to the decree for which he asks. I accordingly allow the appeal. I set aside the order of the lower Courts, and I give the appellant, decree-holder, a decree as provided by s. 90 of the Transfer of Property [333] Act against the person and property of the judgment-debtor, other than that sold. The appellant is entitled to the costs of all three Courts.

Appeal decreed.

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15 A. 333 = 13 A.W.N. (1893) 110.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

DAULAT RAM AND OTHERS (*Defendants*) *v.* DURGA PRASAD AND OTHERS (*Plaintiffs*).* [13th May, 1893.]

Costs—Second appeal—Exercise of discretion of Court as to apportionment of costs.

An appeal as to costs will lie from an appellate decree when the Court has exercised its discretion as to costs arbitrarily, and not according to general principles. *Khooda Buksh* v. *Elahee Buksh* (1) and *Assa Ram* v. *Kashmeeree Dass* (2) followed.

[F., A.W.N. (1905) 75 ; 4 C.W.N. 90 (91) ; 7 C.W.N. 617 (619) ; R., 6 O.C. 52 (57).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellants.

Munsi *Gobind Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J. and AIKMAN, J.—This appeal which is from an appellate decree, relates to costs. It is urged on behalf of the respondent that no such appeal lies under s. 584 of the Code of Civil Procedure. That proposition is too broad. No doubt Civil Courts have full discretion as to costs, but that discretion must be exercised according to general principles and not arbitrarily. That is the effect of what was decided by the Full Bench of the Sadr Diwani Adalat of these provinces, 1861, in the case of *Khooda Buksh* v. *Elahee Buksh* (1) and by the Full Bench of this Court in 1867 in the case of *Assa Ram* v. *Kashmeeree Dass* (2). The Munsif in the present case had decreed the plaintiffs' claim but having rightly found that the plaintiffs were responsible for the litigation by reason of their refusal to produce certificates to collect debts, or other documents showing that they alone of the representatives of [334] the original mortgagees were entitled to give a discharge for the debts, made highly equitable

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* Second Appeal, No. 89 of 1891, from a decree of Maulvi Akbar Husain Khan, Subordinate Judge of Cawnpore, dated the 30th September 1890, modifying a decree of Babu Banke Behari Lal, Munsif of Haveli, dated the 28th June 1890.

(1) S.D.A.N.W.P. 1869, Vol. I, p. 235.

(2) Agra (F.B.) 90.

order as to costs. The lower appellate Court interfered with that order on what we consider untenable grounds. We allow this appeal, with costs in this Court and in the lower appellate Court as far as Daulat Ram is concerned, and vary the decree of the lower appellate Court as to costs by reinstating that portion of the decree of the first Court which relates to costs.

Appeal decreed.

15 A. 334 = 13 A.W.N. (1893) 121.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell.

LALJI LAL (*Judgment-debtor*) v. C. J. BARBER (*Decree-holder*).*
[16th May, 1893.]

Execution of decree—Court executing decree not competent to go behind its terms—Act IV of 1882, *ss.* 88, 90.

Where a decree on a hypothecation bond besides decreeing sale of the hypothecated property purported also to grant relief over against the person and non-hypothecated property of the judgment-debtor and such decree remaining unchallenged became final in its entirety.

Held that it was competent to the decree-holder by application for execution of the decree to proceed against the non-hypothecated property of his judgment-debtor and it was not necessary for him to apply to the Court for a decree under s. 90 of the Transfer of Property Act. *Musaheb Zaman Khan* v. *Inayat ullah* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of Tyrrell, J.

Munshi *Gobind Prasad*, for the appellant.

Mr. *Fateh Chand* and Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

TYRRELL, J.—The appellant is a judgment-debtor under a decree held by the respondent which was made under s. 88 of the Transfer of Property Act on the 14th of September 1887, which was subsequently amended so as to become a decree against non-hypothecated property, also personally against the appellant. So far, of course, it was not a good decree under the section, but the appellant submitted to it and it became final against him. On the 21st of [335] March 1888, and on the 11th of April 1888, steps were taken by the respondent to bring the hypothecated property under attachment and sale. The sale took place in November 1889. On the 4th of December 1891 the respondent made an application for the execution of his decree against the unhypothecated property of the appellant and this application is the subject of the present appeal. The Courts below have disallowed the judgment debtor's objection to execution. That objection is based mainly upon the terms of a judgment of this Court delivered in *Musaheb Zaman Khan* v. *Inayet-ullah* (1). It was argued here to-day that, according to the law laid down in that judgment, the decree held by the respondents could not have been made, in so far

* Second Appeal, No. 639 of 1892, from a decree of C.L.M. Eales, Esq., District Judge of Azamgarh, dated the 2nd May 1892, confirming a decree of Babu Jai Lal, Munsif of Azamgarh, dated the 11th March, 1892.

(1) 14 A. 513.

1893 MAY 16. — APPELLATE CIVIL. — 15 A. 334 = 13 A.W.N. (1893) 121.

as it relates to non-hypothecated property and personal liability, inasmuch as the respondent's cause of action for such relief could not accrue to him until it was discovered that a decree under s. 88 of Act IV of 1882 had not operated to extinguish the entire debt, and it was contended that the respondent's proper and only remedy was by way of a suit under s. 90 of the Act. These propositions of law are unquestionably correct, but the case before me to-day is in one essential radically different from the case before the first Bench mentioned above. The point for determination in that case was that the circumstance that the plaintiff's demand for relief against the non-hypothecated property was not decreed could not be treated as a decision refusing him that relief and as such barring his subsequent suit under s. 90 by virtue of the rule of s. 13 of the Code of Civil Procedure. The decree under s. 88 in that case was properly limited to the property hypothecated in the bond. In the present case the respondent has obtained a decree which the appellant allowed to become final against him, which is a decree not merely under s. 88 but also a decree for relief outside the mortgaged property. There was only one mode by which that decree could have been rectified. The Court executing the decree cannot go behind its terms and declare that such and such terms can be executed while such and such other terms are based on errors of law or of procedure and may not be executed. The Court below [336] is right in holding that it is incumbent on the executing Court to execute the decree as it stands, the execution not being barred by limitation or otherwise. The appeal is dismissed with costs.

Appeals dismissed.

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15 A. 336 = 13 A.W.N. (1893) 111.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice, Aikman.

QUEEN-EMPRESS *v.* RAGHU TIWARI.* [16th May, 1893.]

Act XLV of 1860, s. 182—*False information to a public servant—False complaint to the police.*

Where as the result of a police investigation it appears that a complaint made to the police of the commission of an offence punishable under the Indian Penal Code is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of his allegations before his prosecution under s. 182 of the Indian Penal Code is proceeded with.

[F., 29 A. 587 = 4 A.L.J. 471 (472) = A.W.N. (1907) 195; R., 33 C. 1 = 2 C.L.J. 228 (230) = 10 C.W.N. 158; 19 A.W.N. (1899) 90.]

THIS was a reference by the Sessions Judge of Ghazipur under s. 438 of the Code of Criminal Procedure, 1882. The facts of the case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. *A. Strachey*), for the Crown.

JUDGMENT.

EDGE, C. J. and AIKMAN, J.—Raghu on the 11th of December gave information, to the Police that one Budhan had committed theft. The Police inquired into the matter, and came to the conclusion that the information was false. On the 17th of December 1892, the matter came before a Magistrate of the first class. On the Police report the Magistrate

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* Criminal Revision, No. 161 of 1893.

1893 MAY 16. — REVISIONAL CRIMINAL. — 15 A. 336 = 13 A.W.N. (1893) 111.

directed proceedings to be taken against Raghu under s. 182 of the Indian Penal Code. On the 19th of December, a summons was issued against Raghu and on the 24th, was served upon him. The summons called upon him to appear on the 5th of January 1893, to answer the charge. On the 3rd of January, 1893, Raghu presented to the Court of the Magistrate a petition, dated the 2nd of January, in which he referred to the complaint made by him and to the proceeding against him under s. 182 of the Indian Penal Code, and asked that the latter proceeding should stand over until his complaint had been decided. The Magistrate did not [337] comply with the prayer of that petition, but proceeded with the charge against Rgabu, and having, on the 17th of January, convicted him on a summary trial of the offence under s. 182, sentenced him to three months' rigorous imprisonment. Raghu applied to the Sessions Judge of Ghazipur to revise the order of the Magistrate of the 17th of January 1893. The Sessions Judge requested an explanation on certain points. The Magistrate sent his explanation. The Sessions Judge put forward his views in reply, and sent the case to this Court for us to exercise our powers of revision. The view of the Sessions Judge is that it was illegal on the part of the Magistrate to proceed and decide the charge under s. 182 of the Indian Penal Code before the complaint of Raghu had been adjudicated upon in accordance with his application of the 3rd of January 1893. The Sessions Judge and the Magistrate in their correspondence, and apparently on the invitation of the Sessions Judge, discussed many points which may have been of interest to them. The cases in this Court cannot be reconciled. Many of those cases relate to proceedings under s. 211 of the Indian Penal Code. Although it is difficult to see what case could arise under s. 211 to which s. 182 could not be applied, yet s. 182 would apply to a case which might not fall under s. 211. The offence under s. 182 is complete when false information is given to a public servant by a person who believes it to be false, but who intends thereby to cause such public servant to institute criminal proceedings against a third person. The offence is complete although the public servant takes no step towards the institution of such criminal proceedings. In our opinion it is in such a case not at all necessary that the public servant should take any step whatever on the false information before instituting and prosecuting to a conclusion a charge under s. 182 against the person who had given such false information. Assume, as in this case, that inquiries were made on the false information, and that not only was it shown that the information was false, but the corrupt and wicked motive of the informant was apparent ; in our opinion, it would be absurd that the informant should be called upon to proceed with a false charge which inquiries had shown to be false, and that the proceedings against him under s. 182 should be delayed [338] until the informant, and such witnesses as he might be able to call in support of his complaint, had had afforded to them by the Magistrate an opportunity of committing the further offence of perjury. We are well aware that it may be objected that in this view the Police are in the first instance made the judges of whether the informant's complaint was true of false. As the matter would not finally rest with them, and would have to be determined by a competent Court, some discretion and reliance may be placed in the Police, and in fact in some cases that discretion is by law reposed in them. In cases to which s. 211 especially applies, and in which a criminal proceeding has been instituted, a Court should, in our opinion, as a rule proceed to determine such criminal proceeding instituted in it and should give the person instituting such proceeding, a reasonable

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opportunity of supporting his case before proceeding against him for an offence under s. 211. We are unable to ascertain that there is any restriction imposed by the Indian Penal Code or by the Criminal Procedure Code of 1882 upon the prosecution of an offence either under s. 182 or 211. It appears to us that it has been left to the discretion of the Court to determine when and under what circumstances prosecutions should be proceeded with under ss. 182 and 211. We think that discretion would, as a rule, be rightly exercised by the Court proceeding to dispose of the criminal proceeding then pending before it before taking action under s. 211 or 182 against the person who had instituted such criminal proceeding, or on whose information such criminal proceeding had been instituted. In this particular case the procedure of the Magistrate was in our opinion entirely regular. We are of opinion that the application which was made on the 3rd of January 1893, was filed either, as the Magistrate thought, merely as a defence, or for the purpose of delay. We see no reason for interfering with the conviction and sentence. The record will be returned and a copy of this judgment will be sent to the Magistrate concerned.

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15 A. 339 (P.C.) = 20 I.A. 336 = 6 Sar. P.C.J. 313 = 17 Ind. Jur. 425.

[339] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris, Sir R. Couch and the Hon. George Denman.
[*On appeal from the High Court at Allahabad.*]

BALGOBIND DAS (*Plaintiff*) v. NARAIN LAL AND OTHERS (*Defendants*).
[10th and 14th March and 28th April, 1893.]

Hindu Law—Mitakshara—Joint Hindu family—Mortgage—Attempt by one co-share to mortgage his undivided share on his own account—Effective sale of part of such a share in execution of a decree against the co-sharer—Interest allowed on the mortgage debt according to the contract.

Under the Mitakshara, as administered by the High Courts of the North-West Provinces and Bengal, an undivided share in ancestral estate, held by a member of a joint family in co-parcenary, cannot be mortgaged by him on his own private account, without the consent of those who share the joint estate. An attempted mortgage by one of them does not create a charge which can have priority over purchases at execution sales made *bona fide*, and without notice of it; such purchasers having acquired the right of compelling the partition which the debtor might have compelled, had he been so minded, before the alienation by the sale of his share.

As to the invalidity of the attempted mortgage, *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), referred to, and approved. As to the right of the purchaser of the share at a judicial sale, *Deen Dyal* v. *Jugdeep Narain Singh* (2), followed, and reference made to the distinction, mentioned in the latter case, between a voluntary alienation without such consent, and an involuntary one as the result of the execution of a decree against the co-parcener, and a judicial sale thereunder.

A father and son composed a joint family, holding a share of ancestral lands. The son mortgaged to a banker, to secure a loan, his interest in the undivided share. His father, without having notice of the mortgage, purchased in good faith, portions of the estate forming part of the son's joint share, at sales in execution of decrees against the latter, obtained by his creditors.

Held, that the son's interest in the portions so sold, passed to the father, whose rights therein as purchaser at the judicial sales were not affected by the mortgage.

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(1) 3 B.L.R.F.B. 31. (2) 4 I.A. 247 = 3 C. 198.

The mortgagee could, in execution of a money decree, which he might obtain against the mortgagor, personally attach and bring to a judicial sale such parts of the mortgaged property as had not already been sold, but not in virtue of the mortgage.

Interest on the money lent was contracted to be payable,—" even if a suit should be instituted " at the rate fixed for the period for which the money was lent. *Held*, that interest must be decreed at this rate, according to the contract, down to the institution of the suit.

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[F., 31 A. 507 (510) = 6 A L J. 762; Appr., 20 A. 325; R., 31 A. 176 = 6 A.L.J. (F B) 263 (299) = 1 Ind. Cas. 479 (491); 33 A. 783 (788); 8 A.L.J. 901 = 11 Ind. Ca. 220; 35 M. 47 (62) = 9 Ind. Cas. 596 = 21 M L J. 246 = 9 M.L.T. 389 = 2 M W.N. (1911), 238; 6. A.L J. 11 = A.W.N. (1908), 163; 12 C.P.L.R. 63 (66); 1 Ind. Cas. 83 (84); 11 Ind. Cas. 291 (294); 11 Ind. Cas. 654 (658); 11 Ind. Cas. 892 (894); 13 Ind. Cas. 466 (467) = 14 O.C. 295; 10 O.C. 289 (291).]

[340] APPEAL from a judgment and decree (13th February, 1889) of the High Court, affirming, with a variation as to the amount of interest allowed, a decree (4th February, 1887) of the Subordinate Judge of Benares.

No fact was in dispute on this appeal, which related to an attempted mortgage of the right and interest in joint ancestral estate by a co-sharer, and the distinction between voluntary and compulsory alienations by him, the latter being sales in execution of decrees against him.

The suit was brought by the appellant Balgobind Das, a banker in Benares, who, between 1873 and 1879, had lent money, from time to time, to the first defendant, now the respondent, Narain Lal, who was joint in estate with his father, Naunidh Lal, the third defendant, now respondent. The question raised was whether a simple mortgage by a member of a joint Hindu family, for his own private debt, of his share in the ancestral estates, created a valid charge against purchasers of parts of the same share sold in execution of decrees against him. Some of the ancestral estate, forming portions mentioned in the first schedule of the plaint, had been sold before the date when the mortgage was made, so that there was no doubt that they were not affected by the mortgage. The question was as to other parts sold in execution of decrees against Narain Lal, to *bona fide* purchasers, after the date of the mortgage, but without notice or their knowledge of it. As to this property, mentioned in a second schedule, the question was whether the mortgage was effective against the claim under the judicial sales, or whether the purchasers under the latter, the principal of whom was Naunidh Lal, father of Narain Lal, had acquired such a right that their title was valid, notwithstanding the prior mortgage.

The family property consisted of an eight-anna share of land and houses situate in the districts of Benares, Patna, Tirhut, Sarun, Motihari, Hajipur, Champaran, Gaya, Monghyr and Muzaffarpur, and the father and son, who were under the Mitakshara, had each a four-anna share in the undivided estate. On the 27th November, 1879, Narain Lal executed a bond, with a mortgage of his four [341] anna share to the plaintiff, Balgobind Das, to secure a debt of Rs. 93,000 which with interest at Re.1-8 a month, or eighteen per cent., he bound himself to pay within two years. The money not having been paid, this suit was brought on the 12th of February, 1886, for a decree "enforcing the hypothecation," and ordering a sale, and also payment of the debt by Narain Lal personally. The total amount claimed was Rs. 2,01,484, consisting of Rs. 93,000 principal, and Rs. 1,08,484, interest. With Narain Lal were joined two other defendants, who had purchased at execution sales held after the date of the morgage, the right, title and interest of Narain Lal in parts of the property. They alleged for their defence, amongst other things, that

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Narain Lal, as one member of the joint Hindu family, was not entitled to mortgage his undivided share in the joint family property. In consequence of this, the plaintiff applied to have Naunidh Lal, the father, till then not a party, added as a defendant. This was ordered by the Subordinate Judge on the 24th of September. 1886. Naunidh's defence was that, he and his son being each entitled to a one-half share, and no partition, separation or specification of their shares having taken place, the son had not been competent to mortgage his share without his, Naunidh's, consent.

The Subordinate Judge found that the mortgage had been executed and that the money was due. On the question as to the right of Narain Lal to mortgage, he applied the rule, citing *Sadabart Prashad Sahu* v. *Foolbash Koer* (1), and *Rama Nand Singh* v. *Gobind Singh* (2), that one member of a joint undivided family could not mortgage or sell his share without the consent, express or implied, of his co-parceners. In this case, he saw no reason why the obtaining a share of one of the members by another, as the result of causes beyond the control of the former (for instance, as the result of a judicial sale), should change the character of the remainder of the estate, rendering the co-proprietors separate as to their respective shares. He decreed the claim personally against Narain Lal for the money, with interest at the rate agreed upon only down to the day fixed for the repayment of the principal.

[342] The two questions before the High Court (SIR JOHN EDGE, C.J., and TYRRELL, J.) were, according to the judgment given on the plaintiff's appeal, *first*, whether the mortgage-deed of the 27th of November, 1879 effected what it professed, namely, to mortgage the property: *secondly*, whether the Subordinate Judge was right in disallowing the interest after the date fixed for repayment of the principal. The High Court, on the first point, held, with the Court below, that the deed did not operate so as to effect the property as a mortgage of it. They added that it had been argued before them that defendants, the auction-purchasers took under Narain Lal, and therefore could not be heard to say that he, as a member of a joint Hindu family, with only a right unexercised by him to demand a partition, was without the power, consequently, to mortgage. In one sense, no doubt, auction-purchasers did take under the judgment-debtor, but, in another sense, they took adversely to him. In an auction sale in execution of decree the purchaser did not take by a voluntary conveyance; —on the contrary, he took by operation of the decree obtained against the judgment-debtor. The Judges therefore held, in concurrence with the Subordinate Judge, that it was open to the auction-purchaser in this case to rely on the invalidity of the mortgage attempted by Narain Lal, and that the decree must be in favour of his father Naunidh Lal as such purchaser, in good faith, and without notice.

On the second point, they were of opinion that it was not the intention of the parties that interest should be payable on the debt beyond the date fixed for repayment, at the same rate as that charged down to that date. They fixed five per cent. from that date down to the institution of the suit.

Mr. *T. H. Cowie*, Q. C., and Mr. *J.H.A. Branson*, for the appellant, argued that Narain Lal's mortgage, of the year 1879, effected a valid charge upon the share which he held comprising the property in the deed mentioned. The question was, as had been stated by the first Court, whether the mortgagor was competent to mortgage his share without his

(1) 3 B.L.R. (F.B.) 31. (2) 5 A. 384.

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father's consent, and whether purchasers, in good faith, at judicial sales of part of the property [343] subject to the son's undivided interest, had obtained a title superior to the charge which the son had attempted to make before the sale to them. No doubt a course of decisions, in the North-Western Provinces and Bengal, had established the principle that o long as family estate was undivided, the one co-parcener had no power o transfer his share without the consent of the other. They referred to —*Appovier* v. *Rama Subba Aiyan* (1), *Sadabart Parshad Sahu* v. *Foolbash Koer* (2), *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3), *Chunderkanth Roy* v. *Ram Ruttun Ghosal* (4), [SIR R. COUCH referred to *Madho Parshad* v. *Mehrban Singh* (5).]

The inability of a co-parcener to mortgage was the result of his not being entitled to any specific, or defined, part of the joint property, he being, till partition, entitled only to an interest in the whole joint estate, and not to an ascertained part of it. His interest also was subject to the right of survivorship in others. But on the other hand, each co-parcener could claim to have a partition;—the right of partition which the purchaser at an execution sale under a decree against the co-parcener could claim to work out; and the son, in his father's lifetime, could insist upon having his share. Here, inasmuch as the son, Narain Lal, had an interest ascertainable by his own act, there was a right in him on which the mortgage could operate. The right to insist on a partition had been applied to the purpose of obtaining satisfaction of decrees, and should be held available to the mortgagee, who was prior in time. What should be the operation of the mortgage was expressed in Act IV of 1882, section 58, sub-section 6, showing the nature of the simple mortgage, (as it was formerly as well as now), *viz.*:—the mortgagor, without delivering possession of the mortgaged property, bound himself personally to pay the mortgage money and agreed, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee should have the right to cause the property to be sold, and that the proceeds should be applied, so far as might be necessary, in payment of the mortgage money. [344] They referred to:—

Ganraj Dubey v. *Sheozore Singh* (6), *Chamaili Kuar* v. *Ram Prasad* (7), *Rama Nand Singh* v. *Gobind Singh* (8), *Madho Parshad* v. *Mehrban Singh* (5), and argued that the right to call for a partition was capable of being transferred. They referred to *Suraj Bunsi Koer* v. *Sheo Prashad Singh* (3) *Mussumat Phoolbas Koonwar* v. *Lala Jogeshur Sahoy* (9), *Deendyal Lal* v. *Jugdeep Narain Singh* (10). Part of the judgment in *Mahabeer Persad* v. *Ramyad Singh* (11), showed that, as between alienor and alienee of an interest in joint property, there were equities which might be dealt with so as to become equivalent to an alienation. There had been no dissent expressed by this committee from the decision in *Sadabart's* case, but there had hardly been any such complete affirmation of it as to cover the present one. Their contention now was that there was no real and practical distinction between the rights of a purchaser at an execution sale to insist on a partition of the share of the judgment-

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(1) 11 M.A. 75.
(2) 3 B.L.R. (F.B.) 31.
(3) 6 I. A. 88=5 C. 148.
(4) 2 S.D.A. 1860 (Bengal) 265.
(5) 17 I.A. 194=18. C. 157.
(6) 2 A. 898.
(7) 2 A. 267.
(8) 5 A. 384.
(9) 3 I.A. 7=1 C. 226.
(10) 4 I.A. 247
(11) 12 B.L.R. 90.

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debtor, on the one hand, and on the other, the rights of a purchaser under a voluntary alienation, such as this mortgage; where the share alienated was capable of being, as was the case here, sufficiently defined. A charge had here been created in the undivided fourth share which gave the mortgagee a prior right. They referred to the difference between the law laid down in the decisions of the High Courts of Madras and Bombay, on the one hand, and the decisions in Bengal and the North-Western Provinces, on the other, and that part of the judgment in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1), which related to this subject.

Mr. *J. D. Mayne*, for the respondent, Naunidh Lal, argued that according to the law administered in the North-Western Provinces, the mortgage was ineffectual to charge any part of the share of Narain Lal on the joint estate. In a long course of [345] decisions in the S.D.A., and in the High Court, it had been held that a co-parcener could not alone alienate his share. Such a share only became alienable when a specific part of the property to which it related had been defined as belonging to it. Its ascertainment resulted in the case of execution of a decree against a co-parcener, by his right to a partition being worked out. It had been part of the law of procedure at one time that the right, title and interest of a judgment-debtor could be attached, though later legislation had not been in the same terms as to this. [SIR R. COUCH inquired if this expression had been brought into the Code (VIII of 1859), from any of the earlier Acts or Regulations.] This might have been introduced from the earlier practice, before 1859, but it was not known if it appeared in any of the Regulations. Since 1882 what was sold under the Procedure Code was the estate of the judgment-debtor, and it was for the appellant to establish that, by some means or other, the share, which was the subject of this mortgage, in joint ancestral property, have been withdrawn from the general rule governing co-parcenary estates. The proposition stated in *Sadabart Prasad Sahu* v. *Foolbash Koer* (2) rested on earlier authority. It had been followed by a series of decisions, of which *Chunder Coomar* v. *Hurbuns Sahai* (3) was a late one. In Allahabad there had been *Chamoili Kuar* v. *Ram Prasad* (4), and *Ramanund Singh* v. *Gobind Singh* (5). Also were referred to, *Vasudev Bhat* v. *Venkatesh Sanbhav* (6), *Bhugwandeen Doobey* v. *Myna Baee* (7), *Madho Parshad* v. *Mehrban Singh* (8), *Mussumat Phoolbas Koonwar* v. *Lalla Jogeshur Sahoy* (9).

In *Madho Parshad* v. *Mehrhan Siugh* (8), it was decided that where a co-parcener had sold his undivided share to a purchaser, the rights of a surviving co-parcener prevailed by survivorship over those of the purchaser. Reference was made to the judgment in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (10), in which the [346] committee declined to extend the power of a co-parcener to alienate. A mortgage by a co-pareener did not create any immediate interest in the joint property, and resulted in being merely a personal contract between the mortgagor and the individual coparcener, though a lien might attach when the co-parcenary interest of the shares came, afterwards, to be ascertained by partition of the joint estate. But there could be no charge on the estate till partition, the co-parcenary state of things lasting, and the right of survivorship remaining.

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(1) 6 I.A. 88 at p. 105 = 5 C. 148 at pp. 166, 167.
(2) 3 B.L.R. (F.B.) 31. (3) 16 C. 137. (4) 2 A. 267.
(5) 5 A. 384. (6) 10 B. H. C. R. 139. (7) 11 M.I.A. 487 at p. 516.
(8) 17 I.A. 194 = 18 C. 157. (9) 3 I.A. 7 = 1 C. 226.
(10) 7 I.A. 181 = 5 B. 48.

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The mortgagee's remedy should have been to obtain a decree upon the mortgage debt, and to have attached the land in execution of his decree. But the right to enforce the mortgage was inconsistent with the requirement that partition should precede any transfer. The share might vary, and it was uncertain whether the mortgagor's share was to be taken as it existed at one period, or another. In *Rangasami* v. *Kishnayyan* (1) it was held that the purchaser's right to partition of a share applied to the share as computed with reference to the state of the family at the date of suit. The charge could only take effect when there should be either a voluntary partition, or one upon the compulsion of a judicial sale. He referred to Strange's Hindu law, Vol. I, p. 202. [SIR R. COUCH referred to *Udaram Sitaram* v. *Ranu Panduji* (2), and the statement of the question in that case by SIR M.R. WESTROPP, C.J.]

Mr. *T.H. Cowie*, Q.C., replied.

Their Lordships judgment was afterwards, on the 28th of April, delivered by SIR R. COUCH.

JUDGMENT.

The respondent, Narain Lal, is the son of the respondent Naunidh Lal, and they are governed by the law of the Mitakshara, as administered in the North-Western Provinces. On the 27th of November 1879, Narain Lal executed what is known in India as a simple mortgage, whereby, in consideration of a debt of Rs.86,834-12-3, then due to Balgobind Das, the appellant, and a further advance of Rs. 6,165-3-9, making together Rs. 93,000, [347] Narain Lal pledged a 4-anna share owned by him under the Hindu law out of the 8-anna share of his father, Naunidh Lal, in the ancestral property situate in the districts of Benares, &c., of which a detail was given at the end of the deed. And he bound himself to pay the principal sum and interest at Re. 1-8 per cent. per mensem within two years from the date of the bond. Neither the principal sum nor any part of the interest was paid within the two years nor subsequently, but the appellant did not take any steps to enforce the bond until the 12th of February 1886, when he brought a suit in the Court of the Subordinate Judge of Benares to recover the principal money and interest by enforcement of the hypothecation lien and sale of the mortgaged property. The defendants in the suit were Narian Lal and two others, Balkishen Lal and Gopal Das, who were joined as being in possession of portions of the mortgaged property. By an order, dated the 22nd of June 1886 Bhola Singh was made a defendant instead of Gopal Das and by another order dated the 22nd of September 1886 Naunidh Lal was made a defendant. The real contest in the suit was between him and the appellant. The defence set up in his written statement is that he and his son were under the law of the Mitakshara, and that the mortgage deed was invalid; that out of the properties mentioned in the plaint the properties in the first schedule to the written statement were sold to the extent of the rights and interests of Narain Lal in execution of decrees held by third parties before the date of the plaintiff's mortgage-bond sued on, and were purchased by him with his own money in the name of his wife, that the rights of Narain Lal in the properties mentioned in the second schedule were purchased in good faith by him with his own money, some in his own name, some in the name of his wife, and some through his mukhtar. The whole of the purchases where made at sales by auction in execution of decrees, and it

(1) 14 M. 408. (2) 11 B.H.C.R. 76.

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was found by the first Court that the defendants were *bona fide* purchasers who had no notice or knowledge of the mortgage to the plaintiff. It was admitted by the learned Counsel for the appellant that there was no fact in dispute in this appeal. There is no question as to the properties in the first schedule. They are clearly not affected by [348] the mortgage-deed. As to the properties in the second schedule, the purchasers, according to the judgment of this Board in *Deen Dyal Lal* v. *Jugdeep Narain Singh* (1), acquired the right of compelling the partition which the debtor might have compelled had he been so minded before the alienation by the sale of his share took place. The main question in the case is whether the mortgage is valid, and creates a charge which is to have priority over purchases at execution sales made *bona fide*, and without notice of it.

The Subordinate Judge held that Narain Lal was not competent to mortgage his undivided share in the joint estate without the consent of his father for a debt incurred for his own individual benefit, and made a decree that the plaintiff should recover Rs. 1,26,480 out of the amount claimed from Narain Lal presonally, dismissing the rest of the suit. The High Court, on appeal, affirmed this decree with a variation of the interest.

As to the defence that the mortgage-deed is invalid, the leading case upon the Mitakshara law as administered in Bengal and the North-Western Provinces is *Sadabart Prasad Sahu* v. *Foolbash Koer* (2). In that case two questions had been referrred to a Full Bench, the second being :—"Bhagwan Lal (a member of a Hindu family governed by the Mitakshara law) in his lifetime, executed an ordinary zur-peshgi mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of Bhagwan Lal (who had died) recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it ?" Sir Barnes Peacook in delivering the judgment of the Full Bench (the other Judges concurring) upon this question observed that there were conflicting decisions on the subject, cases in the reports of the High Courts of Bombay and Madras being in the affirmative, and a case in the High Court at Calcutta in the negative, and said that the decision of theCalcutta HighCourt was founded upon a current of authorities supported by the Vyavasthas of Pandits which it was too late for the Court [349] to overrule even if they were disinclined to agree in the principle established by them. Then, after referring to reported decisions of the Sudder Courts, the earliest of which in Bengal was in 1822, and in the North-Western Provinces (formerly part of Bengal) was in 1860, and to the parts of the Mitakshara bearing upon the question, he concluded by saying :—" Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon, I am of opinion that upon the simple fact stated in the second question, Bhagwan Lal had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family."

(1) 4. I.A. 247. (2) 3 B.L.R. (F.B.) 31.

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In the judgment in *Deen Dyal's* case the distinction between the voluntary alienation and a sale in execution is referred to thus :—" Their Lordships' finding that the question of the rights of an execution creditor, and of a purchaser at an execution sale, was expressly left open by the decision in *Sadabart's* case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in Bengal as that which exists in Madras. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's* case as to voluntary alienation. But, however, nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them." It appears to have been sometimes suggested that the law in Madras and Bombay is a logical consequence of the decision in *Deen Dyal's* case, and some argument of this kind seems to have been urged in the present case before the Subordinate Judge. Upon this there is an important passage in [350] the judgment of this committee in *Lakshman Dadu Naik* v. *Ramachandra Dada Naik* (1) where the question related to an alienation by will upon which the authorities in Bombay and Madras were then in conflict. At page 193 their Lordships say. " The argument (that the will should be treated as a disposition by the co-sharer in his lifetime of the undivided share) is founded upon the comparatively modern decisions of the Courts of Madras and Bombay which have been recognized by this committee as establishing that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-shares," and at p. 195. " Their Lordships are not disposed to extend the doctrine of the alienability by co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* above referred to they observed :—" There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law): and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. The question therefore is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are limits of an exceptional doctrine established by modern jurisprudence."

The reported decisions as to the law in the North-Western Provinces do not go so far back as those in Bengal, but in *Chamaili Kuar* v. *Ram Prasad* (2) Mr. Justice Oldfield says " The question cannot be said to be at this time an open one on this side of India. There is no doubt a current of decisions by this Court, invalidating sales by one co-parcener without the consent, express or implied, of his co-parcener, and I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest ... ... The law may be said to have been settled by a course of decisions and it would be undesirable to disturb it."

[351] The reason which has led to the recognition by this committee of the law in Madras and Bombay applies as strongly to the recognition of

(1) 7 I. A. 181. (2) 2 A. 267.

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the settled law of Bengal and the North-Western Provinces, and the judgment in the 7th Indian Appeals appears to their Lordships to be a recognition of that law. This is confirmed by the judgment of this committee in *Madho Parshad* v. *Mehrban Singh* (1). There a Hindu, without the consent of his co-parcener, had sold his undivided share in the family estate for his own benefit, and received the purchase-money to his own use; on his death the surviving co-parcener sued to recover the share. In the judgment delivered by Lord Watson it is said that the Counsel for the appellant conceded in argument that the rules of the Mitakshara law, which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate; and that he likewise conceded that the sales being without the consent of the co-parcener, and not justified by legal necessity, were, according to that law, invalid; but he maintained that the transactions being real, and the prices actually paid, the respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase monies. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold, except on condition of its being made at once available for the repayment of the price which he received, but that the respondent who took by survivorship was not affected by any equity of that kind, and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving co-parcener except by repealing the rule of the Mitakshara law. In the present case the interest has passed to Naunidh, not by survivorship but by purchases at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of the mortgage deed. If any portion of Narain Lal's share is still unsold, the appellant may attach and sell it in execution of the decree against Narain Lal personally, but [352] not by virtue of the mortgage. The decision in this suit is not intended to prejudice that right. But for the above reasons their Lordships hold that the suit against the other defendants was rightly dismissed. The High Court altered the decree of the Subordinate Judge by giving to the appellant interest on the Rs. 93,000 at 5 per cent. per annum, from the 27th of November 1881 to the 13th of February, 1889, the date of its decree. In the mortgage deed it is covenanted that even if a suit is instituted, interest shall be paid on the whole or part of the principal amount at the rate of Re. 1-8 per cent. per mensem (18 per cent. per annum), and the decree should be varied by giving interest at that rate instead of 5 per cent. to the 12th of February 1886 the date of the institution of the suit.

Their Lordships will humbly advice Her Majesty accordingly. The appellant having substantially failed will pay to the respondent, Naunidh Lal, his costs of this appeal.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondent: Messrs. *Pyke* and *Parrott.*

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(1) 17 I. A. 194.

15 A. 352 (P.C.)=20 I.A. 127=6 Sar. P.C.J. 327=17 Ind. Jur. 376.

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PRESENT:

Lord Watson, Lord Morris, Sir R. Couch and the Honourable George Denman.

[*On appeal from the High Court at Allahabad*].

[352] RAJA MOHKAM SINGH AND OTHERS (*Appellants*) v. RAJA RUP SINGH AND OTHERS (*Respondents*). [17th March and 28th April, 1893].

Agreement to supply money for another person's suit—Excess of the reward rendering such agreement inequitable—Champerty.

A fair agreement to supply money to a suitor to carry on a suit, in consideration of the lender's having a share of the property sued for, if recovered, is not to be regarded as necessarily opposed to public policy, or merely, on this ground, void. But in agreements of this kind the questions are: (*a*) whether the agreement is extortionate and unconscionable, so as to be inequitable against the borrower; or (*b*) whether the agreement has been made, not with the *bona fide* object of assisting a claim, believed to be just, and of obtaining reasonable compensation thereof, but for improper objects, as for the purpose of gambling in litigation, or of injuring others, so as to be, for these reasons, contrary to public policy. In either of these cases, effect is not to be given to the agreement. Here, upon the facts the above case (*b*) did not arise, and this agreement was not contrary to public policy. But this agreement fell [353] within case (*a*), and the judgment of the High Court was affirmed, that the agreement was so extortionate and unconscionable, in regard to the excess of the reward, that it was inequitable and, therefore, not enforceable against the defendant.

Ram Coomar Coondoo v. *Chunder Santo Mookerjee* (1) referred to and followed.

[R., 29 A. 303=4 A.L.J. 222=A.W.N. (1907), 55; 24 C. 183 (189); 34 M. 7 (11)=6 Ind. Cas. 439=20 M.L.J. 785=8 M.L.T. 108; 14 C.W.N. 191 (201); 2 Ind. Cas. 385 (389); 10 O.C. 173 (176); 79 P.R. 1894; 26 P R. 1906=20 P.L.R. 1906; 1 S.L.R. 21 (26).]

[N.B.—Read in this connection 11 A. 118, whereon this appeal has arisen. See also 11 A. 57.]

APPEAL from a decree (2) (12th July 1888) varyingr a decree (24th April 1886) of the Subordinate Judge of Mainpuri.

The question raised by this appeal related to an agreement by a suitor, in consideration of an advance of money being made to him for carrying on his suit, to give the lender a share of the property in litigation in the event of success.

In this suit, commenced on the 31st of July 1885, Raja Loke Indar Singh, since deceased, and now represented by his son, Raja Mohkam Singh, the present appellant, was plaintiff. The object of the suit was to enforce against the defendant, Raja Rup Singh, an agreement, admitted to have been executed on the 13th of March 1882. By this, which was in the form of a deed of sale, in consideration of the plaintiffs' paying the costs of an appeal to Her Majesty in Council from a decree, preferred by Raja Rup Singh, and in the event of success, they were to have a one-eighth share of the property involved. This estate was the Bhara Zamindari claimed by Raja Rup Singh; and the plaintiffs were also, under the agreement, to have the like share in an outstanding debt of Rs. 64, 155, due to that estate, with interest. The material part of this instrument is set forth in their Lordships' judgment, where the facts appear. They are

(1) 4 I.A. 23=2 C. 233.
(2) Reported, *sub nomine Loke Indar Singh and others* v. *Rup Singh*, in 11 A. 118.

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also stated in the report (where the agreement is set forth at length) of *Loke Indar Singh* v. *Rup Singh* (1).

The circumstances which preceded the execution by the defendant of the sale-deed of the 13th of march 1882, as well as the result of the litigation in a prior suit, in which Rup Singh obtained possession of the Bhara estate, and its accumulated income, appear in the judgment of the High Court, as well as observations upon the law of champerty, in *Chunni Kuar* v. *Rup Singh* (2).

[354] The defendants had disbursed, in pursuance of the arrangement, about Rs. 8,000, having also stood security for Rs. 4,000, which would have been payable, had the appeal failed. It did not fail, but succeeded see *Rup Singh* v. *Rani Baisni* (3).

The plaintiffs claimed the one-eighth share, but the defendant, after some negotiations, refused to make any payment.

The first Court dismissed the claim upon the ground that the plaintiffs had obtained the execution of the document of the 13th of March 1882, in an inequitable way. That decision was reversed by the High Court on an appeal by the plaintiffs. A Division Bench (EDGE, C.J., and TYRRELL, J.) gave judgment in favour of the plaintiffs, but not to the full extent claimed, holding them entitled to recover the amount of their advances with interest, and also compensation for their having become security for the costs of the defendant; but the Court held them not entitled to any share in the Bhara estate. The judgment is reported in I.L R. 11 All., at p. 122.

On this appeal.

Mr. *R. V. Doyne* and Mr. *G.E.A. Ross*, for the appellants, contended that they were entitled to a decree for the full amount of their claim, either in land of the Bhara estate, or its value there being nothing inequitable in the agreement. It was not unconscionable either in regard to the amount of the reward, or on account of its having been obtained by extortionate acts. It had been freely entered into by the respondent, who had benefited by it. At first, on the arrival in India of the order in Council, in favour of Rup Singh, he had expressed his willingness to carry out the agreement. But afterwards, when a question had arisen as to whether the plaintiffs should receive their share in land, or in cash, he had offered Rs. 50,000; and then, finally, refused to give anything. The appellants to obviate any difficulty arising from the impartible character of the estate, offered in the Court below to take their one-eighth in money; and a reference was made to the Collector of [355] the district, to inquire as to the value of the Bhara estate. This was found by him to be worth Rs. 4,00,000. It was submitted that the appellants were entitled in the proportions specified in the agreement.

Upon the question whether the zamindar of an impartible zamindari estate could alienate a part of it, reference was made to *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (4), *Uddoy Adittya Deb* v. *Jadub Lal Adittya Deb* (5).

As to the question of placing a reasonable construction on the contract, reference was made to *Gunga Pershad Sahu* v. *Maharani Bibi* (6), *Ram*

(1) 11 A. 118. (2) 11 A. 57. (3) 11 I.A.149=7 A. 1.
(4) 15 I.A. 51=10 A. 272. (5) 5 C. 113. (6) 12 I.A. 47=11 C. 379.

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Coomar Coondoo v. *Chunder Canto Mookerjee* (1), *Fischer* v. *Kamala Naicker* (2), *Raja Rup Singh* v. *Rani Baisni and the Collector of Etawah* (3).

The respondent did not appear.

Their Lordships' judgment on a subsequent day was delivered by SIR R. COUCH.

JUDGMENT.

The respondent is the younger and only brother of Mohendra Singh, Rais of the ancient impartible estate of Bhara or Bhauri, who died in September 1871 without leaving a son, but leaving a widow, Rani Baisni, who took possession of and held her husband's estate under an alleged title as widow. The respondent instituted a suit against her in the Court of the Subordinate Judge of Mainpuri to recover possession of the estate as impartible and descending to him under the ancient usage of the family, contending that after the decease of a Raja of Bhara, his nearest and eldest male heir succeeds him to the exclusion of the other male heirs and the total exclusion of women. The suit was dismissed by the first Court on the 25th of September 1878, and the respondent's appeal to the High Court at Allahabad was dismissed on the 7th of May 1880.

On the 13th of March 1882 an instrument of sale upon which the question in this appeal arises, was executed by the respondent. It [356] recites the institution of the suit against the widow, its dismissal, and the dismissal of the appeal, and proceeds is as follows :—

"Thus arose the necessity for filing an appeal to the Privy Council. It is clear I have not a pice and my only hope for justice lies in an appeal to the Privy Council. I have therefore with entreaties got Raja Loke Indar Singh (since deceased and now represented by the appellant Raja Mohkam Singh), Sheikh Nasrat Hussain (Lala Bhikhari Das, Munshi Har Narain), Bibi Chunni Kuar and Kuar Dharam Singh persons belonging to the first class given below to consent that they should meet the costs of the Privy Council including security by way of a help to me and should, in lieu thereof, be the proprietor of an eighth share of the property involved in the case with the exception of those articles. They have accepted the proposal, and deposited the security and the translation fees, and have undertaken to pay the other expenses of the Privy Council appeal." The respondent then by the deed sold an eighth share in the Bhara estate and of outstanding debts due to the estate, amounting to Rs. 64,155 to the persons before named ; and it is stated that the consideration for the sale was Rs. 12,500, the estimated cost of the Privy Council Appeal, consisting of Rs. 4,000 for the security of the Privy Council costs, and Rs. 8,500 for the translation of papers, the pleader's fee, and other expenses of every sort in the said department.

The appeal to Her Majesty in Council was successful. The decrees of both the Lower Courts were reversed, and it was decreed that the plaintiff (the present respondent) should recover possession of the estate (L. R., 11 I. A. 149). On the 13th of August 1884 he was put in possession of it, and having refused to give to the purchasers any part of the eighth share, a suit was on the 31st of July 1885 brought against him to recover it.

The plaintiffs had, on the 31st of January 1881, deposited in the High Court their security bond for the costs of the appeal, and they afterwards advanced for the costs of translation and remittance to England the sums of Rs. 783, Rs. 7,759, and Rs. 2,000.

(1) 4 I.A. 23=2 C. 233. (2) 8 M.I.A. 170. (3) 11 I.A. 149=7 A. 1.

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[357] The law applicable to the case is stated in the judgment of this Board in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1). "Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not be to regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor, who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suit, so as to be contrary to public policy,—effect ought not to be given to them."

The latter part of this passage is not applicable to the present case. The question is whether the agreement was so extortionate and unconscionable as to be inequitable against the respondent. The Subordinate Judge dismissed the suit. He held the sale not to be equitable and just, but he gave other reasons for dismissing the suit which cannot be considered satisfactory. He says:—"It was by no means becoming of the plaintiffs who had made him (the respondent) a Raja to have now joined together in bringing him down from the dignity of a Raja to the state of a subject, and themselves becoming the Rajas at his expense." And he appears to have thought the impartibility of the estate to be an answer to the plaintiffs' claim, for he says:—"Thus, if the plaintiffs' claim, were to be decreed now, it would necessitate a partition of the eighth part of the estate to be awarded to them, who might be called Rajahs or Maharajas thereof. But this would be altogether against the [358] intent of the Privy Council ruling, and it would be as if it were cancelling the said ruling." In fact this judgment appears to their Lordships to be founded, partly at least, on reasons which are inapplicable to the question. The High Court on appeal reversed the decree of the Subordinate Judge and decreed that the plaintiffs should recover from the respondent Rs. 1,588 interest on the amount of the security bonds at the rate of 12 per cent. per annum from the date when they were deposited in Court until the allowance of the appeal by Her Majesty in Council; Rs. 691 expenses of translation and printing, and Rs. 990-13-4 interest thereon at 20 per cent. per annum; Rs. 92 also on account of translation and Rs. 106-14-4 interest thereon from the 22nd of September 1882 to the 12th of July 1888, the date of its decree; Rs. 4,759 money advanced, and Rs. 4,711-6-6 interest thereon at 20 per cent. to the same date; Rs. 2,000 advanced for the purposes of review and Rs. 1,447-5-6 interest thereon, with costs in the High Court and Court below—amounting in the aggregate to Rs. 19,448-12-8. In their judgment the High Court say that after the appeal in the former suit from the Court of the Subordinate Judge had been dismissed, the respondent was without any means, and unless he obtained assistance on such security as he could offer he could not have filed or prosecuted his appeal to the Privy Council; that the plaintiffs did not press him to accept the

(1) 4 I. A. 23.

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terms contained in the deed. After giving their reasons for making the above decree, which are generally that the plaintiffs were not professional money-lenders who had taken advantage of the position of the defendant, and had not volunteered their assistance to promote litigation, they say: "In this case, judging by the disproportion between the liability, which the plaintiffs incurred under the contract, and the amount of the reward which they were to obtain in the event of the defendant succeeding in the Privy Council, we are compelled to conclude either that the plaintiffs did not believe that the defendant's claim in the action was well founded and consequently entered, although unwillingly, into a gambling transaction, or that, if they did believe that his claim was well founded, then the reward which, under their contract, they were to obtain, was excessive and unconscionable. [359] In either event we could not enforce his contract in its terms." The more favourable view for the plaintiffs is that they believed the claim to be well founded. Their Lordships adopt this, and think that the question whether the deed is contrary to public policy does not arise. They consider the finding of the High Court to be that the reward is excessive and unconsionable. It is evident from their judgment that they felt constrained to come to this conclusion. They say: "We confess that in this case our sympathies are entirely with the plaintiffs, and we do not refuse to decree their claim for possession of the share out of any sympathy for the defendant." A decision thus arrived at ought not to be set aside on appeal unless it clearly appears to be wrong, and their Lordships having heard all that the learned Counsel for the appellants could urge against the decree of the High Court are unable to say that they think that it is wrong. They will therefore humbly advise Her Majesty to affirm it, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. Barrow and Rogers.*

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15 A. 359 = 13 A.W.N. (1891) 113.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

MANSAB ALI (*Plaintiff*) v. NIHAL CHAND AND OTHERS (*Defendants*).*
[16th May, 1893.]

Letters Patent, s. 10—*Civil Procedure Code*, ss. 2, 556, 558, 587, 588, 632—*Appeal, dismissal of, for default*—"*Order*"—"*Decree.*"

No appeal will lie under s. 10 of the Letters Patent from the order of a single Judge of the High Court dismising an appeal for default.

The decision of a Court dismissing a suit or an appeal for default is an "order" and not a "decree." *Nand Ram* v. *Muhammad Bakhsh* (1), *Mukhi* v. *Fakir* (2), *Dhan Singh* v. *Basant Singh* (3), *Chand Kour* v. *Partab Singh* (4), *Muhammad Naim-ullah Khan* v. *Ishan-ullah Khan* (5), cited. *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (6), not followed.

[R., 23 C. 827 (828); 28 C. 81 (84); 22 M. 221 (222); 15 A.W.N. 140; 10 C.P.L. 32; 4 L.B.R. 17; 5 O.C. 294 (296); 121 P.R. 1907 = 51 P.W.R. 1907 (F.B).]

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* Appeal No. 3 of 1892 under s. 10 of the Letters Patent.

(1) 2 A. 616. (2) 3 A. 382. (3) 8 A. 519.
(4) 16 C. 98. (5) 14 A. 226. (6) 16 B. 23.

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APPELLATE CIVIL.

15 A. 359 = 13 A.W.N. (1893) 113.

[360] THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J., and AIKMAN, J.—This appeal is brought by the plaintiff under s. 10 of the Letters Patent from an order of the 4th of November, 1891, of our brother Mahmood dismissing the plaintiff's appeal to this Court for default. It is a hard case, but we must be careful not to depart from the correct interpretation of the law on account of the hardness of the case. The appeal which was dismissed was a second appeal in which the amount or value of the subject-matter exceeded one hundred rupees. It was consequently an appeal which our brother Mahmood sitting alone had no jurisdiction to hear and dispose of. His jurisdiction in that respect was limited by Rule I of the Rules of the 30th of November 1889. Rule I was, so far as it applies in this case, made under s. 13 of the 24 and 25 Victoria, C. 104; s. 652 of Act No. XIV of 1882. Further, the appeal, even if it had been one which he had jurisdiction to hear and dispose of, was put in the list of the 4th of November 1891, "for orders" and not for hearing, and it has been the practice of this Court not to dispose of, by way of dismissing or allowing, an appeal which is simply put up "for orders," unless the parties are ready for hearing and are willing that the appeal should be disposed of. The 4th of November 1891, was the day which had been fixed for the hearing in the notice which had been issued to the respondents, but the appeal as a matter of fact, as appears by the office report, which had been made on the morning of the 4th of November 1891, and which was before our brother Mahmood, was not on that day ripe for hearing. Our brother Mahmood, who was the Judge taking applications on the 4th of November 1891, and before whom and in whose list this appeal appeared for orders, must have overlooked the fact that he had no jurisdiction to hear and dispose of the appeal. He must also have overlooked the fact that the appeal had merely been put up for orders. When the appeal was called on on the 4th of November 1891, no one appeared to [361] support or to oppose. Our brother Mahmood, having sole regard to the fact that the 4th of November 1891, was the day fixed for the hearing, dismissed the appeal for default. Pandit *Sundar Lal* for the respondents has contended that this appeal does not lie. He has contended that the order which our brother Mahmood passed on the 4th of November, 1891, was not a decree as it is defined in s. 2 of the Code of Civil Procedure. He has relied on the cases of *Nand Ram* v. *Muhammad Bakhsh* (1), *Mukhi* v. *Fakir* (2), *Dhan Singh* v. *Basant Singh* (3) as showing that the order for dismissal in default was not a decree but an order. He contends that we should follow the ruling of this Court rather than the ruling in *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (4). In support of his contention he also relied on the decision of the Privy Council in *Chand Kour* v. *Partab Singh* (5) in which it was held that a dismissal of a suit for default could not operate under s. 13 of the Code of Civil Procedure as *res judicata*. He has also relied upon an unreported decision of their Lordships of the Privy Council in the case of *Maharaja Radha Prasad Singh* v. *Lal Sahab Rai* delivered on the 12th of

(1) 2 A. 616. (2) 3 A. 382. (3) 8 A. 519. (4) 16 B. 23. (5) 16 C. 98.

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July 1890, in appeal from this Court, was which to the effect that the dismissal of a suit for default of prosecution could not operate as *res judicata*. We have very great respect for the decision of the High Court of Bombay : still in our opinion an order dismissing a suit or appeal in default is an order and not a decree, as those terms are defined in the Code of Civil Procedure. A dismissal in default is not " the formal expression of an adjudication upon any right claimed or defence set up " within the meaning of s. 2 of the Code of Civil Procedure. Indeed it would necessarily follow from the two decisions of their Lordships of the Privy Council to which we have referred that an order dismissing a suit or appeal for default could not be treated as " a formal expression of an adjudication upon any right claimed or defence set up." That view is also supported by a consideration of s. 540 of the Code of Civil Proce-[362]dure. Prior to Act No. VII of 1888, doubts had been entertained whether an appeal lay under s. 540 of the Code of Civil Procedure from an original decree passed *ex parte*. In s. 540, as amended by s. 45 of Act No. VII of 1888, the following words were inserted as part of that section :—" An appeal may lie from an original decree passed *ex parte*." It will be noticed that in Chapter VII, which provides for the dismissal of suits in default, and also provides in certain cases for decrees passed *ex parte*, the Legislature has not treated the passing of an order of dismissal for default as a decree passed *ex parte*, and further it may be noticed that where a decree is passed *ex parte* it is a decree which is founded either on admission or evidence. Therefore it can be treated as a formal expression of an adjudication upon a right claimed or defence set up as the case may be. In the case of a dismissal under s. 557, that section shows that it is an " order " and not a " decree " which is made.

We are of opinion that a dismissal of a suit or of an appeal for default is by an order and not by a decree. By s. 632 it is enacted that "except as provided in this Chapter the provisions of this Code apply to such High Courts." The Chapter is Chapter XLVIII, and this is one of the High Courts to which that Chapter applies. S. 556 read with s. 587 provided the Procedure which our brother Mahmood no doubt applied in this case. We must treat the order which he made as an order made under s. 556 of the Code. It has been held by a Full Bench of this Court in *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (1), that s. 588 of the Code of Civil Procedure limits the application of s. 10 of the Letters Patent in appeals from orders made under the Code of Civil Procedure. An appeal from this particular order of our brother Mahmood is excluded by s. 588 of the Code of Civil Procedure, and whilst no appeal is given from an order under s. 556 of the Code, an appellant whose appeal has been dismissed under s. 556 is given a remedy under s. 558, the remedy being an application to the Court for the readmission of the appeal. He is given a further remedy, should the Court refuse to readmit his appeal. An appeal lies against an [363] order of refusal under s. 588, cl. 27. Consequently an appellant in such a case is not without a remedy. Mr. *Chaudhri*, for the appellant, contended that there was no such remedy open to his client in this case, as our brother Mahmood, having had no jurisdiction to hear and dispose of the appeal, would have no jurisdiction to set aside his own order and readmit the appeal. We need not decide that point, for if our brother Mahmood had no jurisdiction to entertain an application in this case under s. 558

(1) 14 A. 226.

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of the Code, it is quite clear to us that he could have entertained an application for review of judgment under s. 623 of the Code of Civil Procedure, and if he had granted the application for review, as it is probable he would have done, he could have ordered that the appeal be heard by a Bench of two Judges who had jurisdiction to hear it. Having come to the conclusion that the order of the 4th of November 1891 was an order and not a decree, and that, whether our brother Mahmood had jurisdiction or not to make it, it is in fact made under s. 556 of the Code, we are bound to hold that this appeal does not lie. We accordingly dismiss it. As this appeal has arisen out of an unfortunate oversight on the part of our brother Mahmood of two matters which excluded his jurisdiction on that day, we dismiss the appeal, but without costs.

Appeal dismissed.

[See also *Pohkar Singh* v. *Gopal Singh*, Weekly Notes, 1892, p. 50—ED.]

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15 A. 363=13 A.W.N. (1893) 148.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

RADHA PRASAD SINGH (*Plaintiff*) *v.* PATHAN OJAH AND ANOTHER (*Defendants*).* [16th May, 1893.]

Act XII of 1881 (*N.W.P. Rent Act*), ss. 93, *cl.* (*h*), 189—*Act I of* 1887 (*General Clauses Act*), s. 3, *cl.* (*13*)—*Valuation of subject-matter of suit—Appeal valued for purposes of jurisdiction at a higher amount than the suit.*

Where a plaintiff in a suit under s. 93 of the N.W.P. Rent Act valued his suit at Rs. 463, which valuation was not objected to either by the defendant or the Court, and subsequently, being defeated in his suit, preferred an appeal which he valued at a very much greater amount. *Held*, [364] that he must be bound by the valuation put by him upon his suit and could not by alleging a greatly enhanced value obtain an appeal which would not have lain on the valuation stated in the plaint. *Ram Raj Tewari* v. *Girnandan Bhagat* (1), distinguished; *Mahabir Singh* v. *Behari Lal* (2), referred to.

[R., U.B.R. (1902—1903), Vol. II, Court Fees, p. 1.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. H. S. Reid*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

KNOX and BURKITT, JJ.—The suit out of which this second appeal arises was a suit for ejectment of the respondents who were tenants at fixed rates of the appellant and was laid under s. 93, cl. (*h*) of the N.W.P. Rent Act. In his plaint the appellant says in distinct terms:—"The rent of one year of the land claimed is Rs. 46-3, which is the sum at which the suit has been valued." The claim was rejected by the Court of first instance, and in the memorandum of appeal the appellant entered a plea in

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* Second Appeal No. 1019 of 1890 from a decree of H. W. Reynolds, Esq., Additional Judge of Ghazipur, dated the 16th June 1890, confirming a decree of Maulvi Muhammad Wasi, Deputy Collector of Ballia, dated the 30th September 1889.

(1) 15 A. 63=12 A.W.N. (1892) 240. (2) 13 A. 320=11 A.W.N. (1891) 107.

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different terms, but in terms quite as distinctly stated as those in his plaint, to the effect that the value of the disputed property was Rs. 875. The lower appellate Court held that, as the appellant himself rightly or wrongly valued his suit at Rs. 46-3, he could not now alter that value, and it therefore held that no appeal lay to it. It is now contended before us that the District Judge erred in so holding; that the value for the purpose of jurisdiction is the real value of the subject-matter in dispute, and not the value which was stated by the appellant in the plaint solely for the purposes of the Court Fees Act. In support of this contention our attention was directed to the case *Ram Raj Tewari* v. *Girnandan Bhagat* (1), and we were asked to remand the case for an inquiry as to what was the real value of the subject-matter in dispute. Now s. 189 of the North-Western Provinces Rent Act of 1881 provides that an appeal shall lie to the District Judge from the decision of certain Courts in all suits mentioned in s. 93 in which *inter alia*, the amount or value of the subject-matter exceeds Rs. 100. There is abundant authority as to the meaning which should be assigned to the words "amount or value of the subject-matter." The interpretation they should bear is that **[365]** assigned to the word "value" in s. 3, cl. (13) of Act I of 1887 (General Clauses Act, 1887). In that Act "value" used with reference to a suit means "the amount or value of the subject-matter of the suit." This Court has already held in the case of *Mahabir Singh* v. *Behari Lal* (2), that for the purposes of determining the proper appellate Court in a civil case the value of the subject-matter of the suit must be the value assigned by the plaintiff in his plaint and not the value as found by the Court, fraud or negligence excepted. As regards the precedent quoted, *Ram Raj Tewari* v. *Girnandan Bhagat* (2), we fully agree that the principle laid down for the valuation of suits to eject tenants at fixed rates is the correct one, and we should follow that principle in this case if we could arrive at the stage when it would become necessary for us to determine what the value of the subject-matter was. In this case, as the appellant had in his plaint himself put a value on the relief he asked for, and as that value was not questioned by the other side and was accepted by the Court of first instance we are not in a position now to entertain the question as to whether it was or was not the correct value of that subject-matter. We may add that we have consulted the learned Judges who gave the decision in the case of *Ram Raj Tewari* v. *Girnandan Bhagat*(1), and we are authorized by them to say that the question as the value stated in the plaint being the governing value throughout all the subsequent proceedings was not brought to their notice or argued in the case before them. We therefore are of opinion that the learned Judge was right in holding that no appeal lay to him. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) 15 A. 63 = 12 A.W.N. (1892) 240. (2) 13 A. 320 = 11 A.W.N. (1891) 107.

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15 A. 365=13 A.W.N. (1893) 114.

REVISIONAL CRIMINAL.

Before Mr. Justice Tyrrell.

THE QUEEN-EMPRESS *v.* LAKHPAT.* [16th May, 1893.]

Criminal Procedure Code, s. 560—Compensation for frivolous or vexatious complaint—Such compensation inapplicable to a complaint under s. 110 of the Code.

The award of compensation under s. 560 of the Code of Criminal Procedure must be in respect of a frivolous and vexatious accusation of an [366] offence of which the accused person has been discharged or acquitted. That section is not applicable to an application made to a Magistrate solely with a view to his taking proceedings under s. 110 of the Code.

[F., 25 B. 48 (49); 33 P.R. 1902 (Cr.); R., 7 A.L.J. 743=11 Cr. L.J. 446 (447)=7 Ind. Cas. 290; 131 P.L.R. 1905=42 P.R. 1905 (Cr).]

THIS was a reference under s. 438 of the Code of Criminal Procedure made by Sessions Judge of Meerut in respect of an order of a first class Magistrate dismissing an application to take security for good behaviour under s. 110 of the Code from one Hira, and ordering the applicant to pay Rs. 50 as compensation to Hira under s. 560. The applicant applied for revision of the above mentioned order to the Sessions Judge. who, being of opinion that the order was illegal, referred the case to the High Court.

On this reference the following order was passed by TYRRELL, J.:—

ORDER.

One Lakhpat has been fined by a Magistrate at Meerut under s. 560 of the Criminal Procedure Code for having given information to a Magistrate that one Hira was a person amenable to the provisions of s. 110 of that Code. The Magistrate found that Hira was not an habitual robber, house-breaker or thief, or otherwise a person contemplated by s. 110. The Court of the Session Judge of Meerut took up in revision the question of the legality of this fine, and has reported the case upon the ground that s. 560 contemplates information and accusation for an offence, and provides compensation for a person who has been discharged or acquitted of such offence, the accusation against him being held to be frivolous or vexatious.

The order for fine or compensation is to be conveyed in the order of discharge or acquittal of the Magistrate trying the matter. The learned Sessions Judge held that in the present case no offence was imputed, no offence was tried and no offender was discharged. The provisions of Chapter VIII are aimed at the preventing of, and are not consequent on the commission of specified offences. An offence means any act or omission made punishable by any law for the time being in force. The order of discharge or acquittal means an order relating to an imputed offence. Now Hira was not charged with any offence. He was called on to show cause why he should not execute a certain bond: the execution of a bond is the [367] only consequence of failure to show such cause, but it is not a punishment, and the imputed criminal habit is not a charge of an offence. Therefore Hira was not discharged or acquitted of an offence, and therefore there is no order of the Magistrate which could be made the vehicle of a lawful order of compensation as required by s. 560. There is authority

* Criminal Revision No. 274.

relating to the corresponding section of the former Code of Criminal Procedure to the effect that compensation cannot be granted to a person respecting whom a rule similar to that issued under Chapter VIII of the present Code has been discharged.

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The District Magistrate, who was not called on for an explanation in the matter, has interposed an observation to the effect that he remembers "a late ruling of one of the High Courts in which a charge under s. 110 of Criminal Procedure Code was treated as a charge of offence committed." He has ommitted to indicate the ruling he refers to. The order of compensation is set aside, and if any money has been levied under it, it shall be returned.

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15 A. 367=13 A.W N. (1893) 115.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

RUDR PRASAD (*Plaintiff*) v. BAIJNATH AND ANOTHER (*Defendants*).*
[17th May, 1891.]

ivil Procedure Code, ss. 54, 55, 54?, 551. 582, 584, 585—*Second appeal, summary rejection of memorandum—Reasons for rejection to be recorded.*

Per EDGE, C.J.—A Judge to whom a memorandum of appeal from an appellate decree is presented for admission is entitled to consider whether any of the grounds mentioned in s. 584 of the Code of Civil Procedure in fact exist and apply to the case before him, and if they do not to reject the memorandum of appeal summarily. s. 551 of the Code of Civil Procedure applies to appeals which have been admitted.

Per AIKMAN, J.—When a memorandum of appeal is summarily rejected, whether under s. 543 or under s 54 read with s. 582 of the Code of Civil Procedure, the reasons for such rejection should be recorded; *sed quære* whether, unless it appears from the memorandum of appeal taken by itself [368] that a second appeal does not lie, a second appeal can be summarily rejected and should not rather be dealt with under s. 551 of the Code.

Semble that a ground of appeal to the effect that the lower appellate Court has misconstrued a document is not one of the grounds of second appeal contemplated by s. 584 of the Code of Civil Procedure.

[R., 30 A. 290 (293) = 5 A.L.J. 584=A.W.N. (1908) 109.]

THE facts of this case sufficiently appear from the judgment of Edge, C.J.

Pandit *Ratan Chand*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J.—The memorandum of appeal in this case was presented to my brother Blair for admission. He rejected it. He did not state his reasons for rejecting but it is obvious that he made his order of rejection, because the proposed appeal did not come whithin s. 584 of the Code of Civil Procedure. It is enacted by s. 585 that no second appeal shall lie except on the grounds mentioned in s. 584." That section has been emphasized by their Lordships of the Privy Council who have told the Courts in India that they have no power to admit as a second appeal

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* Appeal No. 26 of 1892 under s. 10 of the Letters Patent.

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an appeal which does not fall within s. 584. I regard s. 585 as a positive prohibition by the Legislature to the Courts which are bound to act under the Code of Civil Procedure against admitting, as second appeals, appeals from appellate decrees which do not come under s. 584. It is obvious to my mind that when the Legislature enacted s. 584 and s. 585, they did not intend that those sections should be made futile by an unfounded allegation in a memorandum of second appeal of a ground mentioned in s. 584. If the question as to whether an appeal from an appellate decree lay, depended merely on the statement of a proposed appellant of one of the grounds mentioned in s. 584 in his memorandum of appeal, s. 585 would not come into operation until the appeal had been admitted and had been argued, whereas that section distinctly says that no appeal from an appellate decree not falling within s. 584, shall lie. It is the duty of the Judge to see, when a memorandum of appeal from an appellate decree is presented to him for admission, that the appellant does not, through inadvertence or otherwise, seek to obtain admission of an appeal by stating in his [369] memorandum of appeal one of the grounds mentioned in s. 584, when such ground plainly does not arise. Section 584 gives an appeal when those grounds actually exist, not in cases in which they do not exist as objections to the decree and appeal below except in a false or erroneous statement made in a memorandum of appeal. If s. 584 is intended to give an appeal from an appellate decree when any of the grounds mentioned in that section are stated in a memorandum of appeal, that section might have said so. If it had, it would have reduced the law to an absurdity, because then the appeal would succeed, not because any good ground was shown why it should succeed, but simply because the appellant chose to allege in his memorandum of appeal that one of the grounds mentioned in s. 584 existed in the case. I am consequently of opinion that a Judge taking an application for the admission of an appeal from an appellate decree is entitled to consider whether any of the grounds mentioned in s. 584 in fact exist and are applicable to the case before him. It might be suggested that all such cases should be sent up for a Bench under s. 551 of the Code. I wish to point out that s. 551 applies to appeals, *i. e.*, to cases in which the memorandum of appeal has been admitted and the appeal has been registered. Of course, as frequently happens, an appeal which is prohibited by s. 585 may get through without the attention of the Judge being drawn to the fact that in it none of the grounds mentioned in s. 584 exist. By way of example, a memorandum of appeal from an appellate decree might be presented, and in it might be alleged every single ground mentioned in s. 584. The copy of the judgment and decree, which necessarily accompany the memorandum, might show that, by reason of some finding of fact of the lower appellate Court, not one of those grounds could possibly apply. Another objection has been taken by Mr. *Ratan Chand* to the order of my brother Blair rejecting the memorandum of appeal in this Court. It is contended that as the subject-matter of the appeal exceeds 100 rudees in value, my brother Blair had no jurisdiction to reject the memorandum of appeal. That objection is based upon a very casual reading of, or possibly upon a total omission to read, rule 1 of the Rules of this Court of the 30th of November, 1889. [370] Sub-rule (1) of rule 1 gave my brother Blair, as far as this Court had power to do so under s. 652 of the Code of Civil Procedure, authority or jurisdiction to hear and dispose of an application such as this. Sub-rule (2) of rule 1 relates to second appeals. Now to come to the merits.

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The question between the parties was as to a wall. The plaintiff, appellant here, brought his suit on the allegation that the wall was exclusively his and that the defendant had committed trespass by interfering with the wall. The two Courts found on the evidence that the wall was a party wall, *i.e.*, the common property of the plaintiff and the defendant. The lower appellate Court, before coming to that finding, actually inspected the wall as it stood. So far as appears by anything before us it is a pure question of fact. The title on which the plaintiff claimed was found against him, and there was nothing in the case to bring it within s. 584 of the Code of Civil Procedure. Consequently, in my opinion, my brother Blair acted according to law in rejecting the memorandum of appeal, and I would dismiss this appeal with costs.

AIKMAN, J.—This is an appeal under s. 10 of the Letters Patent against an order of my brother Blair, rejecting a memorandum of second appeal. The order appealed against consists of the single word "rejected." No reasons are given for the rejection. A memorandum of appeal may be rejected under the provisions of s. 543 if it is not drawn up in the manner prescribed by law. It may also be rejected on any of the grounds set forth in s. 54, reading that section with s. 582 of the Code of Civil Procedure; but whether rejected under s. 543, or under s. 54 read with s. 582, the reasons for the rejection ought to be recorded. (*Vide* second paragraph of s. 543 and s. 55). Apparently the reason for the rejection in this case was that, in the opinion of my brother Blair, no second appeal lay with reference to the provisions of ss. 584 and 585 of the Code. By cl. (*c*) of s. 54 read with s. 582 a memorandum of appeal must be rejected if the appeal appears from any statement in the memorandum to be barred by any positive rule of law. If the grounds set forth in the memorandum of second appeal were such as could not by any chance come within any of the clauses of s. 584, it would be [371] the duty of the Court to reject it, because in such a case it would appear from the statement in the memorandum that the appeal would be barred by the prohibition in s. 585. One of the grounds set forth in the memorandum of appeal in question was as follows: "That the sale-deed produced by the plaintiff has not been properly construed. It proves the wall to belong to the plaintiff." It has been the practice of the Court to allow questions regarding the construction of documents to be raised in second appeals, though, speaking for myself, I have some difficulty in understanding under which clause of s. 584 a question as to construction of a document would fall. Unless it appears from the statement in the memorandum of appeal taken by itself that a second appeal does not lie, I am doubtful whether a second appeal can be summarily rejected under cl (*a*) of s. 54 read with s. 582 of the Code of Civil Procedure. I am inclined to think that when it is necessary to refer to the judgment appealed against to see whether a second appeal will lie, it would be better in such a case to fix a date under s. 551 of the Code for hearing the appellant or his pleader before throwing out the appeal. In the present case, however, after comparing the judgment appealed against with the grounds stated in the memorandum of appeal, I have no hesitation in saying that this was not a case in which a second appeal lay, and I concur with the learned Chief Justice in the order proposed by him.

Appeal dismissed.

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15 A. 371 = 13 A.W.N. (1893) 149.

15 A. 371 = 13 A.W.N. (1893) 149.

APPELLATE CIVIL.

Before Mr. Justice Knox.

GULAB KUAR (*Judgment-debtor*) *v.* BANSIDHAR AND OTHERS (*Decree-holders*).* [18th May, 1893.]

Hindu law—Hindu widow—Maintenance—Attachment of property assigned in lieu of maintenance—Civil Procedure Code, s. 256, *cl.* (1).

Held that an interest in the income of immoveable property assigned by way of maintenance to a Hindu widow by the members of her family is not capable of being attached and sold in execution of a decree against the widow. *Diwali* v. *Apaji Ganesh* 1, referred to.

[Not F., 14 C.P.L.R. 114 (115) ; R., 12 C.L.J. 146 (154) = 7 Ind. Cas. 80 (85).]

[372] GULAB KUAR, the appellant, was in possession of two villages which had been assigned to her by her deceased husband, Bhagwant Singh, in lieu of a maintenance alllowance of Rs. 100 per mensem. The respondent Bansider, holding a simple money decree against Gulab Duar caused the rights and interests of Gulab Kuar in those villages to be brought to sale and they were purchased by Girwar Singh and others. Gulab Kuar accordingly sued for cancellation of the sale, pleading *inter alia* that property so assigned in lieu of maintenance could not be made the subject of attachment and sale in execution of a decree. The Court of first instance (the Subordinate Judge) held with reference to the case of *Diwali* v. *Apaji Ganesh* (1) that the property could be attached and sold, and disallowed the judgment-debtor's other pleas. The judgment-debtor appealed to the High Court.

The facts of this case sufficiently appear from the judgment of Knox, J.

Mr. *D. Banerji* and Mr. *Abdul Majid*, for the appellant.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

KNOX, J.—The sole question that has been argued in this appeal is, whether the rights and interests which have been made over to a Hindu widow by the family to which she belongs in lieu of maintenance can or cannot be attached and sold by auction in satisfaction of a decree. The lower Court has held that an objection to the effect that it cannot be so attached and sold is not one which can be entertained. It appears to have arrived at that conclusion after a consideration of the case of *Diwali* v. *Apaji Ganesh* (1). The point, however, for determination here was not expressly decided in that case. The learned Judges decided the case before them upon another point. Looking to the language used in s. 266. cl. (*l*) of the Code of Civil Procedure and the explanation which follows, I am of opinion that this clause was intended to remove rights and interests of this description out of the category of properties which could be attached and sold in [373] execution of a decree. Clause (*l*) owes its origin, no doubt, to a principle similar to that which dictated the insertion of cl. (*g*) in the same section.

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* First Appeal No. 131 of 1892 from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Meerut, dated the 5th March 1892.

(1) 10 B. 342.

The appeal must therefore prevail. The decree of the lower Court will be set aside and the objection raised by the appellant must be allowed with the costs in both the Courts.

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APPELLATE CIVIL.

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Appeal decreed.

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15 A. 373=13 A.W.N. (1893) 122.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

GAURI DATT (*Decree-holder*) v. PARSOTAM DAS (*Judgment-debtor.*)*
[18th May, 1893.]

Act IX of 1887, *s.* 25—*Revision—Letters Patent, s.* 10—*Appeal.*

No appeal will lie under s. 10 of the Letters Patent from an order of a single Judge of the High Court in revision under s. 25 of Act No. IX of 1887. *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (1), referred to.

[F., 28 A. 133=A.W.N. (1905) 218.]

IN this case the appellant, Gauri Datt had obtained a decree in a Court of Small Causes against the respondent and one Shankar Lal on the 11th of February 1887. He applied for execution of this decree on the 7th of January 1888, after which no further steps to execute the decree were taken until the application to which this appeal relates was made on the 13th of April 1891. It was then contended before the Judge of the Small Cause Court that this application for execution was not barred by limitation, because one of the two judgment-debtors having become insolvent, had, during the course of the proceedings in insolvency, made a deposition upon the 14th of April 1888, in which he acknowledged Gauri Datt's decree. The Court, however, disallowed this plea, holding that the acknowledgment of one judgment-debtor only was not sufficient, and dismissed the application for execution as time-barred.

The decree-holder applied to the High Court under s. 25 of Act No. IX of 1887 for revision of this order, but his application was dismissed by Straight, J., on the 8th of February 1892.

The decree-holder then appealed under s. 10 of the Letters Patent from the order of Straight, J., above mentioned.

[374] Kunwar *Parmanand*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C. J.—This appeal has been brought from an order of Mr. Justice Straight, dismissing an application for revision made to this Court under s. 25 of Act No. IX of 1887. The primary question to consider is whether an appeal lies in this case under s. 10 of the Letters Patent. What I said in my judgment in *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (1), in reference to s. 622 of the Code of Civil Procedure, I adhere to, and I think what I there said is equally applicable to an attempt to appeal against an order passed in revision under s. 25, Act No. IX of 1887. In my opinion this appeal does not lie. It should be dismissed with costs.

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* Appeal No. 18 of 1892 under s. 10 of the Letters Patent.

(1) 14 A. 226 at p. 232.

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AIKMAN, J.—I entirely concur with the learned Chief Justice in thinking no appeal lies in this case. Section 25 of the Provincial Small Cause Courts Act, No. IX of 1887, gives the High Court discretionary power to call for the record of a case decided by a Court of Small Causes and pass such order in respect thereto as it thinks fit. In the present case Mr. Justice Straight declined to exercise his discretionary powers. In my opinion there is nothing in s. 10 of the Letters Patent to support the contention that an appeal lies from such an order. I entirely agree with the observations made by the learned Chief Justice in the case of *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (1). These observations, though they had special reference to applications under s. 622 of the Code of Civil Procedure, apply with equal force to applications under s. 25 of the Provincial Small Cause Courts Act. Although not directly in point, the observations of Peacock, C. J., in the case of *Mussamat Ragghu Bibi* v. *Noorjahan Begam and others* (2), support the view I have taken. I have no hesitation in holding that the order of the Judge declining to exercise the discretionary power given to this Court by s. 25 is not a judgment, within the meaning of s. 10 of the Letters Patent, from which an appeal lies. I concur in thinking that this appeal should be dismissed with costs.

Appeal dismissed.

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15 A. 375 = 13 A.W.N. (1893) 122.

[375] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

JAGAN NATH PRASAD (*Defendant*) *v.* BHIKA RAM AND ANOTHER (*Plaintiffs*).* [19th May, 1893.]

Act XII of 1881 (*N.W.P. Rent Act*), *s.* 56—*Landholder and tenant—Landholder's lien for rent—" Rent payable "—" Arrear of rent due."*

The first paragraph of s. 56 of Act No. XII of 1881, applies not only where there is rent in arrear due from the cultivator to his landlord, but also where rent is accruing due in respect of the period during which the produce was being grown.

Hence where any one except the landlord wishes to bring to sale the produce of a cultivator, he must, in order to avoid the prohibition contained in s. 56 of Act No. XII of 1881, tender to the immediate landlord of the cultivator the amount, if any, for which the landlord might on the next ensuing sale day distrain the produce for arrears of rent.

[F., 31 A. 82 = 6 A.L.J. 71 (93) = 5 M.L.T. 185 ; 1 Ind. Cas. 416 (425).]

THE plaintiffs in the suit out of which this appeal arose were the present respondents Bhika Ram and Kanhaiya Ram. The defendants were (1) certain tenants of the plaintiffs who were in possession of a holding bearing an annual rental of Rs. 68, (2) the holder of a decree against the first set of defendants, and (3) the auction purchaser under the said decree.

It appeared that the defendant No. 2, appellant in this appeal, in execution of a money decree against Ram Sukh, one of the first set of defendants, attached in March 1890, a portion of the crops growing on

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* Second Appeal No. 184 of 1891 from a decree of Babu Ganga Saran, Subordinate Judge of Agra, dated the 12th December 1890, reversing a decree of Babu Raj Nath Prasad, Munsif of Mahaban, dated the 19th June 1890.

(1) 14 A. 226 at p. 232. (2) 12 W.R. 459.

such defendant's holding and had them sold, and they were purchased by defendant No. 3 for Rs. 57. Thereupon the plaintiffs sued in the Court of the Munsif of Mahaban to recover Rs. 60 which they alleged to be the rent due to them for the year 1297 *fasli*, in respect of the said holding. The Munsif dismissed the suit on the ground that when the crops were sold the arrears of rent claimed had not yet become payable to the plaintiffs. The plaintiff appealed to the Subordinate Judge who disagreed with the Munsif as to his interpretation of s. 56 of Act No. XII of 1881, and decreed the appeal and the plaintiff's suit with costs. From this decree the defendant, Jagan Nath, the decree-holder, appealed to the High Court.

[376] The Hon'ble Mr. *Colvin* and Mr *J. N. Pogose*, for the appellant.
Babu *Rajendra Nath Mukerji*, for the respondents.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—This suit was brought in the Court of the Munsif of Mahaban by the zemindars against certain agricultural tenants of theirs, and a person who had obtained a Civil Court decree against those tenants, and the vendee at an auction-sale held under that decree. The facts which show the relief that the plaintiffs were entitled to, are stated clearly enough in the plaint; possibly with some exaggeration, so far as the charge of collusion is concerned. The prayer of the plaint as to arrears of rent is wrongly framed. A suit for arrears of rent of agricultural land does not lie in the Civil Court. However, the suit as against the tenants has been dismissed, and they are not parties to this appeal. The suit as against the other two defendants, *i.e.*, as against the execution-creditor and the purchaser at auction-sale, was decreed for the amount of the rent due. The auction-purchaser does not appeal, so we need not consider his position in the suit. In this appeal we have only to consider what remedy the plaintiffs had against the execution-creditor under the decree in the civil suit. That execution-creditor attached and sold the produce of the land which was in the occupation of the plaintiffs' tenants. At the time when the execution-creditor attached and sold that produce, the rent in respect of the land was accruing due to the plaintiffs, the landlords. Whether the execution-creditor could lawfully bring to sale that produce, without first satisfying the lien of landlords, depends on the construction of s. 56 of Act XII of 1881. That section is as follows:—

"The produce of all land in the occupation of a cultivator shall be deemed to be hypothecated for the rent payable in respect of such land; and until such rent has been satisfied, no other claim on such produce shall be enforced by sale in execution of decree or otherwise; and when an arrear of rent is due from any cultivator, the person entitled to receive rent immediately from him may, instead of suing for the arrear as hereinafter provided, recover the [377] same by distress and sale of the produce of the land in respect of which the arrear is due, under the rules contained in this chapter."

It has been contended on behalf of the execution-creditor, appellant, the words "rent payable" in the first paragraph of that section mean "rent due and payable," *i.e.*, that they do not refer merely to rent accruing due. In support of that contention Mr. *Pogose* has relied upon the decision of this Court in *Naikram Singh* v. *Murli Singh* (1) we do not

(1) 5 A W.N. (1885) 262.

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think that it was decided in that suit that "rent payable" in s. 56 meant "rent due." The real point which was decided there was that a landlord could execute his Civil Court decree by a sale of the produce of land held by his tenant. That decision only means that the landlord for whose benefit s. 56 of Act No. XII of 1881, was passed may abandon his lien as landlord on the produce and sell that produce under a Civil Court decree. It is to be noticed in considering what is the construction of s. 56, what was the object of the Legislature, and particularly what was the language which they used. The second paragraph of s. 56 gave the landlord a power of distress when an arrear of rent was due to him from his immediate cultivatory tenant, and in that second paragraph the words used for this purpose are—" when an arrear of rent is due." The words "the rent payable," as used in the first paragraph, do not mean the same thing as "arrear of rent due" in the second paragraph.

In our opinion the distinction was intended. It was intended by the first paragraph to prevent by a Civil Court or other sale made whilst rent was accruing due, the right of distress for an arrear of rent due given by the second paragraph being defeated. In our opinion where any one except the landlord wishes to bring to sale the produce of a cultivator, he must, in order to avoid the prohibition contained in s. 56 of Act No. XII of 1881, tender to the immediate landlord of the cultivator, the amount, if any, for which the landlord might on the next ensuing sale day distrain the produce for arrears of rent. We think that the first paragraph of s. 56 [378] applies not only where there is rent in arrear due from the cultivator to his landlord, but also where rent is accruing due in respect of the period during which the produce was being grown. We dismiss the appeal with costs.

Appeal dismissed.

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15 A. 378=13 A.W.N. (1893) 147.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

SHEO DENI RAM AND ANOTHER (*Defendants*) *v.* TULSHI RAM AND OTHERS (*Plaintiffs*).* [19th May, 1893.]

Act VII of 1870 (*Court Fees Act*), s. 7—*Act VII of* 1887 (*Suits Valuation Act*), ss 4, 10 —*Adoption—Suit to set aside an adoption—Valuation of suit.*

The value for the purposes of jurisdiction of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff. *Keshava Sanabhaga* v. *Lakshmi Narayana* (1), dissented from.

[Appr., 32 C. 734 (739)=9 C W.N. 690 ; R., 28 A. 545=3 A.L.J. 266=A.W.N. (1906) 99 ; 6 C.L.J. 427=11 C.W.N. 705 ; 42 P.R. 1901.]

THE plaintiffs in the suit out of which this appeal arose, being respectively the father, the two minor brothers, and the paternal uncle of the principal defendant, sued one Sheo Deni Ram and his adoptive mother, the widow of one Kali Charan, a paternal uncle of Sheo Deni Ram, to set aside

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* Second Appeal No. 207 of 1891, from a decree of Pandit Bansidar, Subordinate Judge of Ghazipur, dated the 13th December 1890, confirming a decree of Babu Girdhari Lal, Munsif of Ballia, dated the 6th September 1890.

(1) 6 M. 192.

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a deed, which purported to effect the adoption of Sheo Deni Ram by Kali Charan. In the plaint the relief for the purposes of jurisdiction was valued at Rs. 600. The defendants *inter alia* pleaded that, inasmuch as the property to which, if the adoption was held to be valid, Sheo Deni Ram would be entitled to succeed upon the death of Kali Charan, was of considerably greater value than Rs. 1,000, the Court, that of a Munsif, had no jurisdiction to try the suit. The Court, however, overruled this objection and gave the plaintiffs a decree on the merits. The plaintiffs appealed to the Subordinate Judge, taking in that Court the same objection as to jurisdiction which they had raised in the Court of first instance, but the Subordinate Judge, agreeing with the findings of the Munsif, dismissed the appeal. The plaintiffs then appealed to the High Court.

[379] THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Govind Prasad* and Munshi *Jwala Prasad*, for the appellants.

Mr. *Abdul Majid* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

KNOX and BURKITT, JJ.—The main question for decision in this second appeal is whether the Court of first instance had or had not jurisdiction to try the suit out of which this appeal arose. The suit was one in which the respondents, who were plaintiffs, prayed that a certain deed of adoption might be invalidated, and in their plaint they expressly stated that the value of the relief for the purpose of jurisdiction was Rs. 600. It is contended by the appellants that the property at stake, if this deed of adoption be declared invalid, amounts in value to more than Rs. 5,000, and, relying upon the precedent in *Keshava Sanabhaga* v. *Lakshmi Narayana* (1), they urged that the Court of first instance had no jurisdiction to entertain this suit. Up to the present time no rules have in these Provinces been framed for the determination of the value of land or interest in land, suits relating to which would fall under the Court Fees Act, 1870, s. 7, paragraphs 5 and 6 and paragraph 10, clause (*d*).

This being the case, according to s. 4 of Act No. VII of 1887, the only restriction placed upon valuation by that Act is not in force and does not apply, and we are left without any guide. We are not prepared to follow the precedent just quoted in suits of this kind. We are disposed to hold that it is for a plaintiff to put his own valuation on the relief which he claims. We do not see why we should import into a suit, which only asks for a declaration, that a certain deed is invalid, the consideration that, at some future time, the plaintiff or the defendant may or may not enter into or be entitled to claim some property by virtue of the decree which may be passed in that suit. Independently of this view, we are of opinion that this is a case, which is fully covered by the provisions contained in s. 11 of the Suits Valuation Act of 1887, **[380]** and if there has been an undervaluation, which we think there has not been, that undervaluation has not prejudicially affected the disposal of the suit of appeal on its merits. The first plea taken in appeal fails. The findings of fact by the lower appellate Court are fatal to the fourth plea, and these were the only two pleas argued before us. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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(1) 6 M. 192.

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16 A. 380 = 13 A.W.N. (1893) 150.

15 A. 380 = 13 A.W.N. (1893) 150.

APPELLATE CIVIL.

Before Sir John Edge., Kt., Chief Justice and Mr. Justice Aikman.

BEHARI LAL AND ANOTHER (*Plaintiffs*) *v.* KODU RAM (*Defendant*).*
[23rd May, 1893.]

Execution of decree—Attachment as joint family property of property in fact partitioned—Joint suit by holders of two shares to have their shares declared not liable to attachment—Misjoinder of causes of action—Civil Procedure Code, ss. 26, 31, 45, 53, 578.

A decree-holder in execution of a decree against one G. L. attached a house as belonging to G. L. and his two sons forming a joint Hindu family. The sons objected that the house had previously been partitioned and was held by them and their father in separate shares but their objection was disallowed. They then brought a joint suit for a declaration that their respective portions of the house were not liable to attachment in execution of a decree against their father. No objection was taken to the frame of that suit, and the Court of first instance gave the plaintiffs a decree on the finding that partition had in fact taken place prior to the suit in which the defendant, judgment creditor, had obtained his decree. On appeal by the judgment-creditor, the lower appellate Court dismissed the suit entirely, on the ground of misjoinder of causes of action. The plaintiffs appealed to the High Court.

Held on these facts that the plaintiffs should have been allowed to amend their plaint by striking out the name of one them, that under the circumstances s. 578 of the Code of Civil Procedure would apply.

[R., 18 A. 131 (134); 2 C.L.J. 602 (609); 3 O.C. 215 (219.)]

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Jwala Prasad*, for the appellants.

Kunwar *Parmanand*, for the respondent.

JUDGMENT.

[381] EDGE, C. J., and AIKMAN, J.—The suit out of which this appeal arose was one for a declaration of title. It was brought by two Hindu brothers against a person named Kodu Ram, who was executing a decree against their father. The father was also made a defendant in the suit. Kodu Ram in execution of his decree against the father had attached a house. The plaintiffs filed an objection to the attachment, alleging that part of the property attached was theirs and not their father's. The objection was disallowed. They brought this suit. The first Court found there had been a separation in the Hindu family, and that some fourteen years prior to the suit one portion of the house was partitioned off to one of the plaintiffs, another portion of the house to the other plaintiff and the remainder to the father. The first Court gave the plaintiffs a decree. Kodu Ram appealed. Kodu Ram had not taken in his written statement or his memorandum of appeal any objection to the frame of the suit, but the District Judge rightly considering that each plaintiff was suing on a separate cause of action, dismissed their joint suit. The plaintiffs have appealed. No doubt in the great majority of cases in which two or more plaintiffs sue in one suit in respect of causes of action which are not joint, it would be proper to return the plaint under s. 53 of the Code of Civil Procedure for amendment, and leave the plaintiffs

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* First Appeal, No. 193 of 1891, from a decree of R. Scott, Esquire, District Judge of Banda, dated the 21st January 1891, reversing a decree of Munshi Madho Lal, Subordinate Judge of Banda, dated the 19th November 1890.

to elect as to which of them should be struck out of the suit, but we doubt whether a Court should, without giving the parties an opportunity of amendment, absolutely dismiss the whole suit. That is what the District Judge did here. It has been contended on behalf of the respondent that reading ss. 31 and 45 of the Code of Civil Procedure, a suit like this is prohibited. Section 31 does not prohibit the suit. It can be implied from that section that persons having distinct causes of action should not join in one suit as plaintiffs in respect of those distinct causes of action. Neither is there any express prohibition in s. 45 against such a suit. It is a more difficult question whether such a suit as this is allowable under s. 26 of the Code. This is a very peculiar case. The house at one time was the joint family property of the plaintiffs and their father. It was attached by Kodu Ram as the property [382] of the father, a joint objection to the attachment was made and not objected to on the ground of its being joint, but on the ground that it was too late. In one sense these plaintiffs were jointly interested in opposing the attachment and sale, although a sale would only have affected each man's separate interest. Their title was a common title, which was assailed by one and the same action of Kodu Ram. We can well understand that the plaintiffs or their legal advisers may have thought that the case came within the latter part of the first paragraph of s. 45 of the Code of Civil Procedure. No objection was raised by the defendant to the frame of the suit. The Court did not exercise its discretion under s. 53 of the Code. There is not the slightest doubt that the Court had jurisdiction to try either of the causes of action included in the plaint. There was undoubtedly an irregularity in the procedure of the first Court in trying the suit as it was framed, but that irregularity did not affect the merits of the case or the jurisdiction of the Court to deal with either of the causes of action. In our opinion s. 578 of the Code applied. We set aside the decree of the District Judge and remand the appeal under s. 562 of the Code to his Court to be decided on the merits. The costs of this appeal and of the hearing hitherto in the Court below will be borne by each side, *i.e.*, there will be no costs of this appeal and of the hearing hitherto.

Cause remanded.

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15 A. 382=13 A.W N (1893) 149.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

DAULTA KUARI (*Plaintiff*) v. MEGHU TIWARI AND ANOTHER (*Defendants*).* [23rd May, 1893.]

Hindu Law—Hindu widow—Maintenance—Suit on a consent decree to recover arrears of maintenance—Unchastity of widow—Starving maintenance.

A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by the husband's relatives, either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's suit to enforce

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* Second Appeal, No. 420 of 1892, from a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 6th February 1892, reversing a decree of Babu Ganga Prasad, Munsif of Ghazipur, dated the 6th June 1891.

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her right. [383] Upon proof of such subsequent unchastity the widow is entitled to no maintenance whatever. *Vishnu Shambhog* v. *Manjamma* (1) and *Roma Nath* v. *Rajonimoni Dasi* (2), approved.

[F., 9 Ind. Cas. 926 (927) = 19 P.W.R. 1911; R., A.W.N. (1903), 226; 13 C.P.L.R. 156 (157).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Govind Prasad*, for the appellant.

Munshi *Madho Prasad*, for the respondent.

JUDGMENT.

BURKITT, J.—In this case the plaintiff, a Hindu widow, had, on a consent decree, obtained a declaration that she was entitled to receive a certain amount of food and clothing from the defendants by way of maintenance. The present suit has been brought to enforce that decree by recovery of arrears of that maintenance. For the defence it is pleaded that subsequently to the decree the plaintiff became unchaste and is now leading an immoral life. The lower appellate Court has found that these allegations are true and dismissed the suit. On appeal to this Court two contentions have been put forward, *viz.*, (1) that as long as the declaratory decree stands unreversed the plaintiff is entitled to obtain the amount decreed to her by it, and (2) that under any circumstances she is entitled to what is known as "starving maintenance." In my opinion neither of these propositions can be supported. As to the first, I concur with the rule laid down by the Bombay High Court in the case of *Vishnu Shambhog* v. *Manjamma* (1) to the effect that a decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by the husband's relatives, either in a suit brought by them expressly for the purpose of setting aside the decree or in answer to the widow's suit to enforce her right. In the present case the widow has sued to enforce her right. In answer to her suit it has been alleged and proved that she is leading an immoral life. Her suit therefore, on the authority cited above, must fail. As to the second proposition, I am of opinion that it also is unsound. It has been held by the Calcutta High Court in the case of *Roma Nath* v. *Rajonimoni Dasi* (2) that when a Hindu [384] widow became unchaste after her husband's death and was leading an immoral life at or about the date of the suit, she was not entitled to maintenance. The judgment in that case, in which I freely concur, disposes of the second point. The appeal therefore fails on all sides and is dismissed with costs.

Appeal dismissed.

(1) 9 B. 108. (2) 17 C. 674.

15 A. 384 = 13 A.W.N. (1893) 163.

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APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

RAM HARAKH RAI (*Defendant*) *v.* SEODIHAL JOTI (*Plaintiff*).*
[30th May, 1893.]

Act I of 1877, *s.* 9—*Suit for possession of land by person wrongfully ejected—Joinder of other claims.*

A Court should in all cases in which it applies give effect to the provisions of the first paragraph of s. 9 of the Specific Relief Act, 1877, whether that section is expressly pleaded or not.

There is nothing to prevent a claim for damages and a claim for establishment of title being joint with a claim for the relief provided for by the above mentioned section.

[Overruled, 33 A. 174 (179) = 7 A.L.J. 1078 (1084) = 7 Ind Cas. 495 (499); N.F., 25 M. 449 = 11 M.L.J. 403; F., 5 Ind. Cas. 482; 4 A.L.J. 601 = A.W.N. (1907) 244; R., 8 A.L J. 910 = 11 Ind. Cas. 38.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—This appeal raises a question not free from difficulty. The plaintiff is mortgagee of an occupancy-holding not held at a fixed rate. He got into possession and had been in possession for many years. The defendant, who alleges that the right of occupancy devolved upon him under s. 9 of Act XII of 1881, dispossessed the plaintiff otherwise than in due course of law and without the consent of the plaintiff. At the time of the dispossession the plaintiff had crops growing upon the holding. These crops the defendant seized and disposed of to his own use. The suit out of which this appeal has arisen was brought within six [385] months from the date of dispossession. The plaintiff claimed to be put in possession under his mortgage-deed, which was dated the 4th of February, 1876, and also to recover damages for the interference with and conversion of his crops. The first Court decreed the claim. On appeal the lower appellate Court confirmed the decree of the first Court, and the defendant has brought this appeal. Mr. *Jogindro Nath*, for the defendant, contends that the plaintiff had no title, as the transfer by mortgage with possession to the plaintiff was in contravention of s. 9 of Act XII of 1881. He also contends that the suit cannot, as to any part of it, be regarded as a suit under the first paragraph of s. 9 of Act No. I of 1877 (the Specific Relief Act of 1877); and further that, as the plaintiff had no legal title to the land, his client, the defendant, is not liable in damages for taking and removing the crops. It appears to us that the first paragaph of s. 9 of Act No. I of 1877 had a most salutary object in view, *viz.*, to discourage persons forcibly, or otherwise than in due process of law, turning persons in possession of property out of possession thereof, and that Courts should give effect to the first paragraph of s. 9 of Act No. I of 1877 in all cases to which it applies.

* Second Appeal, No. 210 of 1891, from a decree of J. J. McLean, Esq., Officiating District Judge of Azamgarh, dated the 24th December 1890, confirming a decree of Maulvi Ahmad Husain, Subordinate Judge of Azamgarh, dated the 19th May 1890.

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Undoubtedly there was a dispossession here otherwise than in due course of law, and a dispossession without the consent of the plaintiff. His suit was brought within six months from the date of that dispossession. He consequently was entitled to a decree for possesion, no matter what title might be shown against him, and no matter how infirm might be his own title to possession, so long as he had actually held possession. The fact that the plaintiff, in addition to alleging and proving the facts which would entitle him to a decree under the first paragraph of s. 9, claimed a title as mortgagee, would not disentitle him to a decree under the first paragraph of s. 9. The decree under the first paragraph of s. 9 is not a decree which decides any question of title whatever. So far as the decree of the first Court, which was affirmed below, is a decree for possession to the plaintiff, it must be treated as a decree in a suit passed under the first paragraph of s. 9 of Act No. I of 1877, and not as a decree deciding any question of title. [386] So far as the decree of the first Court or of the Court of appeal might be regarded as a decree establishing the plaintiff's title to possession as mortgagee of the occupancy-holding, we set it aside, as the plaintiff failed to make out a good title as mortgagee. The decree so far as it went to establish his title as mortgagee was appealable, notwithstanding the last paragraph of s. 9 of Act No. I of 1877; and so also would be that portion of the decree which went to the question of damages, as the suit under the first paragraph of s. 9 of Act No. I of 1877, the decree which is not appealable, does not comprise a claim for damages. We see no reason why a claim for damages and a claim for establishment of title may not be combined with a claim based on the first paragraph of s. 9 of Act No. I of 1877. As to the claim for damages we are of opinion that the decree below is right. The crops were sown by a person in possession and who had been in possession for many years. The defendant illegally turned that man out of possession, illegally, in the sense that he did not employ the assistance of a Civil Court or a Court of revenue, but seized and dealt with the crop as if it was his own. The result is that, so far as the decree is merely for possession, the decree of the first Court must stand, as there is no appeal from that decree allowed by law. So far as the decree is one for damages, no case is made out here for our setting it aside, but, so far as it may be treated as a decree establishing the plaintiff's title, we set it aside and we dismiss the plaintiff's suit so far as it is a suit asking for the establishment of title. There will be no costs allowed to either side in this Court. To the above extent, *i.e.*, on the question of title, the appeal is allowed.

Decree modified.

15 A 387 F B) = 13 A W.N. (1893) 164.

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15 A. 387 (F.B.) = 13 A.W.N. (1893) 164.

[387] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

TARAPAT OJHA AND OTHERS (*Defendants*) v. RAM RATAN KUAR AND OTHERS (*Plaintiffs*).* [6th June, 1893.]

Act XII of 1881, ss. 93, 95 *cls.* (*m and n*)—*Landlord and tenant—Jurisdiction—Civil and Revenue Courts.*

No suit will lie against a landlord in a Civil Court for the wrongful dispossession of a tenant from a holding to which Act No. XII of 1881 applies.

Where a plaint in a Civil Court alleges facts which, if true, would show that the dispute or matter involved in the suit was one to which s. 93 or s. 95 of Act XII of 1881 would apply, the plaint should be rejected under cl. (*c*) of s. 54 of the Code of Civil Procedure, or possibly in some cases returned under s. 57 of the same Code.

The plaintiffs, alleging themselves to be occupancy-tenants and to have been wrongfully dispossessed by their landlords, who had made a lease of the land in suit, sued the landlords and the lessees of such landlords for recovery of possession and for damages. *Held* that such suit was exclusively cognizable by a Court of Revenue. *Shimbhu Narain Singh* v. *Bachcha* (1) approved.

[**Affirmed**, 18 A. 270 = 16 A.W.N. 59; **R.**, 10 O.C. 23 (27); **D.**, 19 A. 452 (454).]

THIS was a reference to a Full Bench of the whole Court made by a Bench consisting of Edge, C. J., and Aikman, J. The facts of the case were as follows:—

In this case the plaintiff, who were cultivators, residents of a village in the Ballia district, brought this suit in the Court of the Subordinate Judge against the zemindars of the village and the zemindars' lessees to recover possession of certain land upon the following allegations:—That the land in suit, which was situated in a dayara, was their ancestral cultivatory holding: that it had at one time become submerged by the river, but had re-appeared in 1287 F.; that after its re-appearance, at the time of the recent settlement, the defendants, second party, in collusion with the patwari, got possession of the land and took a lease of it from the defendants, first party, and obtained mutation of names in their favour. The plaintiffs prayed for possession of the land in suit, for damages and costs.

[388] Both sets of defendants filed written statements in which they denied all the allegations of the plaintiffs, and further pleaded to the jurisdiction of the Civil Court to entertain the suit.

The Court of first instance held that as the relation of zemindar and tenant was not admitted by the parties to exist between them, the jurisdiction of the Civil Court was not ousted: and it proceeded to try the suit on the merits and decreed the plaintiffs' claim.

The defendants appealed, taking the same objection to the jurisdiction of the Civil Court as they had taken in the Court of first instance.

The District Judge taking the view of the question of jurisdiction which had been held by the Court below, after referring issues to the lower Court on the subject of the time when the land became submerged

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* Second Appeal, No. 1262 of 1889, from a decree of F. W. Fox, Esq., Additional District Judge of Ghazipur, dated the 11th April 1889, modifying a decree of Syed Akbar Husain, Subordinate Judge of Ghazipur, dated the 1st September 1888.

(1) 2 A. 200.

1893 JUNE 6. — FULL BENCH. — A 387 (F.B.) = 13 A.W.N. (1893, 164.

and the subsequent entries in the Revenue papers, ultimately confirmed the decree of the lower Court.

The defendants, first party, then appealed to the High Court.

Munshi *Jwala Prasad*, Mr. *J. Simeon* and Munshi *Madho Prasad*, for the appellants.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondents.

The judgment of the Court (Edge, C. J., Tyrrell, Knox, Blair, Burkitt and Aikman, JJ.) was delivered by EDGE, C. J.

JUDGMENT.

The suit in which this appeal has arisen was brought by the plaintiffs in the Court of the Subordinate Judge of Ghazipur for possession of a cultivatory holding, for cancellation of a Settlement order, for invalidation of a lease granted by the first six defendants to the second set of defendants, and for damages against the second set of defendants for wrongful dispossession. The plaintiffs allege that they were occupancy-tenants of the first set of defendants and that they had been wrongfully dispossessed by the defendants, and that the second set of defendants claimed title, as alleged lessees under the first set of defendants. The first Court gave the plaintiff a decree for possession and for a portion of the damages claimed. The second Court in appeal confirmed the decree for possession but dismissed the claim for damages. The defendants have appealed. [389] The question raised in appeal by the defendants is as to whether the Civil Court had jurisdiction to entertain the suit in respect of any portion of the claim. The question was referred to the Full Bench. The contention on behalf of the defendants is based upon s. 95, cls. (*m*) and (*n*) of Act No. XII of 1881. A large number of authorities have been cited in the course of the argument commencing with *Raghobar Misser* v. *Sital* (1); *Abdul Aziz* v. *Wali Khan* (2); *Shimbu Narain Singh* v. *Bachcha* (3); *Muhammad Abu Jafar* v. *Wali Mnhammad* (4); *Sukhdatk Misr* v. *Karim Chaudhri* (5); *Antu* v. *Ghulam Muhammad Khan* (6); *Ganga Ram* v. *Beni Ram* (7); *the Maharaja of Benares* v. *Angan* (8); *Sheodish Narain Singh* v. *Rameshar Dial* (9); *Hari Das* v. *Gopi Rai* (10); *Mahesh Rai* v. *Chundar Rai* (11). We do not think it necessary to discuss at length in our judgment those cases. There has been a tendency on the part of certain Judges to hold in cases similar to the present case that unless the relationship of landlord and tenant is admitted on the pleadings between a plaintiff and defendant in a suit the Civil Court must necessarily have jurisdiction. On the other hand, other Judges have held that where the real dispute or matter between the parties was one in respect of which a suit under s. 93 of Act No. XII of 1881 might be brought or on which an application under s. 95 of that Act might be made and the plaintiff alleged in his plaint that the relationship of landlord and tenant or of tenant and landlord existed between him and the defendant, the jurisdiction of the Civil Court was ousted and the matter was one solely within the jurisdiction of a Court of Revenue. We may say, without going through those authorities, that we agree with the judgment of Turner, J., and Pearson, J., in the case of *Shimbhu Narain Singh* v. *Bachcha* (3). Applying s. 95 of Act No. XII

(1) N W.P.H.C.R. 1875, 228. (2) 1 A. 338. (3) 2 A. 200.
(4) 3 A. 81. (5) 3 A. 521. (6) 6 A. 110.
(7) 7 A. 148. (8) 7 A. 112. (9) 7 A. 188.
(10) 6 A.W.N. (1886) 137. (11) 13 A. 17.

1893 JUNE 6. FULL BENCH. 15 A. 387 (F.B.) = 13 A.W.N. (1893) 164.

of 1881 to this case, we are of opinion that no suit will lie against a landlord in a Civil Court for the wrongful [390] dispossession of a tenant from a holding to which Act No. XII of 1881 applies. The wording of the first paragraph of s. 95 is not only wide, but is clear and specific, and it excludes the jurisdiction of any Court except the Court of revenue from taking cognizance of any dispute or matter on which an application under cls. (*m*) or (*n*) of that section might be made. That section constitutes the Court of Revenue, the sole Court competent to decide any such dispute or matter and consequently the order of a Court of Revenue on an application under cls. (*m*) or (*n*) is final and cannot be interfered with or questioned in any suit in a Civil Court. In *Shimbhu Narain Singh* v. *Bacha* (1) that point was decided on the corresponding section of Act No. XVIII of 1873 It was there held by Turner, J., that a Civil Court had no power to review an order passed under cl. (*n*) of s. 95 of Act No. XVIII of 1873, and by Pearson, J., that a decision on an application under cl. (*n*) of s. 95 of Act No. XVIII of 1873 operated as *res judicata* and was not open to re-adjudication in a Civil suit. The Court of Revenue could not make its order under cl. (*n*) of s. 95 of Act No. XII of 1882, without deciding whether the tenancy alleged subsisted and whether there had been a wrongful dispossession.

Those would not be subsidiary issues, but they would be the valid issues to be determined by the Court of Revenue to whose exclusive jurisdiction, as the Court of first instance in all such cases, the determination of the dispute or matter was confined. The same observation applies to a claim of a person alleging himself to be a tenant for damages against a person alleged by the complainant to be his landlord for wrongful dispossession. That dispute or matter is confined to the exclusive jurisdiction of the Court of Revenue. Where a plaint in a Civil Court alleges facts which, if true, would show that the dispute or matter involved in the suit was one to which s. 93 or s. 95 of Act No. XII of 1881 applied, the plaint should be rejected under cl. (*c*) of s. 54 of the Code of Civil Procedure, or possibly in some cases returned under s 57 of the same Code. In cases to which s. 93 or s. 95 of Act No. XII of 1881 applies, a denial by a defendant that the relationship [391] of landlord and tenant exists between the parties is immaterial, except in so far as it raises an issue for the Court of Revenue to determine. So far therefore as this was a suit against the first set of defendants who were alleged by the plaintiffs to be their landlords, the suit must be dismissed on the ground that the Civil Court had no jurisdiction to entertain it. Now as to the second set of defendants, there is nothing in s. 95, cl. (*n*) of Act No. XII of 1881 to limit the application for the recovery of the occupancy of land of which a tenant has been wrongfully dispossessed to an application against his landlord. Turning to s. 210 we find that where a tenant makes an application under cl. (*n*) of s. 95 of Act No. XII of 1881 against his landlord he may join in that application as a defendant any person in possession of the holding who claims title under his landlord, whether that person was or was not a party to the wrongful dispossession by the landlord of the tenant. It thus appears that in an application under cl. (*n*) a person may be made a defendant who was no party to the act of wrongful dispossession, but in that case such person can only be joined if he claims title through the landlord. Section 95 of Act No. XVIII of 1873 and s. 95 of Act No. XII of 1881 differ essentially

(1) 2 A. 200.

1893 JUNE 6. — FULL BENCH. — 15 A. 387 (F.B.) = 13 A.W.N. (1893) 164.

in these respects from cl. (6) of s. 23 of Act No. X of 1859. Clause (6) of s. 23 of Act No. X of 1859 gave the Collector who was the Court of Revenue no jurisdiction to assess compensation for the wrongful dispossession, and it limited jurisdiction to order a re-delivery of possession to cases in which the ryot, farmer or tenant had been illegally ejected by the person entitled to receive rent for the land or farm. In our opinion the policy of Act No. XII of 1881 is that all questions concerning the right of a tenant, as such, of an agricultural holding arising out of the relationship of tenant and landlord should, except so far as an appeal to a Civil Court is expressly allowed, be within the exclusive jurisdiction of the Courts of Revenue, whether the dispute was between the tenant and the landholder or between the tenant and any one claiming under the landholder. We are consequently of opinion that the subsidiary question of damages claimed in this suit against the second set of defendants, who are alleged by the plaintiffs to [392] have been parties to the wrongful dispossession and to be claiming under the plaintiff's landlords was one within s. 95 in respect of which an application under cl. (*m*) of that section might be made. On the other hand, where a tenant has been dispossessed by a person not claiming title through the tenant's landlord, the tenant's remedy for possession and damages is by suit in the Civil Court, as in such a case it might be necessary for the tenant to prove not only his own title from the landlord, but the landlord's title to let. For these reasons we are of opinion that the suit as against the second set of defendants, not only for possession but in respect of the damages, fails on the ground of want of jurisdiction of the Civil Court. The other relief claimed in this suit was a decree cancelling an order of a Settlement Officer and a decree ordering a lease granted by the first set of defendants to the second set to be invalid. A Civil Court has no jurisdiction to cancel an order of Settlement Officer by decree in a civil suit. The validity or invalidity of the lease as against the plaintiffs would depend on the finding of the Court of Revenue as to whether a tenancy was subsisting between the plaintiffs and the first set of defendants. As the appeal was referred to the Full Bench on the question of jurisdiction, and as our decision on that question disposes of the respondents' suit, we allow the appeal, and dismiss the suit with costs in all Courts.

Appeal decreed.

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15 A. 392 = 13 A.W.N. (1893) 146.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MATABADAL.* [13th June, 1893.]

Criminal Procedure Code, s. 476—Order by Magistrate for prosecution under s. 195 of the Indian Penal Code—Preliminary inquiry

When a Magistrate takes action under s. 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry. *Boperam Surma* v. *Gouri Nath Dutt* (1) followed.

[F., 34 A. 267 (268) = 9 A.L.J. 231 = 13 Cr. L.J. 141 = 13 Ind. Cas. 829.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

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* Criminal Revision No. 279 of 1893.

(1) 20 C. 474.

[393] Mr. *J. Simeon*, for the applicant. 1893
The Government Pleader (Munshi *Ram Prasad*), for the Crown. JUNE 13.

JUDGMENT.

REVISIONAL CRIMINAL.

15 A. 392 = 13 A.W.N. (1893) 146.

AIKMAN, J.—The applicant in this case was convicted by the Joint Magistrate of Allahabad of an offence punishable under s. 193 of the Indian Penal Code and sentenced to four months' rigorous imprisonment, which conviction and sentence were upheld in appeal by the Sessions Judge. He applies to this Court for revision. The first ground in the application is that there was no sanction for the prosecution under s. 195 of the Code of Criminal Procedure. This was a case which was instituted under the provisions of s. 476 of the Code of Criminal Procedure by the Magistrate before whom the alleged offence was committed, and, this being so, s. 195 of the Code does not apply. Even had sanction been necessary, this would have afforded no ground for interference, as it is not shown that the want of sanction occasioned any failure of justice. (See s. 537 of the Code of Criminal Procedure). The next ground in the application is that the conviction is bad, inasmuch as no inquiry was held by the Magistrate under s. 476. I entirely concur with the opinion expressed by the Calcutta High Court in a recent case, *Baperam Surma* v. *Gouri Nath Dutt* (1), to the effect that it is not necessary for the validity of an order under s. 476 that there should be a preliminary inquiry. The petitioner was convicted of having made on oath two contradictory and irreconcilable statements. It is objected in the third ground of the application that there is no evidence on the record to show which of the two statements was false. It is unnecessary that there should be any such evidence. It is now settled law that there may be a conviction in the alternative without any such evidence. The contention that the sentence is too severe is without force. I am of opinion that the applicant deserves the punishment he got. The application is rejected.

Application rejected.

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15 A. 394 = 13 A.W.N. (1893) 145.

[394] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

GANGA PRASAD (*Applicant*) *v.* NARIAN AND OTHERS. (*Opposite parties*).* [13th June, 1893.]

Criminal Procedure Code, ss. 145, 146—"*Tangible immoveable property*"—*Standing crops—Attachment—Civil and Revenue Courts—Jurisdiction.*

Standing crops are "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure. *Cheda Lal* v. *Mul Chand* (2) and *Madayya* v. *Yenkata* (3), followed.

S. 146 of the Code of Criminal Procedure does not give jurisdiction to pass an order of attachment in a dispute between parties whose rights regarding such dispute would have to be determined by a Revenue Court.

[R., 14 C.L.J. 515 = 16 C.W.N. 540 (547); 11 Ind. Cas. 729.]

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Azamgarh moving the High Court to revise an order under s. 146 of the said Code passed by a first class Magistrate of

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* Criminal Revision No. 310 of 1893.

(1) 20 C. 474. (2) 14 A. 30. (3) 11 M. 193.

1893 JUNE 13.

REVISIONAL CRIMINAL.

15 A. 394 = 13 A.W.N. (1893) 145.

the Azamgarh district. The facts of the case sufficiently appear from the Judgment of Aikman, J.

JUDGMENT.

AIKMAN, J.—In this case there was a dispute between a landholder and certain tenants. The landholder asserted that he had ejected the tenants from certain fields and that the crops growing in certain of the fields had been shown by him. The tenants, on the other hand, denied that they had been ejected, and claimed the crops as grown by them. The landholder applied to the Criminal Court to have the tenants bound over to keep the peace. The Magistrate before whom the case came took no action under Chapter VIII of the Code of Criminal Procedure, but, considering that the case was one of a dispute as to immoveable property, and being unable to satisfy himself as to which of the parties was in possession of the property, attached the crops on the land under the provisions of s.146 of the Code of Criminal Procedure. The learned Sessions Judge, being of opinion that the Magistrate's order was illegal, has reported the case to this Court. The Sessions Judge considers that the Magistrate's order dealing with the standing crops is illegal, inasmuch as, in his opinion, a standing crop is not immoveable property. I do not consider that the view of the learned Sessions Judge in this respect is correct. In order to give the Magistrate jurisdiction under s. 145 he must be satisfied of the existence of a dispute **[395]** likely to cause a breach of the peace "concerning any tangible immoveable property or the boundaries thereof." The expression "tangible immoveable property" has taken the place of the words "any land or any houses, water, fisharies, crops or other produce of land," which occurred in the corresponding section, *viz.*, 530 of the Code of 1872. It is clear that under that Code the Magistrate could interfere in a dispute regarding crops. I do not think that the substitution of the expression "tangible immoveable property" in the present Code has taken away the right of interference as regards standing crops. The Code of Criminal Procedure contains no definition of the words "immoveable property," but these words have been defined in s. 2, cl. (5) 6 of the General Clauses Act (No. I of 1868); and that definition has been held both by this High Court and the Madras High Court to include standing crops. (See I.L.R., 14 All. 30 and I.L.R., (11 Mad. 193). There was nothing therefore in the fact of part of the property regarding which the dispute existed, being standing crops, to deprive the Magistrate of jurisdiction. The learned Sessions Judge further points out that the Magistrate omitted to make the order in writing which is required by the first paragraph of s. 145 of the Code of Criminal Procedure. I consider that this defect in the Magistrate's procedure might have been got over by reference to the provisions of s. 537. There is a more serious defect in the Magistrate's proceedings, and that is, that there is nothing on the record to show that he was satisfied that a dispute existed likely to cause a breach of the peace. He must be satisfied of the existence of such a dispute before he can take action under s. 145. I am, moreover, doubtful as to whether the Magistrate could, in this case, take action under s. 146. That section runs as follows:—"If the Magistrate decides that none of the parties is then in such possession, or is unable to satisfy himself as to which of them is then in such possession, of the subject of dispute, he may attach it until a competent Civil Court has determined the rights of the parties thereto, or the persons entitled to possession thereof." This, as has been stated, was a case of dispute between a landholder and his tenants and such a dispute **[396]** would have to be

determined, not by a Civil, but by a Revenue Court. The Code in other places, as, for instance, in s. 476 distinguishes between Civil and Revenue Courts, and as only a Civil Court is mentioned in s. 146, I am of opinion that that section does not give jurisdiction to pass an order of attachment in a dispute between parties whose rights would have to be determined by a Revenue Court.

1893 JUNE 13.

REVISIONAL CRIMINAL.

15 A. 394 = 13 A.W.N. (1893) 145.

For the above reasons I quash the order of the Magistrate, dated the 28th of March, 1893. If the Magistrate is of opinion that there is any probability of a breach of the peace, he ought to exercise the preventive jurisdiction with which he is invested by Chapter VIII of the Criminal Procedure Code.

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5 A. 396 = 13 A.W.N. (1893) 167.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

LIAQAT ALI AND OTHERS (*Defendants*) v. KARIM-UN-NISSA AND OTHERS (*Plaintiffs*).* [20th June, 1893.]

Muhammadan Law—Legitimacy—Acknowledgment.

Held that a Muhammadan could not by acknowledging him as his son render legitimate a child whose mother at the time of his birth he could not have married by reason of her being the wife of another man. *Muhammad Allahadad Khan* v. *Muhammad Ismail Khan* (1), followed.

[F., 34 B. 111 (114) = 11 Bom. L R. 1117 = 4 Ind. Cas. 251 ; 7 Ind. Cas. 820 (837) ; 27 C. 801 ; R., 190 P.L.R. 1903 ; D., 9 C.W.N. 352.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *Amir-ud-din*, for the appellants.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The suit in which this second appeal has arisen was brought by Musammat Karim-un-nissa and her two daughters, Musammat Rahiman and Musammat Aziman, against the widow of Muhammad Ali, deceased, and his surviving [397] legitimate children, to obtain a decree for possession of certain shares in immoveable property, which immoveable property had belonged to Muhammad Ali. The suit was brought on the allegation that Musammat Karim-un-nissa was the widow, and the two other plaintiffs the daughters, of Muhammad Ali. As to some of the shares, they claimed to inherit them directly from Muhammad Ali, and as to others, from Anwar Ali, whom the plaintiffs alleged to have been the son of Muhammad Ali and to have inherited and obtained possession of portions of Muhammad Ali's property. Anwar Ali was the son of Muhammad Ali by Karim-un-nissa. Muhammad Ali died in 1881. The suit was brought in 1889. The defendants were and are in possession. It was found that before the time Musammat Karim-un-nissa went through the ceremony of marriage with Muhammad Ali, she had been married to one Amir Ali. Amir Ali died about four years before this suit. The plaintiff endeavoured to prove that Amir Ali had divorced Musammat Karim-un-nissa before she went

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* Second Appeal No. 26 of 1891, from a decree of G.L. Lang, Esq., Commissioner of Jhansi, dated the 12th December, 1890, reversing a decree of W.R. Tucker, Esq., Assistant Commissioner of Jhansi, dated the 19th July, 1890.

(1) 10 A. 289.

1893 JUNN 20. — APPELLATE CIVIL. — 15 A. 396 = 13 A.W.N. (1893) 167

through the ceremony of marriage with Muhammad Ali. Only one witness was called to prove the alleged divorce. His evidence was merely that Amir Ali stated to him that he had divorced Karim-un-nissa. The Commissioner of Jhansi in the first appeal very properly did not act on that evidence, which was in our opinion entirely insufficient on which to find a divorce, but the Commissioner of Jhansi having regard to the fact that a ceremony of marriage between Muhammad Ali, and Karim-un-nissa had been performed, the fact that they lived together for fifteen years until Muhammad Ali's death, and the fact that Muhammad Ali had treated Karim-un-nissa's children in the same manner as he treated his undoubtedly legitimate children; and from the fact that Musammat Kariman, who was the lawfully married wife or Muhammad Ali, had in 1881 acknowledged the legitimacy of Anwar Ali and that measures had been taken to secure Anwar Ali's succession and inheritance to Muhammad Ali, came to the conclusion that there was so strong a presumption as to amount to a positive proof of the legality of Karim-un-nissa's marriage. As the Commissioner of Jhansi referred to [398] these matters in connection with the question as to whether there had been a divorce, he must have come to the opinion that there had been a divorce. There was no direct finding that there had been a divorce prior to the ceremony of marriage between Karim-un-nissa and Muhammad Ali. Now none of those matters to which he referred are, in our opinion, separately or collectively evidence on which the Commissioner of Jhansi could find that Amir Ali had in fact divorced Musammat Karim-un-nissa. The only direct evidence as to a divorce was that of the witness who stated that Amir Ali had told him he had divorced Karim-un-nissa. The Commissioner found that that evidence, coupled with the repudiation of Karim-un-nissa by Amir Ali and their total separation, was not sufficient to establish a divorce. The matters on which he relied having regard to what takes place in native families were as consistent with there having been a divorce as with there not having been a divorce. As we have said, Amir Ali died only four years before this suit, and if a divorce had taken place prior to the performance of this marriage ceremony between Muhammad Ali and Karim-un-nissa, positive evidence of that might have been forthcoming. We must take it, consequently, that there was no legal marriage established between Muhammad Ali and Karim-un-nissa. The result is that Karim-un-nissa is not a widow of Muhammad Ali, the other plaintiffs are not his legitimate daughters, and Anwar Ali was not his legitimate son. It is true that Anwar Ali was recognized by Muhammad Ali as his legitimate son, but, following the ruling in *Muhammad Allahdad Khan and another* v. *Muhammad Ismail Khan and others* (1) we hold that the acknowledgment by Muhammad Ali of any child of Musammat Karim-un-nissa as his legitmate child was worthless, she being a person who was not capable of being married to him and consequently was not capable of bearing legitimate offspring to him. The result is that the plaintiffs are not entitled to inherit directly from Muhammad Ali, and Anwar Ali was not entitled to inherit from Muhammad Ali. The defendants are in possession. No title superior or equal to theirs has [399] been proved by the plaintiffs to disturb their possession, and consequently the suit fails. We allow this appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

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(1) 10 A. 289.

15 A. 399=13 A.W.N. (1893) 170.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

1893 JUNE 21.

APPELLATE CIVIL.

15 A. 399= 13 A.W.N. (1893) 170.

GULZAR SINGH (*Defendant*) v. KALYAN CHAND (*Plaintiff*).*
[21st June, 1893.]

Cause of action—Suit by zamindar to recover possession of occupancy holding against occupancy tenant and his alleged transferee in possession—Death of occupancy tenant after filing of suit but before notice—Act XII of 1881, *s.* 9.

A plaintiff is not entitled to a decree in his suit unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to a decree.

One K. C., a zemindar, sued in a Court of Revenue to recover an occupancy holding from one B. S., his occupancy tenant, and that tenant's transferee G. S., to whom, by a transfer which was inoperative under s. 9 of Act No. XII of 1881 B S. had purported to make over his occupancy holding. The occupancy tenant died after the suit was filed, but before he had received notice of it, and the transferee being in sole possession of the occupancy holding defended the suit. *Held* under the above circumstances that the zemindar's suit must fail, inasmuch as at the time when it was filed he was not entitled to immediate possession of the occupancy holding.

[Appl., 31 A. 507=6 A.L.J. 762 (766); R., 31 A. 176—6 A.L.J. 263 (301)= 1 Ind Cas. 479; 8 A.L J. 458=10 Ind. Cas. 999 (1000); D., 16 A. 325 (328.)]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gobind Prasad*, for the appellant.

Munshi *Ram Prasad*, Babu *Datti Lal* and Lala *Sheo Charan Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and AIKMAN, J.—The suit was brought by Lala Kalyan Chand, a zamindar, against Baldeo Singh, who was a tenant having a right of occupancy, but was not a tenant at fixed rates, and against Gulzar Singh, who was a sister's son of Baldeo Singh, to whom Baldeo Singh had made a gift of all his interest in the occupancy holding. The suit was brought on the 13th of February 1890, in a Court of Revenue, and a decree for possession was claimed on the ground that Baldeo Singh, by making the gift [400] had committed an act inconsistent with the purpose for which the land was let, within the meaning of cl. (*b*) of s. 93 of Act No. XII of 1881. Baldeo Singh died before notice of the plaint was served upon him, but after the plaint was filed. He died some time between the 13th of February and the 13th of March 1890. The exact date of his death is immaterial. The Court of Revenue gave a decree for possession, and on appeal to the District Judge of Allahabad he confirmed that decree, but on different grounds. Gulzar Singh is the appellant here. We should say that after Baldeo Singh had died, the plaintiff had Gulzar Singh, who was already a defendant in his personal capacity to the suit, made a defendant as representing Baldeo Singh. Gulzar Singh in his representative capacity filed no written statement. In his personal capacity he filed a written statement in which he alleged that the gift was good, as he was a

* Second Appeal No. 500 of 1891, from a decree of F. E. Elliot, Esq., District Judge of Allahabad dated the 4th February 1891, confirming a decree of Syed Mehdi Ali, Assistant Collector of Allahabad, dated the 13th March 1890.

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partner with Baldeo Singh in the cultivation, and that Baldeo Singh was his maternal uncle. He also pleaded that Baldeo Singh had died 20 days before the 13th of March 1890. Clause (*b*) of s. 93 of Act No. XII of 1881 did not apply to the case. The learned District Judge, the case being before him in appeal, rightly disregarded the question as to whether the suit had been brought in the proper Court or not. He was entitled to take that course under ss. 206, 207 and 208 of Act No. XII of 1881. He remanded certain issues, and it was found, and he himself found, that Gulzar Singh was not a co-sharer to whom a transfer could be made under the second paragraph of s. 9 of Act No. XII of 1881, *i.e.*, that he was not a co-sharer in favour of whom and Baldeo Singh the right of occupancy originally arose and had not become by succession a co-sharer in the right, and he found that at no time did Gulzar Singh share with Baldeo Singh in the cultivation of the holding. That is, shortly, the effect of the findings. It is therefore perfectly obvious that Gulzar Singh was not a person to whom Baldeo Singh could transfer his right of occupancy. On those findings, which are conclusive between the parties, it is obvious that Gulzar Singh was not a person who could be entitled to inherit the right of occupancy from Baldeo Singh, and, being a collateral, such right of occupancy could not devolve upon him. The case presents [401] consequently, this peculiar feature, that if this suit had been brought for possession against Gulzar Singh as a trespasser and had been brought fourteen days after time when it was instituted, Gulzar Singh, on the facts found, would have had absolutely no defence. We are assuming that Baldeo Singh left no direct descendant upon whom the right of occupancy could devolve: yet it appears to us that the plaintiff's suit, treating it as a suit for possession, and not looking at it as controlled in any way by the reference to cl. (*b*) of s. 93 of Act No. XII of 1881, must fail. A person who sues for possession of any immoveable property, *i.e.*, who sues to have another person in possession ejected, must, in order to entitle him to a decree, show that he had himself a right to the immediate possession at the date when he instituted his suit, assuming of course that his title to possession is denied. Now the second paragraph of s. 9 of Act No. XII of 1881 prevented the right of occupancy passing from Baldeo Singh to Gulzar Singh. That paragraph of that section prevents any right of occupancy to which it refers being transferable, except by voluntary transfer, between persons in favour of whom as co-sharers such right originally arose or who have become by succession co-sharers therein. Consequently, the gift was absolutely inoperative to transfer the right, and the right remained in Baldeo Singh, unless the making of the gift amounted to a relinquishment. Section 31 of Act No. XII of 1881 contemplates occupancy tenants relinquishing their occupancy tenancies and consequently their rights of occupancy. That section does not prohibit a relinquishment by an occupancy tenant, but it does provide that unless the occupancy tenant who wishes to relinquish gives the notice required by that section and relinquishes accordingly, he should continue liable for the rent, unless the landlord re-lets the land to some other person. Such occupancy tenant who relinquishes and has not given the notice provided for by that section would, no doubt, be liable to make good the loss to the landlord during the time the occupancy holding might remain unlet. Now, although it is clear that an occupancy tenant can relinquish his occupancy right and his occupancy holding, subject to any liability which he may incur by a non-observance of the requirements of s. 31 of Act No. XII [402] of 1881, still it must in every case be considered whether the facts show a relinquishmet. As we under-

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stand the meaning of relinquishment in this connection, it must be a relinquishment to or in favour of the landholder. A relinquishment might be inferred from a man ceasing to occupy the holding personally or by his servants or by his tenants and going away under circumstances from which it might be inferred that he did not intend to return and had abandoned any interest that he had in the holding. In such a case as that we are of opinion that a Court might infer that the occupancy tenant had relinquished his holding and his occupancy rights, but in a case like the present, in which it is obvious that Baldeo Singh, so far from intending to relinquish the right of occupancy or the occupancy holding in favour of the zamindar, intended to transfer the holding and the right in it to his donee and to keep that right alive, it would be impossible for a Court to find that Baldeo Singh had relinquished in favour of his landlord his right of occupancy, although in one sense he had in favour of his nephew Gulzar Singh, so far as he was able, relinquished and intended to relinquish his right of occupancy. The position then stands thus:—At the time when this suit was instituted Baldeo Singh, who had not been ejected under Act No. XII of 1881 and who had not, transferred the right of occupancy to any person in whose favour such transfer would be effective under s. 9 of Act No. XII of 1881, and who had not relinquished his occupancy right in favour of his landlord, was alive and that right of occupancy was then a subsisting right vested in Baldeo Singh. Baldeo Singh and not the zamindar was the person who, as against Gulzar Singh, was entitled to possession. The right not being transferable, whilst that right subsisted in Baldeo Singh, his landlord, the zamindar, could not prove a right in himself to the immediate possession of the occupancy holding. In the view which we have taken in this case it was immaterial that Baldeo Singh was made a defendant in the suit; it is immaterial that he has died, so long as his death was subsequent to the institution of the suit, and it would be immaterial if he had continued alive to the present day and had not put in a defence in the suit, for Gulzar Singh on his pleadings read with the [403] plaint, shows that the right of occupancy had been in Baldeo Singh, and that Baldeo Singh was alive after the institution of the suit; and the plaint shows that the only ground on which a decree for possession is claimed was that Baldeo Singh professed to make a gift of the occupancy right and holding to Gulzar Singh and put Gulzar Singh in possession. A man peaceably in possession of immoveable property is entitled to remain there until some one with a better title to immediate possession obtains a decree ejecting him. At the commencement of this suit the plaintiff was not entitled to the immediate possession of the occupancy holding, although, if he had brought his suit one fortnight later, after Baldeo Singh had died, and had brought that suit in the proper Court, Gulzar Singh would apparently, on the facts found here, have been without a defence. The ground on which we have to dismiss this suit, although a technical ground, is a ground which it is necessary to observe in law, *viz.*, that the plaintiff is not entitled to a decree in his suit, unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to the decree. The transaction here between Baldeo Singh and Gulzar Singh was one flagrantly in contravention of the second paragraph of s. 9 of Act No. XII of 1881, and was supported in this suit by a false case. In speaking of a false case we refer to the attempt on the part of Gulzar Singh to prove that he had shared in the cultivation of the holding. For these reasons, although we allow the

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appeal and dismiss the suit, we do so without costs in any Court. We should say that obviously this decision, being one that at the time the suit was brought the plaintiff was not entitled to a decree for possession, cannot bar a suit which may be brought by the zamindar against Gulzar Singh as a trespasser since the death of Baldeo Singh.

Appeal decreed.

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15 A. 404 = 13 A.W.N. (1893) 168.

[404] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

BENI MADHO (*Defendant*) *v.* GAYA PRASAD (*Plaintiff*).*
[22nd June, 1893.]

Jurisdiction—Civil and Revenue Courts—Set-off.

A Court of Revenue cannot entertain a claim to a set-off unless such claim, if made the subject of a suit, would fall within its jurisdiction.

Held that in a suit in a Court of Revenue by a lambardar to recover rent, the defendant was not competent to plead as a set-off that certain arrears of *malikana* were due to him by the plaintiff.

[R., 2 Ind Cas. 297 (298) = 12 O.C. 124 (127).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Rup Nath Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C.J., and AIKMAN, J.—The suit in which this appeal has arisen was one for arrears of rent of an agricultural holding brought by the lambardar in a Court of Revenue. He sued for balances left unpaid in respect of each of three years. The defendant put forward a claim to have *malikana*, which he alleged was due to him, and which he alleged was equivalent to the unpaid balances, allowed as a set-off against the plaintiff's claim. The question before us is as to whether a Court of Revenue could entertain a set-off of this kind. The only two sections of Act No. XII of 1881 which apparently specifically refer to set-off are ss. 42 and 151, but those sections are not exhaustive. A Court of Revenue is a Court with a limited jurisdiction. It has not got the ordinary jurisdiction of a Civil Court, and a Court of Revenue cannot entertain a suit which it is not given jurisdiction to hear, nor can it entertain a set-off of a nature which is not within the ordinary jurisdiction of the Court. In a suit for rent a Court of Revenue could no doubt entertain a set-off in respect of revenue which the tenant had been obliged to pay. It could also, where the argeement for tenancy provided that certain payments, if made, would be deducted from rent, go into the question of set-off in respect of such payments, or, as in a case before [405] the Court recently, in which the parties agreed that the interest of

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* Second Appeal, No. 77 of 1891, from a decree of H. W. Reynolds, Esq., Officiating District Judge of Banda, dated the 14th October 1890, modifying a decree of Munshi Nazar Muhammad Khan, Assistant Collector of Banda, dated the 9th July 1890.

a bond should be deducted from the rent. The Court of Revenue cannot entertain a set-off in a case in which the assistance of a Civil Court would be required to ascertain a title or to determine whether there had been a contract not relating to the tenancy. No Court can entertain a set-off if it would not have had jurisdiction to entertain a suit if one had been brought to recover the money sought to be set-off. In this case the District Judge rightly determined that the Court of Revenue had no jurisdiction to entertain the set-off claimed. We dismiss the appeal with costs.

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Appeal dismissed.

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15 A. 405=13 A.W.N. (1893) 172.

REVISIONAL CIVIL.

Before Mr. Justice Burkitt.

J. J. GUISE AND OTHERS (*Applicants*) v. JAISRAJ AND ANOTHER (*Opposite parties*).* [28th June, 1893.]

High Court's power of revision—Practice—Civil Procedure Code, ss. 281, 283, 484, 622.

The High Court will not exercise its revisional jurisdiction so long as there is any other remedy open to the applicant.

Where a Subordinate Judge disallowed an application for the release of certain property which had been attached before judgment: *Held* that there being a remedy by suit under s. 283 of the Code of Civil Procedure, the High Court should not interfere with such order in revision, *Ittiachan* v. *Velappan* (1), *Sheo Prasad Singh* v. *Kastura Kuar* (2) and *Gopal Das* v. *Alaf Khan* (3) referred to.

[R., 18 A. 163=16 A W.N. 18 ; 28 A. 72 (74)=2 A.L.J. 749=A W.N. (1905) 191 ; 34 A. 592 (594)=10 A.L.J. 130=16 Ind. Cas. 1 (2) ; 2 A.L.J. 370 ; 2 Ind. Cas. 284=12 O.C. 109; 8 Ind. Cas. 613=3 Bur. L.T. 39 ; 8 Ind. Cas. 876=13 O.C. 341; 80 P.L R. 1901 ; 57 P.L.R. 1903=13 P.R. 1903; D., 1 L.B.R. 180 (182).]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Colvin*, Mr. *A. H. S. Reid*, and Pandit *Moti Lal*, for the applicants.

Mr. *T. Conlan*, for the opposite parties.

JUDGMENT.

BURKITT, J.—This is an application for revision of an order passed on the 26th of August 1892, by the Subordinate Judge of [406] Azamgarh by which he refused to release certain property then under attachment. It appears that certain chests of indigo manufactured by Mr. Cooper at the Maharajganj factory in the Azamgarh district had been sent by Mr. Cooper to Messrs. Burn and Co.'s office at Azamgarh for despatch to Calcutta. While there they were attached by order of the Subordinate Judge before decree by some parties who had instituted a suit against Mr. Cooper. The attachment was made under the provisions of s. 484 of the Code of Civil Procedure. Subsequently the present applicants, who are the firm of Messrs. Gisborne and Co. of Calcutta, put in an objection to the

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* Miscellaneous, No. 2 of 1893, application for revision under s. 622 of the Code of Civil Procedure.

(1) 8 M. 484. (2) 10 A. 119. (3) 11 A. 383.

1893 JUNE 28. — REVISIONAL CIVIL. — 15 A. 405 = 13 A.W.N. (1893) 172.

attachment before the Subordinate Judge. Their objection practically amounted to this ; that under an arrangement made between them and Mr. Cooper whose creditors they were for a large amount, the Maharajganj factory and its produce, present and future, had been mortgaged to them. The Subordinate Judge refused to release the property from attachment chiefly, it would appear, because he held that it had not been in the possession of the applicants and that they had only a lien on it. He refused to adjudicate on the conflicting rights of the parties to the indigo chests or their proceeds. His order was one purporting to be passed under s. 281 of the Code of Civil Procedure, and by it the Subordinate Judge disallowed the application to have the property released from attachment and to have it made over to the applicants. As to this order it is admitted by the learned counsel who appeared for the applicants that the applicants have still left to them a remedy by the suit mentioned in s. 283. For the opposite party Mr. *Conlan* takes an objection that in such a case as an order passed under s. 281, this Court will not exercise its revisional powers. In support of that contention he mentioned several authorities. Those to which I would refer are *Ittiachan* v. *Nelappan* (1) in which a Full Bench of the Madras High Court held that they had no power to interfere in revision in the case of an order passed under s. 281 and that applicants' proper remedy was by suit. Similarly, in the case of *Sheo Prasad Singh* v. *Kastura Kuar* (2) [407] this Court held that the special and extraordinary remedy, by invoking the revisional powers of this Court, should not be exercised unless as a last resource for an aggrieved litigant. Again, in the case of *Gopal Das* v. *Alaf Khan* (3), Mr. Justice Straight, whose judgment was afterwards affirmed on appeal, is reported to have said :—"The recognized rule of this Court is that if a party to civil proceedings applies to us to exercise our powers under s. 622, he must satisfy us that he has no other remedy open to him under the law to set right that which he says has been illegally, irregularly or without jurisdiction done by a Subordinate Court." These last two cases apply in every way to the case I am now considering. The learned counsel for the applicants admits that they have open to them a remedy by way of suit in which they can question the decision of the Subordinate Judge so far as it is injurious to them. Admittedly they have not availed themselves of that remedy, and therefore, adopting and acting on the precedents above cited, I think that this Court should not grant to them the extraordinary remedy by way of revision for which they have applied. For this reason I think this application should be rejected. It is therefore unnecessary for me to enter into its merits or to come to any finding as to whether the reasons set forth in the application are or are not good grounds for the exercise of the revisional jurisdiction of this Court. I dismiss this application with costs.

Applicaiton dismissed.

(1) 8 M 484. (2) 10 A. 119 at p. 122. (3) 11 A. 383.

15 A. 407=13 A.W.N. (1893) 173.

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15 A. 407= 13 A.W.N. (1893) 173.

REVISIONAL CIVIL.

Before Mr. Justice Burkitt.

ALI GAUHAR KHAN (*Applicant*) v. BANSIDHAR (*Opposite Party*).*
[28th June, 1893.]

Civil Procedure Code, s. 311—Execution of decree—Application to set aside sale in execution—Decree-holder a necessary party to such application.

The decree-holder is a necessary party to an application under s. 311 of the Code of Civil Procedure.

[408] Hence where a judgment-debtor applied under the abovementioned section to have a sale in execution of a decree against him set aside and made no attempt to implead the decree-holder until long after limitation had expired. *Held* that the application must be dismissed. *Karamas Khan* v. *Mir Ali Ahmed* (1) referred to.

[Rel. on, 19 Ind. Cas. 475 (476); D., 39 C. 687 (693)=16 C.W.N. 570 (572)=14 Ind. Cas. 67 (68).]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba* and Babu *Becha Ram Bhattacharji*, for the applicant.

JUDGMENT.

BURKITT, J.—This is an application for revision of an order passed by the District Judge of Aligarh on the 13th of January 1893, affirming on appeal an order of the Munsif of Aligarh passed under s. 311 of the Code of Civil Procedure cancelling the sale of certain property. It appears that the property was sold on the 20th of February 1892, and was bought by one Ali Gaubar Khan. On the 25th of February, the judgment-debtor made an application to the Court under s. 311 asking to have the sale set aside. The appicant impleaded as respondent to this application only the auction-purchaser, and did not implead the decree-holder. In subsequent proceedings, but long after the limitation period had expired, the decree-holder was made a party to the case and served with notice of the proceedings. At the first hearing in the course of these proceedings the auction-purchaser objected that the application was bad for want of parties, alleging, as I understand, that the decree-holder was a necessary party and that he was brought on the record of the case too late. The contention was that the absence of the decree-holder was fatal to the proceedings and that he was brought on the record too late to cure the original defect.

The first matter which requires to be decided in this case is :—Was the decree-holder or was he not a necessary party to this application ? It has been decided by this Court in a recent case, *Karmat Khan* v. *Mir Ali Ahmed* (1), that to an application under s. 311 of the Code of Civil Procedure the auction-purchaser is a necessary party and that his non-joinder within the fixed period of limitation is fatal to the application. It seems to me that the reasons given by the learned Judge who decided that case apply even more forcibly to the [409] case of decree-holder. I cannot conceive how it could be considered that he is not a necessary party to an application the practical effect

* Miscellaneous Application, No. 5 of 1893, for revision under s. 622 of the Code of Civil Procedure.

(1) 11 A.W.N. (1891) 121.

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of which, if granted, would be to deprive him, for a time at least, of the fruits of his decree. In such a matter he has a great, and indeed I may say, an overwhelming interest, and is entitled to be heard fully in support of the sale. It is quite possible to imagine a case in which, if the decree-holder were not a party to such an application, the judgment-debtor and the auction-purchaser might collude together to defraud the decree-holder. I am therefore of opinion that the decree-holder was an absolutely necessary party to this application. Admittedly he was not made a party to it till long after the limitation period of 30 days had expired.. The Munsif, consequently, when he brought the judgment-debtor *(a)* on the record as a party, exercised a power with which he was not vested by law, and, as that order has been confirmed on appeal by the Judge, it is one to which the provisions of s. 622 are applicable.

I notice that in his judgment, applying s. 34 of the Code of Civil Procedure, the District Judge has held that the applicant, by not taking at the earliest opportunity his objection as to misjoinder, must be considered to have waived that objection. In this matter, too, I think the learned Judge was wrong. It appears that the objection was taken at the first hearing, and an objection so taken must be held to have been taken at the earliest opportunity. The case of *Imam-ud-din* v. *Laladhar* (1) is an authority for this proposition.

The results of the foregoing conclusions is briefly that as the judgment-debtor *(a)* was a necessary party to the application, and as he was not made a party to it till after the expiry of the limitation period, the Court below in making him a party acted without jurisdiction. The case accordingly comes within the purview of s. 622 of the Code of Civil Procedure. Therefore, setting aside the concurrent orders of the two lower Courts, I direct that the application under s. 311 for cancelment of the sale be rejected. The applicant is entitled to costs in all three Courts.

Application rejected.

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15 A. 410 = 13 A.W.N. (1893) 173.

APPELLATE CIVIL.

[410] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*

KEDAR NATH AND ANOTHER (*Plaintiffs*) *v.* RAM DIAL AND OTHERS (*Defendants*).* [3rd July, 1893.]

Act XIX of 1873, ss. 3 *sub.-s.* (1), 107—*Partition*—Wajib-ul-arz—*Power of Collector in constituting a new mahal by partition to frame a new* wajib-ul-arz *for such mahal.*

It is within the implied, though not within the specified, powers of a Collector while constituting new *mahals* by partition of a previously existing single *mahal* to frame a new *wajib-ul-arz* for each of the new *mahals* so constituted.

[R., 22 A. 1 (8) = 19 A.W.N. 111.]

THE facts of this case sufficiently appear from the judgment of the Court.

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* Second Appeal, No. 762 of 1890, from a decree of G.A. Tweedy, Esq., Officiating District Judge of Cawnpore, dated the 10th April 1890, confirming a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 17th September 1889.

[(a) "*Judgment-debtor*" seems to be a misprint for "*decree-holder*."—ED]

(1) 14 A. 524.

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15 A. 410 = 13 A.W.N. (1893) 173.

Mr. *Amir-ud-din*, for the appellants.
Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—The question upon which this appeal turns is by no means an easy one. It is this:—Whether on the partition of a *mahal* for which at the settlement a record-of-rights was prepared and sanctioned, the partitioning officer can prepare for each of the separate *mahals* into which the original *mahal* is partitioned a new record-of-rights. In 1876, in the settlement of *mahal* Purwa Mir, a *wajib-ul-arz* was prepared and recorded. If that is the record-of-rights governing this case, the plaintiffs, appellants here, are entitled to succeed. In 1886 perfect partition of Purwa Mir into seven *mahals* was made by the Collector, and on that partition separate records-of-rights were prepared for the new *mahals* and, amongst others, for *mahal* Sham Sundar and *mahal* Munna Singh. If these records-of-rights were legally prepared, the defendants, respondents here, are entitled to have this appeal dismissed. Mr. *Amir-ud-din* for the plaintiffs has contended, and we think correctly, that there is no express provision enabling a partitioning officer to prepare and record on partition new records-of-rights. There does not appear to be any power in that respect [411] specifically given to the partitioning officer. Mr. *Amir-ud-din* has gone further and has contended that no officer other than a Settlement Officer during the course of settlement operations has power to frame and record any record-of-rights. We have come to the conclusion, although with some hesitation, that the latter contention of Mr. *Amir-ud-din* is not sound. In *Jai Ram* v. *Mahabir Rai* (1) a new *wajib-ul-arz* prepared on perfect partition by the partitioning officer was recognised by this Court as a lawfully prepared *wajib-ul-arz* and as governing the *mahal* to which it applied. Turning to Act No. XIX of 1873, we find in s. 107 that "perfect partition" means the division of a *mahal* into two or more *mahals*. Under that Act a recorded co-sharer in a *mahal* is under certain circumstances, entitled to have perfect partition of his share, and under that Act the old *mahal* Purwa Mir divided by perfect partition into seven *mahals*. Section 3, sub-s. (1) of the Act difines a *mahal* as "(*a*) any local area held under a separate engagement for the payment of the land revenue, and for which a separate record-of-rights has been framed; or (*b*) any local area of which the revenue has been assigned or redeemed, and for which a separate record-of-rights has been framed." If it was the intention of the Legislature that '*mahal*' when it occurred in the Act should have the meaning assigned to it in the definition clauses of s. 3 it would apparently necessarily follow there could be no perfect partition of a *mahal* into two or more *mahals* unless a separate record-of-rights was framed for each new *mahal*. It is impossible to say what may have been the intention of the Legislature. Strictly speaking a *khewat* is as much a part of a record-of-rights in a village as is a *wajib-ul-arz*. Section 94 of the Act directs the Collector to keep and maintain the record-of-rights and from time to time to cause to be registered all changes which may take place and anything which may affect any of the rights and interests recorded. On a partition it is quite manifest that the original *khewat* of the village would no longer apply, as the *mahal* to which it related no longer existed, and it

(1) 7 A. 720,

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would be necessary to prepare a fresh *khewat* for each separate new *mahal*. Although, apparently, no express power is given to the [412] partitioning officer by Act No. XIX of 1873 to frame separate records-of-rights for the separate *mahals*, still, as the object of a perfect partition is to create absolutely separate *mahals* with separate interests, he must of necessity, it appears to us, have power to do all things which are necessary to the creation of separate *mahals* on partition. It is conceivable that one object may occasionally be to exculde from a right of pre-emption in one new *mahal* the shareholders in other new *mahals* into which the original *mahal* might be partitioned. In the result we come to the conclusion, no doubt with some hesitation, that the partitioning officer lawfully framed a new and separate record-of-rights for each *mahal* into which on partition the original *mahal* was divided. Under these circumstances we hold that the *wajib-ul-arz* of 1886 applies and we dismiss this appeal with costs.

Appeal dismissed.

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15 A. 412=3 A.W.N. (1893) 177.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

ANTU SINGH AND OTHERS (*Plaintiffs*) v. MANDIL SINGH AND OTHERS (*Defendants*).* [4th July, 1893.]

Practice—Suit for exclusive possession—Decree for joint possession circumstances under which such decree may be granted.

Although under certain circumstances in a suit for exclusive possession of immoveable property a decree for joint possession may be given, nevertheless such a decree should not be given unless the plaintiff asks for it and the evidence shows that he is entitled to it.

[D., 20 A.W.N. 196.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Rojendro Nath Mukerji*, for the appellant.

The respondents were not represented.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The plaintiffs brought their suit for exclusive possession of a tank. The first Court gave them a decree for exclusive possession. The defendants appealed. The [413] District Judge found that the plaintiffs were not entitled to exclusive possession and dismissed their suit. The plaintiffs now appeal on the ground that the District Judge should have given them a decree for joint possession. The District Judge was not asked to find whether or not the plaintiffs were entitled to joint possession, nor did the plaintiffs ask him to give them a decree for joint possession. The cases in which, in a suit for exclusive possession, it has been held that a decree for joint possession might have been or ought to have been given do not apply to

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* Second Appeal, No. 310 of 1891, from a decree of J. J. McLean, Esq., District Judge of Azamgarh, dated the 21st January 1891, reversing a decree of Babu Nihala Chandar, Munsif of Azamgarh, dated the 18th June 1890.

the present case, in which the Judge was not asked to find whether the plaintiffs were entitled to joint possession, and in which the plaintiffs did not ask him for a decree for joint possession. Further, it was not shown here, as we infer from the District Judge's judgment, that the plaintiffs were entitled to a decree for joint possession even if they had asked for it.

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We dismiss this appeal, but without costs, as no one appears for the respondents.

Appeal dismissed.

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15 A. 413=13 A.W.N. (1893) 178.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

GAURI SHANKAR (*Defendant*) v. KARIMA BIBI AND OTHERS (*Plaintiffs*).*
[6th July, 1893.]

Civil Procedure Code, s. 562 —Appeal from order of remand—Effect of findings of fact and findings of law.

On an appeal from an order of remand under s. 562 of the Code of Civil Procedure the High Court is bound to accept the findings of fact of the Court which made the remand, that Court being a Court of first appeal, provided that there is evidence to support them; but where the High Court has decided a question of law in an appeal from an order under s. 562 of the Code, that decision of the question of law will be final for all purposes in the suit and in any appeal which may subsequently be made to the High Court. *Deo Kishen* v. *Bansi* (1) referred to.

[F., 3 Ind. Cas. 283 (284)=6 M.L.T. 198; Appr.. 20 A. 42 (45)=17 A.W.N. 195; R., 25 P.L.R. 1903=1 P.L.R. 1903=1 P.R. 1903.]

THE facts of the case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

[414] Mr. *A. H. S. Reid* for the respondents.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This is a second appeal. The Subordinate Judge of Ghazipur dismissed the suit holding that ss. 13 and 43 of the Code of Civil Procedure applied. On appeal the District Judge, also applying ss. 13 and 43 of the Code, dismissed the appeal. There was an appeal to this Court, and this Court rightly or wrongly, held that ss. 13 and 43 did not apply to the case and made an order of remand under s. 562 of the Code of Civil Procedure. Under that order of remand the appeal below was re-heard and a decree passed. This second appeal is from that decree. For the defendant, appellant, it is contended that ss. 13 and 43 of the Code of Civil Procedure apply, and it is further contended that the order of this Court remanding the case under s. 562 does not conclude the defendant from showing that ss. 13 and 43 do apply. In support of that contention the case of *Deo Kishen* v. *Bansi* (1) has been relied upon. As we understand that case, it was there held that some observations in an appeal from an order under s. 562 of the

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* Second Appeal, No. 407 of 1891, from a decree of H. F. D. Pennington, Esq., District Judge of Ghazipur, dated the 4th March 1891, reversing a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 30th July 1890.

(1) 8 A. 172.

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15 A. 411=
13 A.W.N.
(1893) 118.

Code of Civil Procedure were merely *obiter*. The observations related not to conclusions of law but to findings of fact. We think that looked at from that point of view that case was rightly decided. On an appeal from an order under s. 562 of the Code of Civil Procedure this Court must accept the findings of fact of the Court which made the order, that Court being a Court of first appeal; and as it is bound to accept those findings of fact as correct, if there is evidence to support them, it follows that any affirmance by this Court of such findings of fact would be merely *obiter*. It is otherwise with regard to conclusions of law. Where this Court has decided a question of law on an appeal from an order under s. 562 that decision of the question of law would be final for all purposes in the suit and in any appeal which might come up to this Court subsequently in the suit. Those grounds of appeal which depend on the application of ss. 13 and 43 of Code of Civil Procedure fail. The only other point is as to whether it was incumbent on the pre-emptor to observe the rules of [415] the Muhammadan law of pre-emption. Pre-emption in this case arose not by reason of the Muhammadan law, but by reason of the custom or contract, embodied in the *wajib-ul-arz*, and consequently the *wajib-ul-arz* is to be looked at and not the Muhammadan law on the point. We dismiss the appeal with costs.

Appeal dismissed.

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(3) S. 9—See LANDLORD AND TENANT, 15 A. 399.
(4) Ss. 9, 31—See RELINQUISHMENT, 13 A. 396.
(5) Ss. 10, 95 (*a*)—See JURISDICTION OF CIVIL COURTS, 13 A. 17.
(6) S. 36—See LANDLORD AND TENANT, 15 A. 189.
(7) S. 56—See LANDLORD AND TENANT, 15 A. 375.
(8) S. 93 (8)—See CO-SHARERS, 15 A. 137.
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(1) *Appeal—Pleadings—Case set up in appeal which was not that set up in the Court of first instance.*—The plaintiff came into Court on the allegation that she was the owner of a certain house and that the defendants were her tenants at a certain rent, and she sought to eject the defendants for non-payment of rent. The Court of first instance having found her allegations of tenancy to be untrue, she then in appeal endeavoured to support a plea that the defendants were trespassers, such plea having formed no part of the original case. *Held* that the plaintiff could not under the circumstances be heard in support of a new plea of which the defendants had had no notice until the case was in appeal. NAIKU KHAN v. GAYANI KUAR, 15 A. 186=13 A.W.N. (1893) 69 ... 837

(2) *Act XIX of* 1873, ss. 113 *and* 114—*Partition, application for—Order on objection as to title raised in course of partition proceedings "Order" or "decision"—Appeal.*—A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N.W.P. Land Revenue Act (Act No. XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order or decision on such point. An appeal will lie from the "order" or "decision" of such Collector or Assistant Collector. NIAZ BEGAM v. ABDUL KARIM KHAN, 14 A. 500=12 A.W.N. (1892) 62 ... 688

(3) *Act* XII *of* 1881 (*N.W.P. Rent Act*), *ss.* 93, *cl.* (*h*) 189—*Act* I *of* 1887 *General Clauses Act*), *s.* 3, *cl.* (13)—*Valuation of subject-matter of suit—Appeal valued for purposes of jurisdiction at a higher amount than the suit.*—Where a plaintiff in a suit under S. 93 of the N.W.P. Rent Act valued his suit at Rs. 46-3, which valuation was not objected to either by the defendant or the Court, and subsequently, being defeated in his suit, preferred an appeal which he valued at a very much greater amount. *Held*, that he must be bound by the valuation put by him upon his suit and could not by alleging a greatly enhanced value obtain an appeal which would not have lain on the valuation stated in the plaint. RADHA PRASAD SINGH v. PATHAN OJAH, 15 A. 363=13 A.W.N. (1893) 148 ... 950

(4) *Act* IX *of* 1887, *s.* 25—*Revision—Letters Patent,* s. 10—*Appeal.*—No appeal will lie under s. 10 of the Letters Patent from an order of a single Judge of the High Court in revision under s. 25 of Act No. IX of 1887. GAURI DATT v. PARSOTAM DAS, 15 A. 373=13 A.W.N. (1893) 122 ... 957

(5) *Civ. Pro. Code*, *ss.* 206, 582, 588, 591—*Letters Patent, North-Western Provinces, s.* 10—*Amendment of decree—Order of a single Judge of the High Court amending an appellate decree—Appeal from such order.*—Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under s. 206 read with ss. 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its appellate civil jurisdiction to amend its own decrees, it is one to which the provisions of Ch. XLIII of the Code of Civil Procedure are applicable, and from such

Appeal—(*Continued*). PAG

order no appeal under s. 10 of the Letters Patent will lie. MD. NAIM-UL-LAH KHAN v. IHSAN-UL-LAH KHAN, 14 A. 226 (F.B.)=12 A.W.N.(1892)14 515

(6) *Civ. Pro. Code, ss. 496, 588, cl. (24)—Order refusing to set aside an injunction—Appeal.*—An appeal will lie under s. 588, cl. (24), of the Code of Civil Procedure from an order under s. 496 of the Code refusing to set aside an injunction. ZABADA JAN v. MUHAMMAD TAIAB, 15 A. 8=12 A.W.N. (1892) 140 ... 719

(7) *Civ. Pro. Code, ss. 522, 525—Award—Decree on an award filed in Court, how to be framed—Appeal.*—When an award has been filed in Court, as provided by s. 525 of the Code of Civil Procedure, the judgment and decree based thereon must be drawn up specifically in terms of the award. If the decree merely decrees in general terms the claim of one party or of the other, it cannot be said that such decree is in accordance with the award, and being "not in accordance with the award" an appeal will lie therefrom. UMMI FAZL v. RAHIM-UN NISSA, 13 A. 366=11 A.W.N. (1891) 129 ... 233

(8) *Civ. Pro. Code, s. 562—Appeal from order of remand—Effect of findings of fact and findings of law.*—On an appeal from an order of remand under s. 562 of the Code of Civil Procedure the High Court is bound to accept the findings of fact of the Court which made the remand, that Court being a Court of first appeal, provided that there is evidence to support them; but where the High Court has decided a question of law in an appeal from an order under s. 562 of the Code, that decision of the question of law will be final for all purposes in the suit and in any appeal which may subsequently be made to the High Court. GAURI SHANKAR v. KARIMA BIBI, 15 A. 413=13 A.W.N. (1893) 178 ... 985

(9) *Letters Patent, s. 10—Civ. Pro. Code, ss. 2, 556, 558, 587, 588, 632—Appeal, dismissal of, for default—"Order"—"Decree."*—No appeal will lie under s. 10 of the Letters Patent from the order of a single Judge of the High Court dismissing an appeal for default.

The decision of a Court dismissing a suit or an appeal for default is an "order" and not a "decree." MANSAB ALI v. NIHAL CHAND, 15 A. 359=13 A.W.N. (1893) 113 ... 947

(10) *Rules of Court of the 30th November, 1889—Practice—Memorandum of appeal—Appeal described as "first appeal from order" instead of first appeal from decree.*—It is not a fatal objection to an appeal that the same is described in the memorandum as "First appeal from Order" being in reality a First appeal from a decree, it not being shown that the respondent was in any way prejudiced by such misdescription or that by reason thereof an insufficient stamp was placed on the memorandum. SANT LAL v. SRI KISHEN, 14 A. 221=12 A.W.N. (1892) 66 ... 512

(11) *Appeal—Decree conditional upon payment of a certain sum within a specified time—Appeal presented after the expiration of the time so fixed.*—The plaintiff in a pre-emption suit obtained a decree in his favour, conditional on payment into Court of a certain sum within a specified time; otherwise his suit was to stand dismissed. He did not comply with the terms of the decree, but, after the expiration of the term mentioned therein, appealed against it.

Held that the appeal would lie both in respect of the sum fixed by the decree to be paid by the plaintiff-appellant, and the discretion of the Court as regards the period allowed for payment. KODAI SINGH v. JAISRI SINGH, 13 A. 189 (F.B.) ... 118

(12) *Jurisdiction—Exercise by Subordinate Judge of jurisdiction of District Court—Appeal—Bengal Civil Courts Act (XII of 1887), ss. 23, 24—Power of appellate Court to add respondent—Limitation—Civ. Pro. Code, s. 559—Minor—Guardian—Bengal Minors Act (XL of 1858), s. 7.*—The words in s. 24 of the Bengal Civil Courts Act (XII of 1887) "subject to the rules applicable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore orders passed under that section by a Subordinate Judge in proceedings under the Bengal Minors, Act (XL of 1858) transferred to him under s. 23 (2) (b) of the former Act, are appealable to the High Court and not to the Court of the District Judge.

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The power of an appellate Court to make a person a respondent, under s. 559 of the Civ. Pro. Code, is not affected by the Limitation Act (XV of 1877).

In exercising its powers under s. 559 of the Civ. Pro. Code, an appellate Court is competent to make a person a respondent who in the original suit, was arrayed on the same side with the appellant.

The grant of a certificate under s. 7 the Bengal Minors Act (XL of 1858) should not be based exclusively of considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed. SOHNA v. KHALAK SINGH, 13 A. 78=11 A.W.N. (1891) 1 ... 49

(13) *Execution of decree—Party improperly brought on the record as representative of deceased judgment-debtor—Appeal—Costs—Civ. Pro. Code, ss.* 2, 244, *cl.* (*c*), 540.—One B.D. was made a party to an application for execution of a decree as one of the representatives of a deceased judgment-debtor. It had been decided in a previous suit that B.D. was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative, and his objection was allowed and the order allowing it remained unappealed and became final. The Court, however, while allowing the objection, did not give the objector his costs.

Held, that the objector did not, by being unproperly brought into the execution proceedings, lose his right of appeal, and further, that he could under the circumstances appeal on the question of costs alone. BISHEN DAYAL v. BANK OF UPPER INDIA, LTD., 13 A. 290=11 A.W.N. (1891) 94 ... 183

(14) *Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale—Order against defaulter to make good such deficiency—No appeal from such order—Civ. Pro. Code, ss.* 2, 293, 540, 588.—No appeal lies from an order under S. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. ILAHI BAKHSH v. BAIJ NATH, 13 A. 569=11 A.W.N. (1891) 156 ... 359

(15) *Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale—Order against defaulter to make good such deficiency—Appeal—Civ. Pro. Code, ss.* 2, 293, 540, 588.—No appeal lies from an order under s. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. So *held* by Edge, C J., Mahmood and Knox, JJ., Straight, J., dissenting. DEOKI NANDAN RAI v. TAPESRI LAL, 14 A. 201 (F.B.)=12 A.W.N. (1892) 74 ... 499

(16) *Execution of decree—Order dismissing application under s.* 295 *of the Civ. Pro. Code, for participation in assets—Civ. Pro. Code, ss.* 2, 244, 295—*Appeal.*—No appeal will lie from an order under s. 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under s. 244 read with s. 2 of the said Code. KASHI RAM v. MANI RAM, 14 A. 210=12 A.W.N. (1892) 56 ... 505

(17) See APPELLATE COURT, 15 A. 315.

(18) See CIV. PRO. CODE, s. 559, 14 A. 154.

(19) See COSTS, 15 A. 333.

(20) See CRIMINAL APPEAL.

(21) See EXECUTION OF DECREE, 13 A. 1.

(22) See INSOLVENCY, 14 A. 145.

(23) See LANDLORD AND TENANT, 14 A. 50.

(24) See LETTERS PATENT, 14 A. 361.

(25) See MORTGAGE (REDEMPTION), 13 A. 94.

(26) See OATHS ACT, ss. 10 and 11, 13 A. 386.

(27) See PAUPER APPEAL, 13 A. 305.

(28) See PAUPER SUIT, 13 A. 326.

(29) See PRE-EMPTION, 13 A. 376.

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(30) See PRINCIPAL AND SURETY, 15 A 183.

(31) See REMAND, 15 A. 119.

(32) See SANCTION TO PROSECUTE, 15 A. 61.

(33) See SUCCESSION CERTIFICATE ACT, Ss. 9 and 19, 13 A. 214.

Appeal to Privy Council.

(1) *Act* I *of* 1868, *s.* 3, *cl.* (1)—*Act* X *of* 1877, *s.* 599—*Civ. Pro. Code*, s. 599—*Act* VII *of* 1888, s. 57—*Act* XV *of* 1877, *ss.* 2 *and* 5; *sch. ii. arts.* 177 *and* 178 —*Application for leave to appeal to Her Majesty in Council—Limitation.* —Section 599 of Act No. XIV of 1882 was not inconsistent with article 177 of the second schedule of Act No. XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to article 177. The limitation therefore for an application for leave to appeal to Her Majesty in Council is six months from the date of the decree to appeal from which leave is sought.

The provisions of the second paragraph of s. 5 of Act No. XV of 1877 do not extend to applications for leave to appeal to Her Majesty in Council. *In the matter of petition of* SITA RAM KESHO, 15 A. 14=12 A.W,N. (1892) 152 ... 724

Refusal of leave to appeal from a judgment and conviction under the Indian Penal Code—General rule as to refusal of leave to appeal in criminal cases —Misdirection of a jury not of itself a ground.—Although in very special and exceptional circumstances, leave to appeal to Her Majesty in Council may be granted in a criminal case, no countenance was given to the view that an appeal would be allowed merely on the ground that the Judge trying the case had misdirected the jury.

There was no reason to believe that there had been any misdirection by the Judge, or that he had, as he was alleged by the petitioner to have done, misconstrued, in charging the jury, a section of the Penal Code. Not only on the latter ground, but on the broader ground above stated, the petition was rejected. *In the matter of* MACCREA, 15 A. 310 (P.C.)= 20 I.A. 90=6 Sar. P.C.J. 344=17 Ind. Jur. 430 ... 915

Appellate Court.

(1) *Act* I *of* 1887 (*General Clauses Act*) s. 3, *cl.* (13)—*Act* XII *of* 1887 (*Bengal N.W. Provinces and Assam Civil Courts Act*) s. 21, *cl.* (*a*)—"*Value of the original suit*"—"*Amount or value of the subject-matter of the suit*"—*Jurisdiction — Civ. Pro. Code*, s. 2—*Decree, definition of.*—For the purpose of determining the proper appellate Court in a Civil suit what is to be looked to is the value of the original suit, that is to say, the "amount or value of the subject-matter of the suit." Such "amount or value of the subject-matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint.

An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of s. 2 of the Civ. Pro. Code. MAHABIR SINGH *v.* BEHARI LAL, 13 A. 320=11 A.W.N. (1891) 107 ... 202

(2) *Civ. Pro. Code, ss.* 566 *and* 567—*The framing a new issue by an appellate Court—Evidence recorded in one suit admitted by consent at the hearing of another.*—In the Court of first instance the appellant, upon the title of a sister's son was one of the plaintiffs who obtained a decree for an inheritance, the suit having been heard at the same time with another, in which relations of the deceased owner, alleging themselves to be of the same *gotra* wtih him, also obtained a decree as his heirs. Evidence in the latter suit was received in that of the appellant by consent of parties, both suits having been brought against the same defendant, whose title, as widow of a son alleged to have been adopted by the last owner, was set up in both but was not proved.

Appeals having been filed in both suits, in that brought by the sister's son a new issue was framed by the appellate Court, under section 566, Civil

Appellate Court—(*Concluded*). PAGE

Pro. Code, as to whether he was entitled as nearest of kin, or was excluded by the other claimants, whose suit was, at the time, compromised.

Held, that, after what had taken place in regard to both suits the appellate Court could frame this issue, although it was new, and had not been raised by the defendant's written answer.

With reference to the evidence in the one suit having been imported as a whole into the other at the first hearing; and the admission of evidence upon the trial of the new issue; it was held, that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son, on return made under section 567. CHANDI DIN v. NARAINI KUAR, 14 A. 366 (P.C.) ... 603

(3) *Civ. Pro Code, ss.* 566, 567—*Reference of issues for determination—Transfer.*—Where an appellate Court has made an order of reference under s. 566 of the Code of Civil Procedure, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal elsewhere. UDIT NARAIN SINGH v. JHANDA, 15 A. 315=13 A.W.N. (1893) 108 ... 981

(4) *Court-fee—Appeal—Ground of appeal going to the whole of the respondent's decree.*—Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case, and which, if successful, would deprive the respondent of his decree as a whole, and not merely of his interest in it *quoad* the particular appellant, the appellate Court is justified in refusing to hear such appellant on such ground as aforesaid unless he pays a Court-fee sufficient to cover the whole relief obtainable on such ground of appeal. BUJHAWAN RAI v. MAKUND LAL, 15 A. 112=12 A.W.N. (1892) 248 ... 789

(5) See APPEAL, 13 A. 78.

(6) See CRIMINAL APPEAL, 13 A. 171.

(7) See DOCUMENTARY EVIDENCE, 14 A. 356.

(8) See EXECUTION OF DECREE, 13 A. 394.

(9) See HIGH COURT, JURISDICTION OF, 13 A. 575.

(10) See SESSIONS COURT, 15 A. 205.

(11) See STAY OF EXECUTION, 15 A. 196.

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Arbitration.

(1) *Arbitration under the Civ. Pro. Code—Invalidity of award when not made within the time fixed by the Court—Civ. Pro. Code, ss.* 508, 514, 521—*Cost.*—When once an award has been delivered it is no longer competent to the Court to grant further time, or to enlarge the period for the delivery of this award under section 514 of the Code of Civil Procedure.

Where an award was not made within the period fixed by the Court's order but was made after the date given in the last order extending the time for its delivery, *held*, that the award was invalid. The decree of the Court dealing with the award as if duly made within the time, could not be treated as enlarging it.

Order to be that the suit should proceed. Neither party to be entitled to costs in either Court below after the first judgment with regard to the stage at which the objection was taken; and the costs prior to that to abide the issue. RAJA HAR NARAIN SINGH v. C. B. KUAR, 13 A. 300 (P.C.)=18 I.A. 55=6 Sar. P.C.J. 14=15 Ind. Jur. 283 ... 189

(2) *Civ. Pro. Code, s.* 514—*Arbitration—Power of Court to extend time for making award.*—A Court has power to act under s. 514 of the Code of Civil Procedure at any time before the award is actually made, whether the time previously limited for making the award has expired or not. RAM MANOHAR MISR v. LAL BEHARI MISR, 14 A. 343=12 A.W.N. (1892) 18 ... 587

(3) *Act* XIX *of* 1873 (*N.W.P. Rent Act*), *s.* 221—*Civ. Pro Code, s.* 521—*Arbitration—Award delivered after expiration of time allowed by Court.*—

Arbitration—(*Concluded*). PAGE

The principle of the ruling of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwat Kuar* (18 I.A. 55=13 A. 300) is applicable also to arbitrations under s. 221 of Act No. XIX of 1873. GAURI SHANKAR v. BHABAN LAL, 14 A. 347=12 A.W.N. (1892) 20 ... 590

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See USE AND OCCUPATION, 14 A. 176.

Attachment.

(1) See CIV. PRO. CODE, ss. 268, 274, 15 A. 134.

(2) See EXECUTION OF DECREE, 13 A. 76.

See EXECUTION OF DECREE, 15 A. 380.

See HINDU LAW (MAINTENANCE), 15 A. 371.

A achment before judgment.

(1) See MORTGAGE (GENERAL), 14

See REVISION, 15 A. 405.

A tempt.

(1) *Letters Patent*, s. 32—*Act* XLV *of* 1860, ss. 415, 511—*Attempt—Acts necessary to constitute an attempt.*—Section 511 of the Indian Penal Code was not meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts or done in the course of the attempt to commit the offence, or done with the intent to commit it and done towards its commission.

Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation is a question of fact in each case. *In re petition of* R. MACCREA, 15 A. 173=13 A.W.N. (1893) 71 ... 829

(2) See PENAL CODE, ss. 511, 307, 300, 299, 14 A. 38.

Auction-purchaser.

(1) See APPEAL, 13 A. 569; 14 A. 201.

(2) See EXECUTION OF DECREE, 13 A. 119.

(3) See MORTGAGE (PRIORITY), 13 A. 288.

(4) See MORTGAGE (SIMPLE MORTGAGE,) 13 A. 28.

) See SEPARATE SUIT, 13 A 383, 244.

Award.

(1) See APPEAL, 13 A. 366.

(2) See ARBITRATION, 13 A. 300.

(3) See ARBITRATION, 14 A. 347.

Baqqals.

See RES JUDICATA, 15 A. 327.

Bias.

Criminal Procedure Code, s. 555—*Act* I *of* 1878, s. 9—*Jurisdiction of officer in charge of the exercise and opium administration of a district to try cases under the Opium Act—Meaning of the term "personally interested."*—A Magistrate in charge of the excise and opium administration of a district is not "personally interested" in the observance of the provisions of Act No. I of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the above mentioned Act. *In re petition of* GANESH, 15 A. 192 (F.B.)=13 A.W.N. (1803) 79 ... 841

Breach of Contract.

(1) See INTEREST, 13 A. 330.

(2) See SET OFF, 15 A. 9.

Burden of proof. PAGE

(1) See ACT XI OF 1878, ss. 19 (*f*), 25, 15 A. 129.
(2) See HINDU LAW (ALIENATION), 14 A. 179.
(3) See HINDU LAW (JOINT FAMILY), 13 A. 216.
(4) See HINDU LAW (WIDOW), 14 A. 420.
(5) See LANDLORD AND TENANT, 13 A. 571.
(6) See POSSESSORY SUIT, 14 A. 193.
(7) See APPEAL, 14 A. 500.
(8) See WAJIB-UL-ARZ, 15 A. 410.

Bai-bil-wafa.

Construction of document—Mortgage—Sale—Bai-bil-wafa, *nature of—Act* IV *of* 1882 (*Transfer of Property Act*), *s.* 58—*Pre-emption.*—The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882, and not a sale.

The plaintiff in a suit for pre-emption had, prior to the sale of the property claimed, executed a deed in respect of his share in the village in virtue of which he claimed the right to pre-empt, the material portion of which deed was as follows:—"Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and returning the property sold, described above in the document, to me the vendor, revoke the sale."

Held that this deed was a *bai-bil-wafa* or mortgage by conditional sale and that as the conditional sale had not become absolute at the time when the right of pre-emption accrued, the conditional vendor or mortgagor was still a shareholder in the village, and therefore had still a subsisting right of pre-emption. ALI AHMAD v. RAHMAT-ULLAH, 14 A. 195=12 A.W.N. (1892) 42 ... 495

Cause of action.

See LANDLORD AND TENANT, 15 A. 399.

Certificate of guardianship.

See APPEAL, 13 A. 78.

Champerty.

Agreement to supply money for another person's suit—Excess of the reward rendering such agreement inequitable.—A fair agreement to supply money to a suitor to carry on a suit, in consideration of the lender's having a share of the property sued for, if recovered, is not to be regarded as necessarily opposed to public policy, or merely, on this ground, void. But in agreements of this kind the questions are, (*a*) whether the agreement is extortionate and unconscionable, so as to be inequitable against the borrower; or (*b*) whether the agreement has been made, not with the *bona fide* object of assisting a claim, believed to be just, and of obtaining reasonable compensation therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring others, so as to be, for these reasons, contrary to public policy. In either of these cases, effect is not to be given to the agreement. Here, upon the facts the above case (*b*) did not arise, and this agreement was not contrary to public policy. But this agreement fell within case (*a*) and the judgment of the High Court was affirmed, that the agreement was so extortionate and unconscionable, in regard to the excess of the reward, that it was inequitable, and, therefore, not enforceable against the defendant. RAJA MOHKAM SINGH v. RAJA RUP SINGH, 15 A. 352 (P.C.)=20 I.A. 127=6 Sar. P.C J. 327=17 Ind. Jur. 376 ... 943

Charge.

(1) See CO-SHARERS, 14 A. 273.
(2) See INTEREST, 13 A. 330.
(3) See MORTGAGE (SIMPLE MORTGAGE), 13 A. 28.

Civil Procedure Code (Act VIII of 1859).

S. 271—See MORTGAGE (SALE OF MORTGAGED PROPERTY), 14 A. 509.

Civil Procedure Code (Act X of 1877). PAGE

Ss. 45, 212, 244 (*a*)—See TRANSFER OF SUIT, 14 A. 531.

Civil Procedure Code (Act XIV of 1882).

(1) See STANDING CROPS, 14 A. 30.
(2) S. 2—See APPELLATE COURT, 13 A. 320.
(3) Ss. 2, 244, 295—See APPEAL, 14 A. 210.
(4) Ss. 2, 244 (c), 540—See APPEAL, 13 A. 290.
(5) Ss. 2, 244, 622—See REVISION, 14 A. 520.
(6) Ss. 2, 293, 540, 588—See APPEAL, 14 A. 201.
(7) S. 13—See RES JUDICATA, 13 A. 309; 15 A. 3; 15 A. 108; 15 A. 327.
(8) S. 13, Expl. 2—See RES JUDICATA, 14 A. 64.
(9) Ss. 13, 43—See RES JUDICATA, 13 A. 53.
(10) Ss. 13, 278, 331—See RES JUDICATA, 14 A. 417.
(11) S. 25—See SMALL CAUSE SUIT, 13 A. 324.
(12) Ss. 26, 31, 45, 53, 578—See EXECUTION OF DECREE, 15 A. 380.
(13) S. 32—See PARTIES TO SUIT, 14 A. 524.
(14) S. 43—See RES JUDICATA, 14 A. 572.
(15) S. 52—See VERIFICATION OF PLAINT, 15 A. 59.
(16) S. 54—See LIMITATION, 15 A. 65.
(17) Ss. 54, 55, 543, 551, 582, 584, 585—See SECOND APPEAL, 15 A. 367.
(18) Ss. 54, 57—See LANDLORD AND TENANT, 15 A. 337 (F.B.)
(19) S. 111—See SET OFF, 13 A. 96.
(20) Ss. 111, 216—See SET OFF, 15 A. 9.
(21) S. 142-A—See DOCUMENTARY EVIDENCE, 14 A. 356.
(22) S. 158—See EXECUTION OF DECREE, 15 A. 49.
(23) Ss. 203, 562, 622, 647—*Small Cause Court—Judgment of Small Cause Court, what should be contained therein—Revision—Act IX of 1887 (Small Cause Courts Act)*; s. 25.—Section 203 of the Code of Civil Procedure does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given.

Where a judgment in a Small Cause Court suit stated merely that the suit was dismissed for reasons given in the Judge's decision in another suit, and the judgment in the suit so referred to was in the following words:—"Claim for recovery of money lent with interest. Reply. Defendant—pleads that he has paid the debt to plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered that the claim is decreed with costs:—" *held* that this was in fact no judgment at all, and the case must be remanded for re-trial on the merits under the analogy of s. 562 of the Code of Civil Procedure, read with s. 647 *ib.* MALIK RAHMAT v. SHIVA PRASAD. 13 A. 533=11 A.W.N. (1891) 172 ... 337

(24) S. 206—See STEP-IN-AID OF EXECUTION, 13 A. 124.
(25) Ss. 206, 209, 622.—See DECREE, AMENDMENT OF, 15 A. 121.
(26) Ss. 206, 582, 588, 591—See APPEAL, 14 A. 226.
(27) S. 214—See PRE-EMPTION, 14 A. 529.
(28) Ss. 224, 336, 622—See PRINCIPAL AND SURETY, 15 A. 183.
(29) S. 230—*Execution of decree—"Application to execute a decree"—Limitation.*—The term "application to execute a decree" in the third paragraph of s. 230 of the Code of Civil Procedure means any application to execute a decree. It is not confined to the last application preceding the expiry of the period of twelve years from either of the points of time mentioned in cl. (*a*) or cl. (*b*) of the same paragraph of the section above mentioned. TILESHRI RAI v. PARBATI, 15 A. 198=13 A.W.N. (1893) 93 ... 845
(30) S. 232—See STEP-IN-AID OF EXECUTION, 13 A. 89.
(31) S. 237—See HINDU LAW (JOINT FAMILY), 14 A. 190.
(32) S. 246—See CROSS DECREES, 14 A. 389.
(33) Ss. 258, 283—See CLAIM TO ATTACHED PROPERTY, 13 A. 339.

Civil Procedure Code (Act XIV of 1882)—(*Continued*). PAGE

(34) S. 266 (l)—See HINDU LAW (MAINTENANCE), 15 A. 371.

(35) S. 268 (*a*)—See EXECUTION OF DECREE, 13 A. 76.

(36) *Ss.* 268, 274—*Mortgage-bond—Attachment.*—Where the rights and interests under his mortgage of a mortgagee out of possession are attached in execution of a decree, the procedure by which such attachment must be effected is that prescribed by s. 268 of the Code of Civil Procedure. S. 274 of the Code cannot be applied in such a case. KARIM-UN-NISSA v. PHUL CHAND, 15 A. 134=13 A.W.N. (1893) 51 ... 803

(37) S. 274—See EXECUTION OF DECREE, 13 A. 119.

(38) Ss. 283, 622, 2[illegible], [illegible]—See REVISION, 15 A. 405.

(39) S. 293—See APPEAL, 13 A. 569.

(40) Ss. 295, 315—See SEPARATE SUIT, 13 A. 383.

(41) S. 311—See DECREE-HOLDER, 15 A. 318.

(42) S. 311—See PARTIES TO SUITS, 15 A. 407.

(43) Ss. 336, 344—See PRINCIPAL AND SURETY, 13 A. 100.

(44) Ss. 350, 359—See INSOLVENCY, 14 A. 145.

(45) S. 351—See EXECUTION OF DECREE, 14 A. 358.

(46) S. 373—See COSTS, 15 A. 169.

(47) S. 373—See RES JUDICATA, 13 A. 564.

(48) S. 375—*Act* X *of* 1873 (*Indian Oaths Act*), *s.* 11—*Adjustment of suit.*—The question in a suit was whether the purchase-money for a house, which had been paid by the defendant, had been paid out of his own funds or out of monies belonging to the plaintiff. A witness for the defence having made statements apparently favourable to the plaintiff's case, the pleaders for both parties signed and presented to the Court a petition that if upon a particular bond in the witness's possession it should be stated, that the money was received through the defendant, the Court should decree the suit, otherwise the suit should be dismissed.

Held that this arrangement was not an adjustment or compromise of the suit within the meaning of s. 375 of the Civil Procedure Code, so as to determine the jurisdiction of the Court and necessitate its passing a decree according to the arrangement.

The Oaths Act (X of 1873) does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says he will be bound by the oath of a particular person, s. 11 of the Act only means that *pro tanto* he will be bound, *i.e.*, so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth as against him throughout the whole of the litigation. But it in no way compels the Court trying the case to accept it as conclusive. MUHAMMAD ZAHUR v. CHEDA LAL, 14 A. 141=12 A.W.N. (1892) 3 460

(49) S. 411—See JURISDICTION, 15 A. 324.

(50) Ss. 411, 412—See PAUPER SUIT, 13 A. 326.

(51) Ss. 485, 486, 268 (*a*)—See MORTGAGE (GENERAL), 14 A. 162.

(52) Ss. 496, 588, cl. 24—See APPEAL, 15 A. 8.

(53) Ss. 508, 514, 521—See ARBITRATION, 13 A. 300.

(54) S. 514—See ARBITRATION, 14 A. 343.

(55) S. 521—See N.W.P. RENT ACT, s. 221, 14 A. 347.

(56) Ss. 522, 525—See APPEAL, 13 A. 366.

(57) S. 542—See LIMITATION, 15 A. 123.

(58) S. 542—See SECOND APPEAL, 13 A. 381.

(59) S. 544—See EXECUTION OF DECREE, 13 A. 1.

(60) S. 546—See STAY OF EXECUTION, 15 A. 196.

(61) Ss. 556, 558—See LETTERS PATENT, 14 A. 361.

(62) *S.* 559—*Addition of a respondent by the Court—Limitation.*—*Held* by the Full Bench that it is competent to a Court acting under s. 559 of the Code of Civil Procedure to add a person as respondent in an appeal though the time within which an appeal might have been preferred as

Civil Procedure Code (Act XV of 1882)—(Concluded). PAGE

against such person has expired. BINDESHRI NAIK v. GANGA SARAN SAHU, 14 A. 154 (F.B.) = 12 A.W.N. (1892) 13 469

(63) S. 559—See APPEAL, 13 A. 78.

(64) S. 562—See APPAEL, 15 A. 413.

(65) Ss. 562, 591—See REMAND, 15 A. 119.

(66) S. 566—See REMAND, 14 A. 23.

(67) Ss. 566, 567—See APPELLATE COURT, 14 A. 366.

(68) Ss. 566, 567—See APPELLATE COURT, 15 A 315.

(69) S. 577—See COMPROMISE DECREE, 14 A. 350.

(70) S. 599—See APPEAL TO PRIVY COUNCIL, 15 A. 14.

(71) S. 617—See LIMITATION ACT, art. 179 (5), 15 A. 84.

Claim to attached property.

Execution of decree—Attachment—Previous assignment in satisfaction of decree of third party—Suit by assignee to establish right to attached property—Civil Procedure Code, Ss. 258 and 283.—Where a regular suit under s. 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property, on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor,—

Held, that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above-mentioned relates only to the Court executing the decree. KALYAN SINGH v. KAMTA PRASAD, 13 A. 339 = 11 A.W.N. (1891) 100 ... 215

Cognizance of offence.

Criminal Procedure Code, ss. 191 and 342—Magistrate taking cognizance of an offence on his own personal knowledge—Right of accused to have the case transferred—Power of Magistrate to question the accused.—Where a Magistrate was found to have taken cognizance of an offence under cl. (c) of s. 191 of the Code of Criminal Procedure. *Held* that he had no power, on an application being made under the last clause of the section above named, to refuse to transfer the case.

Held also that where a Magistrate, before evidence taken for the prosecution, put questions to the accused of the nature of a cross-examination, such procedure was illegal, as it could not be said that the questions were put "for the purpose of enabling the accused to explain any circumstances appearing against him in the evidence," within the meaning of s. 342 of the Code of Criminal Procedure. QUEEN-EMPRESS v. R. HAWTHORNE, 13 A. 345 = 11 A.W.N. (1891) 102 ... 219

Collector.

See WAJIB-UL-ARZ, 15 A. 410.

Commitment to Sessions Court.

See SESSIONS COURT, 15 A. 205.

Compensation.

See FRIVOLOUS COMPLAINT, 15 A. 365.

Compromise.

(1) See CIV. PRO. CODE, s. 11, 14 A. 141.

(2) See PLEADER AND CLIENT, 13 A. 272.

Compromise decree.

Civil Procedure Code, s. 577—Unverified Sulahnamah*—Execution of decree—Mortgage, redemption of—Decree not specifying result of non-payment of mortgage—Debt within the time prescribed thereby for payment—Limitation—Act XV of 1877 (Indian Limitation Act), sch. ii, art. 179.*—Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so called *sulahnamah* being sent down to Lower Court for verification, it was found that the attendance of the parties for that purpose could not

Compromise decree—(*Concluded*). PAGE

be procured :—*Held* that the High Court was not justified in passing a decree under s. 577 of the Code of Civil Procedure in accordance with the terms of the unverified *sulahnamah*.

Where a decree for redemption of mortgage stated that the amount due under the mortgage should be paid within four months, but omitted to state what the result would be if the mortgage debt was not so paid :—*Held* that it was competent to the decree-holder to execute such a decree at any time within the period of limitation prescribed by art. 179 of the second schedule of Act XV of 1877. BANDHU BHAGAT v. SHAH MUHAMMAD TAQI, 14 A. 350=12 A.W.N. (1892) 40 ... 592

Conditional decree.

(1) See EXECUTION OF DECREE, 13 A. 400.
(2) See PRE-EMPTION, 14 A. 529.

Conditional sale.

(1) See MORTGAGE (CONDITIONAL SALE).
(2) See PRE-EMPTION, 14 A. 341.

Confiscation.

See FORFEITURE ACT, s. 20, 13 A. 108.

Consent decree.

See HINDU LAW (WIDOW), 15 A. 382.

Construction of document.

(1) *Construction of document—Deed—Sale-deed or deed of gift.*—A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—" Hath * * * nawasi apneki bai katai karke zar-i-samman tamam wokamal wasul paker baksh diya aur hiba kardiya."

The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was appearently no evidence external to the deed that any consideration had passed between the parties.

Held by EDGE, C.J., and TYRRELL and KNOX, JJ., that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale.

Per MAHMOOD, J., *contra*.—The lower Appellate Court having found that no consideration had passed, the deed must be considered as a deed of gift, though wearing the appearance of a sale deed, and, possession not having been given, under Muhammadan Law the gift was invalid. ANGAN LAL v. MUHAMMAD HUSAIN, 13 A. 409=11 A.W.N. (1891) 159. ... 262

(2) See EQUITABLE CHARGE, 15 A. 304.

Contract Act (IX of 1872).

S. 74—*Mortgage—Interest—Penalty.*—Where in a contract under which interest is payable it is agreed between the parties that if such interest be not paid punctually the defaulter shall be liable to pay interest at an enhanced rate (whether from the time of default or from the time when interest first became payable under the contract), such agreement does not come within s. 74 of the Indian Contract Act, and is to be construed according to the intentions of the parties as expressed therein and not as a stipulation for a penalty. Such agreement is to be enforced according to its terms unless it be found to have been when made unconscionable or fraudulent.

The English doctrine of penal stipulations as applied to such agreements considered and not followed. BANKE BEHARI v. SUNDAR LAL, 15 A. 232 (F.B.)=13 A.W.N. (1893) 130 ... 867

Contribution.

Act IV of 1882 (Transfer of Property Act), ss. 52 and 82—Contribution—Lis pendens.—Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and having obtained a decree caused property A to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage-debt. Before such sale, however, X had, in execution of a simple

Contribution.—(*Concluded*). PAGE

money-decree, acquired a share in property A. X accordingly sued for contribution from property B, in that, so far as his share in property A went, he had satisfied the mortgage debt, and ultimately obtained a decree in his favour ; but, during the pendency of that litigation, property B had been transferred to Y.

Held that Y must take the property subject to X's right to contribution from it in respect of the loss of his share in property A. BALDEO SAHA *v.* BAIJ NATH, 13 A. 371=11 A.W.N. (1891) 133 ... 236

Co-sharers.

Co-sharers—Payment of arrears of Government revenue by one co-sharer; effect of —Charge—Lien—Act XIX *of* 1873 (*N.W.P. Land Revenue Act*), *ss.* 146, 148, 150—166, 173—*Act* XII *of* 1881 (*N.W.P. Rent Act*), *ss.* 93, 171, et seq—*Act* IV *of* 1882 (*Transfer of Property Act.*), *s.* 100.—A co-sharer in a mahal, who was also the lambardar, paid arrears of Government revenue for the years 1882, 1883, and part of 1884, in respect of certain lands in the mahal which were the exclusive property of another co-sharer. These lands were subject to simple mortgages executed in 1873, upon which decrees were obtained in 1884, and had been sold in execution of these decrees in 1887. The co-sharer-lambardar, having obtained a decree in a Court of Revenue against the mortgagors under s. 93 (*g*) of the N.W.P. Rent Act (XII of 1881) for recovery of the arrears of revenue paid by him, sought to execute that decree under s. 177 of the Act by sale of the lands which had been sold in 1887 ; and thereupon the auction-purchaser at that sale objected under s. 178, and, the objection having been overruled, brought a suit as authorized by s. 181 in a Civil Court to establish his title to the lands and to have them protected from sale in execution of the Court of Revenue decree. This suit was decreed, and the decree, not having been appealed against, became final. Subsequently, the co-sharer-lambardar brought a suit in the Civil Court in which he claimed a decree for enforcement of lien by sale of the lands for the amount of the Court of Revenue decree, and for a declaration that the said lien "which is on account of Government," be declared preferential to the mortgages of 1873, the decrees thereon of 1884, and the sales under those decrees of 1887. He claimed this lien not only in respect of the arrears of Government revenue paid, but also in respect of future interest.

Held by the Full Bench (Mahmood, J., dissenting):—

(i) That the Legislature had not given or recognized in the North-Western Provinces any such right of charge or lien in favour of a person paying Government revenue as was claimed here, or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments.

(ii) That no Civil Court had jurisdiction to entertain the suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immoveable property could be sold to the prejudice of incumbrances to which it was subject.

(iii) That it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest, by declaration or otherwise, a decree of a Court of Revenue with the attributes of decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882.

(iv) That there is no general principal of equity to the effect that whoever having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquired a charge on the share of his defaulting co-sharer.

(v) That the principal of Maritime Civil Salvage had no application to th case, and that no analogy could exist between the case of a salvor in Maritime Civil Salvage and the case of a co-sharer in a mahal to whom s. 146 or s. 148 of the North-Westren Provinces Land Revenue Act (XIX of 1873) applied. SETH CHITOR MAL v. SHIB LAL, 14 A. 273 (F.B.)=12 A.W.N. (1892) 117. ...

Co-sharers. PAGE

Act XII *of* 1881, *ss.* 93 *(g)*, 205—*Act* XIX *of* 1873, *s.* 146—"*Proprietor*"—"*Co-sharer*"—*Civil and Revenue Courts, jurisdiction of.*—Where a lambardar brought a suit for arrears of land revenue payable by the proprietors against several defendants of whom some were co-sharers and others mortgagees in possession. *Held* that such suit was one of the nature contemplated by s. 93 *(g)* of the North-Western Provinces Rent Act, 1881, and was cognizable by a Court of Revenue as against all the defendants. LACHMAN SINGH v. GHASI, 15 A. 137=13 A.W.N. (1893) 63 ... 806

Costs.

(1) *Taxation—Competency of Judge before taxation to reconsider an order as to costs made by his predecessor in office—Certificate of pleader's fee—Civil Procedure Code, s. 373—Revision.*—A Subordinate Judge in granting the application of a plaintiff before him for permission to withdraw with leave to file a fresh suit in the same matter made an order as to costs in favour of the defendants in the following terms:—"As the case has not been contested to the bitter end, half the pleader's fees are allowed and the process expenses, &c., incurred in the case, except those already refused to the defendants. For travelling and incidental expenses defendants to put in a bill in one week, this to be subject to the decision of the Court after hearing both parties. The application under s. 373 of the Code of Civil Procedure is granted with leave to the plaintiff to bring a fresh suit for the same matter. Costs allowed to defendants as above."

The Judge who had made the above order having been transferred before taxation was completed.

Held that it was competent to his successor at taxation and before granting payment of the pleader's fees to consider whether the certificate given by a pleader as to the fee paid to him in the case was according to rule and to disallow payment of any fee not duly certified as paid.

Held also that the order under s. 373 of the Code of Civil Procedure was an order liable to revision. MARY DICK v. LOUISA DICK, 15 A. 169=13 A.W.N. (1893) 78 ... 826

(2) *Costs—Second appeal—Exercise of discretion of Court as to apportionment of costs.*—An appeal as to costs will lie from an appellate decree when the Courts has exercised its discretion as to costs arbitrarily, and not according to general principles. DAULAT RAM v. DURGA PRASAD, 15 A. 333=13 A.W.N. (1893) 110 ... 930

(3) See APPEAL, 13 A. 290.

(4) See ARBITRATION, 13 A. 300.

Court.

Act III *of* 1877, *s.* 73—*Criminal Procedure Code, s.* 195—*Registrar*—"*Court.*"—A Registrar acting under s. 73 of the Indian Registration Act, 1877, is not a Court within the meaning of s. 195 of the Code of Criminal Procedure. QUEEN-EMPRESS v. RAM LAL, 15 A. 141=13 A.W.N. (1893) 59 ... 809

Court executing decree.

See EXECUTION OF DECREE, 15 A. 324.

Court-fee.

(1) *Suit for declaratory decree—Declaration sought that certain property was joint ancestral property and not liable to attachment in execution of a certain decree—Court-fee payable on such suit.*—"The plaintiffs specified in their plaint as the reliefs sought by them:—(1) That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendant No. 4, dated 4th December, 1883, against the defendant No. 1. (2) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the amount of the decree and the value of the property at Rs. 6,000. (3) That any other relief which the Court may think the plaintiffs entitled to may also be granted".

Held, that the suit should be deemed a suit for one declaratory decree only, without consequently relief, and that a court-fee of Rs. 10 was sufficient. GOBIND NATH TIWARI v. G. MATI TAURAYAN, 13 A. 389=11 A.W.N. (1891) 139 ...

Court-fee—(*Concluded*). PAGE

(2) See APPELLATE COURT, 15 A. 112.
(3) See LIMITATION, 15 A. 65.
(4) See PAUPER APPEAL, 13 A. 305.
(5) See STAMP DUTY, 15 A. 117.

Court Fees Act (VII of 1870).

(1) S. 7—See VALUATION OF SUIT, 15 A. 378.
(2) S. 7 (5)—See VALUATION OF SUIT, 15 A. 63.
(3) S. 7, cl. (ix)—See MORTGAGE (REDEMPTION), 13 A. 94.

Criminal Appeal.

(1) *Appeal preferred by appellant in jail—Power of appellate Court to dispose of appeal in absence of the appellant—Criminal Pracedure Code*, ss. 420, 421, 422, 423.—Where an appeal, preferred under s. 420 of the Criminal Procedure Code, has been admitted by the appellate Court, and notice has been properly given under s. 422, and record of the case has been sent for and perused under s. 423, the appellate Court is competent, under the last-mentioned section, to dispose of the appeal though the appellant is not present aud is not represented by a pleader.

The only limitation placed by s. 423 on the powers of the appellate Court is that the Court, before disposing of the appeal, must peruse the record, and, if the appellant is present or is represented by a pleader, the appellant in person must be heard, or the pleader must be heard.

So *held* by the Full Bench, Mahmood, J., dissenting.

Held, by Mahmood, J., *contra*, that the principles of *audi alteram partem* and *ubi jus ibi remedium* and the provisions of s. 422 of the Code, as to notice of appeal, imply that, where an appeal is admitted and not summarily rejected under s. 421, the appellant must have a real opportunity of being heard; that in the passage in s. 423 "after perusing the record and hearing the appellant or his pleader, if the appears," the word "he" refers to the pleader, and must not be read as "either of them;" that, in any case, the words "if he appears" make it a condition precedent to the disposal of an appeal under the section that the appellant is heard, or at least has the choice of appearing; that the word "appears" refers to the *personal* appearance of the appellant; and that an appeal which has been admitted cannot be disposed of unless the appellant is before the appellate Court, or can be heard within the meaning of s. 423.

Semble, per Mahmood, J., but the High Court in appeal is competent to send for a criminal to appear before it to explain a difficulty in his case. QUEEN-EMPRESS v. POHPI, 13 A. 171 (F.B.)=11 A.W.N. (1891) 48 ... 107

(2) See APPEAL TO PRIVY COUNCIL, 15 A. 310.

Criminal Case.

See APPEAL TO PRIVY COUNCIL, 15 A. 310.

Criminal Practice.

(1) See CRIM. PRO. CODE, S. 161, 15 A. 11.
(2) See SESSIONS COURT, 15 A. 6.
(3) See SESSIONS TRIAL, 14 A. 521.

Criminal Procedure Code (Act X of 1882).

(1) *S.* 55—*Subsequent treatment of persons arrested under the provisions of s.* 55. Where a person is arrested by the police under the provisions of s. 55 of the Code of Criminal Procedure he should always be given the option of release on reasonable bail being supplied. *In re* PETITION OF DAULAT SINGH, 14 A. 45=11 A.W.N, (1891) 179 ... 401

(2) S. 107.—See SECURITY TO KEEP THE PEACE, 14 A. 49.

(3) S. 110—See FRIVOLOUS COMPLAINT, 15 A. 365.

(4) *Ss.* 133, 136, 140—*Act* XLV *of* 1860, *s.* 188—*Disobedience to order duly promulgated by public servant.*—A person against whom an order under s. 133 of the Code of Criminal Procedure is passed, who neglects to take any steps whatever in respect of such order within the time therein specified, either by way of compliance therewith or by

Criminal Procedure Code (Act X of 1882)—(*Continued*). PAGE

way of objection thereto in the manner prescribed by law, renders himself liable to be proceeded against under s. 188 of the Indian Penal Code without its being necessary to wait until the order has been made absolute. If such order is made absolute under s. 140 of the Code of Criminal Procedure, further proceedings can then be had, under s. 188 of the Indian Penal Code, against the person disobeying the order absolute. When an order under s. 138 of the Code of Criminal Procedure has been made absolute under s. 140 *ib.*, its validity cannot subsequently be questioned. QUEEN-EMPRESS v. BISHAMBAR LAL, 13 A. 577 = 11 A.W.N. (1891) 169 ... 365

(5) S. 145—See DISPUTE AS TO POST OF IMMOVEABLE PROPERTY, 13 A. 362.

(6) Ss. 145, 146—See MAGISTRATE, JURISDICTION OF, 15 A. 394.

(7) *S.* 161—*Act* XLV *of* 1860, *ss.* 191 *and* 193—*False evidence—Statement made to a police officer investigating a case—Mode of recording such statements.*—It is not necessary that the statement of a witness recorded under s. 161 of the Code of Criminal Procedure, 1882, should be elicited and recorded in the form of alternate question and answer. It is sufficient if such statement is substantially an answer to one or more questions addressed to the witness before the statement is made.

The provisions of ss. 191 and 193 of the Indian Penal Code do apply to the case of false statements made under s. 161 of the Code of Criminal Procedure, 1882.

It is not illegal, though unnecessary, for a police officer recording a statement under s. 161 of the Code of Criminal Procedure, 1882, to obtain the signatures of persons present at the time to authenticate his record of such statement. QUEEN EMPRESS v. BHAGWANTIA, 15 A. 11 = 12 A.W.N. (1892) 141 ... 722

(8) Ss. 161, 162—See STATEMENTS MADE TO THE POLICE, 15 A. 25.

(9) Ss. 191, 342—See COGNISANCE OF OFFENCE, 13 A. 345.

(10) *S.* 192—*Transfer—Procedure to be followed where a case has been transferred after the evidence for the prosecution has been recorded.*—A Magistrate to whose Court a case under s. 355 of the Indian Penal Code has been transferred at a stage when all the evidence for the prosecution had been taken, did not re-summon the witnesses for the prosecution but proceeded to act on their evidence as if it had been taken before himself;—*Held* that whether such procedure amounted to an irregularity of illegality or not, it was sufficiently prejudicial to the accused to warrant the conviction being quashed. QUEEN-EMPRESS v. BASHIR KHAN, 14 A. 346 = 12 A.W.N (1892) 19 ... 589

(11) S. 195—See COURT, 15 A. 141.

(12) Ss. 195, 404, 439—See SANCTION TO PROSECUTE, 15 A. 61.

(13) Ss. 195, 476, 487—See SESSIONS JUDGE, JURISDICTION OF, 14 A. 354.

(14) Ss. 233, 234, 537, 338, 339—See JOINT TRIAL OF ACCUSED, 14 A. 502.

(15) S. 268—See SESSIONS TRIAL, 13 A. 337.

(16) Ss. 268, 428, 537—See MATERIAL IRREGULARITY, 15 A. 136.

(17) Ss. 289, 292—See SESSIONS TRIAL, 14 A. 212.

(18) *S.* 337—*Pardon—Trial of person who having accepted a pardon has not fulfilled the conditions on which it was offered.*—Where a pardon has been tendered to any person in connection with an offence, he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the trial of the principal offence, and of any offence connected therewith, has been completed. QUEEN-EMPRESS v. SUDRA, 14 A. 336 = 12 A.W.N. (1892) 21 ... 582

(19) *Ss.* 342, 366, 367 *and* 540—*Sessions trial—Accused person, examination of—Witnesses, treatment of by Court—Order of examination—Judgment—Sentence.*—Questions put by the Court to an accused person under the provisions of s. 342 of the Code of Criminal Procedure, 1882, must be strictly limited to the purpose described in that section, *i.e.*, "of enabling the accused to explain any circumstances appearing in the evidence against him." The evidence referred to in that section is the evidence already given at the trial at the time when the Court puts questions to the accused.

Criminal Procedure Code (Act X of 1882)—(*Concluded*). PAGE

It is not intended by s. 540 of the Code of Criminal Procedure, 1882, that a Judge shall reverse the order of a Sessions trial and call the witnesses summoned for the defence before the case for the prosecution is closed.

It is illegal on the part of a Court to threaten witnesses with the penalties of the law unless they are evidently giving wilfully false evidence or persistently refusing to give evidence of facts which must be within their knowledge.

A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial before the judgment required by s. 367 of the Code of Criminal Procedure, 1882, has been written is illegal. QUEEN-EMPRESS v. HARGOBIND SINGH, 14 A. 242 =12 A.W.N. (1892) 83 ... 525

(20) Ss. 420 to 423—See CRIMINAL APPEAL, 13 A. 171.

(21) S. 423—See SESSIONS COURT, 15 A. 205.

(22) S. 476—See SANCTION TO PROSECUTE, 15 A. 392.

(23) S. 488—See MAINTENANCE, 13 A. 348.

(24) Ss. 488, 490—See MAINTENANCE, 15 A. 143.

(25) S. 155—See BIAS, 15 A. 192.

(26) S. 560—See FRIVOLOUS COMPLAINT, 15 A. 365.

Cross Claims.

See SET OFF, 15 A. 9.

Cross decrees.

Set-off—Civil Procedure Code, s. 246.—Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree, under the provisions of s. 246 of the Code of Civil Procedure, to plead such decree in answer to an application for execution of the decree against him singly. RAM SUKH DAS v. TOTA RAM, 14 A. 339=12 A.W.N. (1892) 12 ... 584

Cruelty.

See HUSBAND AND WIFE, 13 A. 126.

Custom.

See WAJIB-UL-ARZ, 13 A. 407.

Dacoity.

(1) *Act* XLV *of* 1860, *s.* 395—*Dacoity—Forcible removal of cows by Hindus from the possession of Muhammadans.*—Where a large body of Hindus acting in concert and apparently under the influence of religious feeling attacked certain Muhammadans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such cattle to their lawful owners. *Held* that the offence of which the Hindus were guilty was decoity under s. 395 of the Indian Penal Code, and not merely riot. QUEEN-EMPRESS v. RAM BARAN, 15 A. 299=13 A.W.N. (1893) 142 ... 908

(2) See RIOT, 15 A. 22.

Damages.

(1) See INTEREST, 13 A. 330.
(2) See TRESPASS, 13 A. 98.

Deadly weapon.

See LATHI, 15 A. 19.

Declaratory Suit.

(1) See COURT FEE, 13 A. 389.
(2) See EQUITABLE CHARGE, 15 A. 304.
(3) See RES JUDICATA, 13 A. 309.

Decree.

(1) See APPEAL, 14 A. 210 ; 15 A. 359.
(2) See REVISION, 14 A. 520.
(3) See APPELLATE COURT, 13 A. 320.

Decree and Judgment, Variance between. PAGE

See RES JUDICATA, 15 A. 3.

Decree, Amendment of.

(1) *Civil Procedure Code*, ss. 206, 209, 622—*Amendment of decree—Interest given by amendment in decree which was not given by the judgment—Revision.*—The plaintiffs sued for recovery of a certain sum of money and interest up to date of suit and for interest during the suit and subsequent to decree until satisfaction thereof. The Court in its judgment awarded the plaintiffs a specified sum of money and ordered that the rest of the plaintiffs' claim should stand dismissed. Subsequently the Court amended its decree by adding a decretal order for the payment to the plaintiffs by the defendant of interest during the pendency of the suit and after decree until the satisfaction of the debt. *Held* that it was illegal for the Court to decree the claim for interest by way of amendment of its decree and that the order so amending the decree was open to revision. HASAN SHAH v. SHEO PRASAD, 15 A. 121=13 A.W.N. (1893) 44 ... 795

(2) See APPEAL, 14 A. 226.

(3) See STEP-IN-AID OF EXECUTION, 13 A. 124.

Decree, Form of.

(1) See APPEAL, 14 A. 500.
(2) See EXECUTION OF DECREE, 13 A. 343.
(3) See MORTGAGE (SALE OF MORTGAGED PROPERTY), 13 A. 581.
(4) See POSSESSORY SUIT, 15 A. 412.

Decree, Construction of.

See EXECUTION OF DECREE, 13 A. 360.

Decree-holder.

(1) *Civ. Pro. Code*, s. 311—"*Execution of decree—Decree holder*."—The term "decree-holder" in s. 311 of the Code of Civil Procedure is not limited to the decree-holder who instituted the execution-proceedings, but include a decree holder who is entitled to come in and share in the proceeds under s. 295 of the Code. AJUDHIA PRASAD v. NAND LAL SINGH, 15 A. 318=13 A.W.N. (1893), 119 ... 920

(2) See EXECUTION OF DECREE, 15 A. 324.
(3) See PARTIES TO SUITS, 15 A. 407.

Delegation.

See REMAND, 14 A. 23.

Deposit of title-deeds.

See TRANSFER OF PROPERTY ACT, S. 59, 14 A. 238.

Desertion

See HUSBAND AND WIFE, 13 A. 126.

Discretion.

See COSTS, 15 A. 333.

Dismissal for default.

(1) See APPEAL, 15 A. 359.
(2) See LETTERS PATENT, 14 A. 361.
(3) See RESTORATION OF APPEAL, 15 A. 55.

Disobedience to lawful authority.

See CRIM. PRO. CODE, Ss. 133, 136, 140, 13 A. 577.

Dispute as to possession of immoveable property.

(1) *Crim. Pro. Code*, s. 145—*Order for interim possession of immoveable property—Point of time, possession at which is to be looked at in determining which party is entitled to an order under s.* 145.—The possession which a Magistrate acting under s. 145 of the Code of Criminal Procedure has to find and support, is possession at the time of the Magistrate's proceedings. Hence, where a Magistrate decided a question of possession under s. 145 upon evidence taken six months previously,—*held* that such order was irregular and unsustainable. *In the matter of the petition of* JAI LAL, 13 A. 362=11 A.W.N. (1891) 115 ... 230

(2) See MAGISTRATE, JURISDICTION OF, 15 A. 394.

District Judge, Jurisdiction of. PAGE

See TRANSFER OF SUIT, 14 A. 531.

Documentary Evidence.

Evidence—Document rejected as inadmissible but allowed to remain on the record —Civ. Pro. Code, s. 142-A.—Where a document tendered in evidence in a Court of first instance was rejected as inadmissible but was nevertheless allowed to remain on the record of the case. *Held*, that the mere fact of the document remaining on the record did not make it evidence in the Appellate Court, but it must be tendered as evidence in the Appellate Court and accepted thereby. HAR GOBIND v. NONI BAHU, 14 A. 356=12 A.W.N. (1892), 42 ... 596

Dying Declaration.

See MATERIAL IRREGULARITY, 15 A. 136.

Easement.

(1) *Way—Prescription—Landholder and tenant—Act* V *of* 1882 (*Easements*)—*Act* VIII *of* 1891.—There is nothing in Act VIII of 1891 to compel the Court to apply the Easements Act (V of 1882) to a suit commenced before Act VIII of 1891 came into force.

A tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as tenant, over other land belonging to his landlord.

So *held* by the Full Bench. UDIT SINGH v. KASHI RAM, 14 185 (F.B.) =12 A.W.N. (1892), 38 ... 489

(2) *Right of way—Easement of necessity—Act* XV *of* 1877, *s.* 26—*Act* IV *of* 1882, *s.* 8—*Easements "annexed"*—*Act* V *of* 1882, *ss.* 2, 5, 13, 19—44 *and* 45, *Vic., Chap.* 41, *s.* 6—*Act I of* 1872, *s.* 114, *Illustration* (*g*)—*Presumption against plaintiff from refusal to produce title-deeds.*—The plaintiffs were owners of an hotel and the defendant of certain adjacent property. The two properties had at one time been united, and at that time the manager of the hotel on behalf of the owner used to obtain water for the purposes of the hotel from a certain spring by means of a road which ran over land which subsequently became the defendant's. There was another, but smaller and much less convenient path from the hotel to the spring. The plaintiffs became owners of their portion of the property in 1886, and the defendant of his portion in 1888. The plaintiffs continued to use the above-mentioned road through the defendant's property for the purpose of getting water from the hotel until 1889, when the defendant refused to permit them any longer to use the road. The plaintiffs accordingly sued the defendant for a declaration of their right of way over the said road; but refused to put in evidence the deed under which they became owners of the hotel property.

Held upon these facts that the plaintiffs were not entitled to any right of way over the land in question. Owing to the non-production by the plaintiffs of their title-deeds, is must be presumed as against them that the evidence afforded thereby would be unfavourable to their claim, and no right of way in favour of the plaintiffs could be shown to arise otherwise, either as an easement of necessity or as an easement the intention to grant which might be inferred. WUTZLER v. SHARPE, 15 A. 270=13 A.W.N. (1893), 151 ... 890

Easement of necessity.

See EASEMENT, 15 A. 270.

Ejectment.

(1) See LANDLORD AND TENANT, 13 A. 403; 14 A. 223; 15 A. 189.
(2) See POSSESSORY SUIT, 13 A. 537.
(3) See VALUATION OF SUIT, 15 A. 63.

English Law.

See LANDLORD AND TENANT, 13 A. 571.

Equitable Charge.

Equitable charge on property purchased—A charge created in favour of the lender of the purchase-money.—By the acts of the parties, and their relations to

Equitable Charge—(*Concluded*). PAGE

one another, money borrowed by an agent for a principal for the purchase of property was rendered a charge upon the latter in the principal's hands, he being the real purchaser.

The lender of money, which he advanced to the nominal purchaser of property, who was the agent of the real purchaser, made the advance with the knowledge that it was for the principal's purposes, the latter only using the agent's name in the purchase. The nominal purchaser then executed a deed purporting to hypothecate the property as security for the loan. The lender, not having been paid, obtained a money-decree against the nominal purchaser, and, bringing the property to a Court sale, bought it himself. He could not, however, obtain entry of his name in the collectorate books, on the opposition of the real purchaser, and a suit brought by him for a declaration of his title, and his right to possession, against the nominal purchaser, was dismissed.

Afterwards, in the present suit, which the lender brought against both the real and the nominal purchasers, it was *held* that although, in regard to the previous judgment, it might be difficult to decide that the deed itself constituted a valid hypothecation, the facts of the case were sufficient to show that the lender of the money was entitled to a declaration that the advance of money for the purchase formed an equitable charge upon the property against the real purchaser. BHAGWATI PRASAD v. RADHA KISHEN SEWAK PANDE, 15 A. 304 (P.C.)=20 I. A. 108=6 Sar. P.C.J. 7 =17 Ind. Jur. 320 ... 911

Equitable Estoppel.

See LANDLORD AND TENANT, 14 A. 362.

Equitable Mortgage.

See MORTGAGE (EQUITABLE MORTGAGE).

Estoppel.

(1) See LANDLORD AND TENANT, 15 A. 189.

(2) See MORTGAGE (SALE OF MORTGAGED PROPERTY), 14 A. 509.

Evidence.

(1) *Evidence—Failure to prove an alleged transaction of lending money.*—Upon the evidence the decision of the High Court was affirmed as to a question of fact, *viz.*, whether the defendant's deceased father had, or had not, in his lifetime, in consideration of a payment to his order by the plaintiff, promised repayment. The High Court, reversing the decree of the first Court, had found that there had been no sufficient proof of the alleged transaction. This was the conclusion, also, on this appeal; and although it was possible that the money might (as it was indicated in the judgment) have been wrongly obtained from the plaintiff by persons about him, it was not shown to have been received by the alleged borrower. LACHMI PRASAD v. NARENDRO KISHORE SINGH, 14 A. 169 (P.C.)=19 I.A. 9= 6 Sar. P.C.J. 106=15 Ind. Jur. 750 ... 478

(2) *Acknowledgment of debt—Stamp—Act* I *of* 1879, *sch.* I, *art.* 1—*Act* XV *of* 1877, *s.* 19.—The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of Art. 1, sch. I, of the Indian Stamp Act, 1879, is a question in each case of the intention of the writer. Hence, were such a letter, written *ante litem motam*, before limitation in respect of the debt had expired, and at a time when other evidence of the debt was subsisting, was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation under the provisions of s. 19 of the Indian Limitation Act, 1877. *Held* that the said letter was not inadmissible in evidence by reason of its not having been stamped. BISHAMBAR NATH v. NAND KISHORE, 15 A. 56=12 A.W.N. (1892) 234 ... 752

(3) See APPELLATE COURT, 14 A. 366.

(4) See DISPUTE AS TO POSSESSION OF IMMOVEABLE PROPERTY, 13 A. 362.

(5) See DOCUMENTARY EVIDENCE, 14 A. 356.

(6) See JOINT TRIAL OF ACCUSED, 14 A. 502.

(7) See MAHANT, 13 A. 256.

(8) See MATERIAL IRREGULARITY, 15 A. 136.

(9) See STATEMENT MADE TO THE POLICE, 15 A. 25.

(10) See WAJIB-UL-ARZ, 13 A. 407.

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S. 114—See EASEMENT, 15 A. 270.

Examination of accused person.

(1) See COGNISANCE OF OFFENCE, 13 A. 345.

(2) See CRIM. PRO. CODE, Ss. 342, 366, 367, 540, 14 A. 242.

Exclusive possession.

See POSSESSORY SUIT, 15 A. 412.

Execution of Decree.

(1) *Decree of Appellate Court—What that decree should contain.*—Where the Judgment of an Appellate Court directed that a certain sum over and above what had been decreed to him in the Court of first instance should be decreed to the appellant, but the decree of the Appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based and to the decree of the Court of first instance,—

Held that though the decree as thus drawn was informal, yet as the amount due to the decree-holder was ascertainable from the record, and the decree was thus practically capable of execution, execution should, as a matter of equity, be granted to the decree-holder. JAWAHIR MAL v. KISTUR CHAND, 13 A. 343=11 A.W.N. (1891) 119 ... 217

(2) *Decree conditional on payment of a sum certain within a fixed time—Payment after time specified in decree.*—A Court having framed a decree conditioned on the payment by the plaintiff of a sum certain with a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed. RAM LAL DUBE v. HAR NARAIN, 13 A. 400 =11 A.W.N. (1891) 150 ... 256

(3) *Decree to be executed where there has been an appeal.*—Where the Appellate Court has modified the decree of the Court below, the decree of the Appellate Court supersedes entirely that of the lower Court, and is the only decree which can be executed. NOURANG RAI v. LATIF CHAUDHRY, 13 A. 394=11 A.W.N (1891) 148 ... 252

(4) *Insolvency—Two reliefs not concurrent—Civil Procedure Code, ss. 351, et seq.*—A decree-holder in respect of whose judgment-debtor an order declaring him insolvent and appointing a receiver has been passed under s. 351 of the Code of Civil Procedure, and whose decree has been placed on the list of the judgment debtor's scheduled debts, cannot, *pari passu* with the proceedings in insolvency, go on executing his decree in the ordidary way against that judgment-debtor. GAURI DATT v. SHANKAR LAL, 14 A. 358=12 A.W.N. (1892) 36 ... 597

(5) *Attachment—Incorrect description of property sought to be attached—Subsequent purchase of some property under a decree for pre-emption—Civil Procedure Code, s.274.*—In execution of a simple money decree against the holders of a *muafi* interest in a certain village, who did not possess any zamindari interest in that village, an attachment was obtained by the decree-holder in 1884, of "an eight biswas zamindari share of mauza *D*," and under that attachment a sale took place in January, 1886. Meanwhile, in December, 1885, a decree for pre-emption in respect of a sale by the judgment debtors in 1881 of their *muafi* interests in the village, was decreed in favour of persons who were not parties to the litigation in which the attachment of 1884 was effected. The plaintiffs (who were in possession) sued for a declaration of their right to the *muafi* interests as against the auction-purchaser under the sale of January, 1886.

Held that the attachment in 1884 was not a good attachment of the *muafi* interests of the judgment-debtors, and the auction purchaser could not be held to have purchased those *muafi* interests, and the title of the plaintiffs under their pre-emptive decree of December, 1885, must prevail. HARGU LAL SINGH v. MUHAMMAD RAZA KHAN, 13 A. 119=11 A.W.N. (1891) 16 ... 74

(6) *Attachment of debt—Order prohibiting creditor from recovering debt—Suit for rent under attachment—Civil Procedure Code, s. 268 (a)—Act XV of 1877 (Limitation Act), s. 15—Injunction or order staying a suit*—S. 268, cl. (a) of the Civil Procedure Code, does not mean that, while a debt is under attachment, the person to whom the debt was originally owing,

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should be barred from bringing a suit in respect of it. What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor.

Semble.—An order of attachment under S. 268 of the Civil Procedure Code is not an injunction or order staying a suit within the meaning of s. 15 of the Limitation Act (XV of 1877). SHIB SINGH v. SITA RAM, 13 A. 76=10 A.W.N. (1890) 194 ... 47

(7) *Attachment as joint family property of property in fact partitioned—Joint suit by holders of two shares to have their shares declared not liable to attachment—Misjoinder of causes of action—Civil Procedure Code, ss.* 26,31,45, 53, 578 —A decree-holder in execution of a decree against one G.L. attached a house as belonging to G.L. and his two sons forming a joint Hindu family. The sons objected that the house had previously been partitioned and was held by them and their father in separate shares, but their objection was disallowed. They then brought a joint suit for a declaration that their respective portions of the house were not liable to attachment in execution of a decree against their father. No objection was taken to the frame of that suit, and the Court of first instance gave the plaintiffs a decree on the finding that partition had in fact taken place prior to the suit in which the defendant, judgment-creditor, had obtained his decree. On appeal by the judgment-creditor, the lower Appellate Court dismissed the suit entirely, on the ground of misjoinder of causes of action. The plaintiffs appealed to the High Court.

Held on these facts that the plaintiffs should have been allowed to amend their plaint by striking out the name of one of them, and that under the circumstances s. 578 of the Code of Civil Procedure would apply. BEHARI LAL v. KODU RAM, 15 A. 380=13 A.W.N. (1893) 150 ... 962

(8) *Mortgage—Decree against the person and other property of the jugment-debtor as well as against the property mortgaged—Act* IV *of* 1882 (*Transfer of Property Act*), *s.* 90.—In a suit for enforcement of a mortgage security the plaintiffs prayed for a decree both as against the mortgaged property and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressely provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two of the judgment-debtors were to be liable.

Held that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree-holder to obtain a separate decree under s. 90 of the Transfer of Property Act (IV of 1882). BATAK NATH v. PITAMBAR DAS, 13 A. 360=11 A.W.N. (1891) 127 ... 228

(9) *Limitation—Execution of decree—Act* XV *of* 1877 (*Limitation Act*), *sch ii, art.* 179 *cl.* (2)—"*Appeal*"—"*Final decree or order*"—*Decree against defendants severally—Appeal by some only of the judgment-debtors—Civil Procedure Code, s.* 544.—Where a decree for possession of immoveable property was passed not jointly, but severally, as against all the defendants individually, and specifically stated the proportions of which they were severally in possession as also the costs separtely payable by each of them to the plaintiff ; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non-appealing defendants, but referred merely to the specific property alleged to be in the appellants' hands :—

Held by the Full Bench (*Brodhurst* and *Mahmood, JJ.* dessenting) that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree, was barred by limitation, and clause 2 of art. 179, sch. ii of the Limitation Act (XV of 1877), did not apply so as to make time run from the proceedings in the appeal preferred by the other defendants. That clause appeals only to those cases in which the parties to the execution proceedings were parties to the appeal, or to the class of cases to which s. 544 of the Civil Procedure Code applies.

Execution of Decree—(*Continued*). PAGE.

Held by *Brodhurst* and *Mahmood, JJ.*, *contra*, that art. 179, clause 2, must be construed as applying without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original suit. MASHIAT-UN-NISSA v. RANI, 13 A. 1 (F B) = 10 A.W.N. (1890) 207 ... 1

(10) *Execution of decree—Court executing decree not competent to go behind its terms—Act IV of 1882, ss. 88, 90.*—Where a decree on a hypothecation bond besides decreeing sale of the hypothecated property purported also to grant relief over against the person and non-hypothecated property of the judgment-debtor and such decrees remaining unchallenged became final in its entirety.

Held that it was competent to the decree-holder by application for execution of the decree to proceed against the non-hypothecated property of his judgment-debtor and it was not necessary for him to apply to the Court for a decree under s. 90 of the Transfer of Property Act. LALJI LAL v. C.J. BARBER, 15 A. 334 = 13 A.W.N. (1893), 121 ... 931

(11) *Act IV of 1882 (Transfer of Property Act), s. 90—Nature of decree contemplated by that section.*—The plaintiff obtained a decree on a hypothecation bond, the decree providing that the money secured by the bond was to be realised by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment-debtor. The hypothecated property was sold and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied for enforcement of that portion of the decree which related to the other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under s. 90 of the Transfer of Property Act (IV of 1882). This objection was allowed and the decree-holder applied for and obtained a decree under the said section. The judgment-debtor then appealed against that decree on the ground, amongst others, that, looking to the terms of the original decree, the application under s. 90 was superfluous.

Held, that the decree contemplated by s. 90 of the Transfer of Property Act is in fact an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. DURGA DAI v. BHAGWAT PRASAD, 13 A. 356 = 11 A.W.N. (1891) 104 ... 226

(12) *Civil Procedure Code, s. 158—Act VI of 1892, s. 4.—Execution of decree—Application for execution struck off in consequence of non-payment of talbana—Subsequent application for execution.*—An application for execution of a decree by attachment of immoveable property having been presented by a decree-holder, the Court executing the decree ordered that the costs of such attachment should be deposited by the decree-holder on or before a certain specified date. The costs of attachment were not deposited by the day named in the order above referred to and the Court thereupon passed the following order :—"This case came on for hearing to-day ; as the decree-holder has not deposited the costs of attachment, &c., therefore it is ordered that the case be struck off for default."

Held, that whether this second order was an order under s. 158 of the Code of Civil Procedure deciding the application for attachment, or whether its effect was merely to remove the application from the file of pending applications without deciding it, in either case no fresh application (being of a precisely similar nature) was entertainable, though in the latter case, possibly the former application might be renewed. PHEKU v. PIRTHI PAL SINGH, 15 A. 49 = 12 A.W.N. (1892) 222 ... 747

(13) See APPEAL, 14 A. 210.

(14) See CIV. PRO. CODE, S. 230.

(15) See CLAIM TO ATTACHED PROPERTY, 13 A. 339.

(16) See COMPROMISE DECREE, 14 A. 350.

(17) See DECREE-HOLDER, 15 A. 318.

(18) See EXECUTION PROCEEDINGS, 13 A. 278.

Execution of Decree—(*Concluded*). PAGE

(19) See HINDU LAW (ALIENATION), 15 A. 339.
(20) See HINDU LAW (JOINT FAMILY), 14 A. 190.
(21) See HINDU LAW (MAINTENANCE), 15 A. 371.
(22) See MORTGAGE (SIMPLE MORTGAGE), 13 A. 28.
(23) See RES JUDICATA, 13 A. 53; 13 A. 564; 14 A. 64; 14 A. 417.
(24) See STAY OF EXECUTION, 15 A. 196.
(25) See STEP IN AID OF EXECUTION, 13 A. 89.
(26) See STEP-IN-AID OF EXECUTION, 13 A. 124; 13 A. 211.
(27) See TRESPASS, 13 A. 98.

Execution Proceedings.

(1) *Execution of decree—Application for order absolute for sale—Mortgage—Act IV of 1882 (Transfer of Property), ss.* 88 and 89.—The holder of a decree under s. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree.

Held that this was a good application under s. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters. OUDH BEHARI LAL v. NAGESHAR LAL, 13 A. 278 (F.B.)=11 A.W.N. (1891) 83 ... 174

(2) See LIMITATION ACT, art. 179 (5) 15 A. 84.
(3) See SEPARATE DECREE, 13 A. 383.

Execution Sale.

(1) *Act I of 1879, s. 46; sch. i, art. 16—Stamp—Sale certificate—Sale subject to incumbrance.*—Where property subject to an incumbrance is sold by auction in execution of a decree, the sale certificate should be stamped according to the amount of the purchase money, and not according to the amount of the purchase money together with the incumbrance. JWALA PRASAD v. RAMNARAIN, 15 A. 107=12 A.W.N. (1892) 243 ... 785

(2) See APPEAL, 13 A. 569.
(3) See APPEAL, 14 A. 201.
(4) See PARTIES TO SUITS, 15 A. 407.
(5) See STEP-IN-AID OF EXECUTION, 13 A. 211.

Ex-proprietary Tenant.

(1) See LANDLORD AND TENANT, 15 A. 219, 231.
(2) See RELINQUISHMENT, 13 A. 396.

False Certificate of attendance.

See USING FORGED DOCUMENT, 15 A. 210.

False Complaint.

Act XLV *of* 1860, s. 182—*False information to a public servant—False complaint to the police.*—Whereas the result of a police investigation it appears that a complaint made to the police of the commission of an offence punishable under the Indian Penal Code is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of his allegations before his prosecution under s. 182 of the Indian Penal Code is proceeded with. QUEEN EMPRESS v. RAGHU TIWARI, 15 A. 336=13 A.W.N. (1893), 111 ... 932

False Evidence.

(1) See CIV. PRO. CODE, S. 16:, 15 A. 11.
(2) See SESSIONS JUDGE, 14 A. 354.

Findings of fact.

See APPEAL, 15 A. 413.

Forfeiture Act, 1859.

S. 20—*Forfeiture of rebel's property—Limitation.*—A Hindu widow in possession of a six annas zamindari share of her husband's, sold the share in 1855 to

Forfeiture Act, 1859—(*Concluded*). PAGE

persons who, in 1858, were convicted of rebellion, and their estates, including the share, were confiscated by Government. The share was granted to other persons as a reward for loyalty, and remained in their possession until 1886, when a suit for possession and mesne profits was brought, just before the expiry of twelve years from the widow's death, by a reversioner to her husband's estate, on the ground that the sale of 1855 could not affect more than the widow's life-interest, and that nothing more had been confiscated by the Government in 1858 and granted to the defendants. The plaintiff had taken no stepts in 1855 to question the sale, or in 1858 to assert his claims as reversioner.

Held that the suit was barred by s. 20 of Act IX of 1859. RAMPHUL TIWARI v. Bodri NATH, 13 A. 108 ... 68

Former Judgment.

Evidence afforded by prior records—False personation—Res judicata.—Where the main question was whether, in fact, the heir to an estate, a minor in possession through the manager under the Court of Wards, had been, as the plaintiff alleged him to have been, put forward by false personation, a Divisional Court of appeal decided in favour of the defence and dismissed the suit.

Pending this decision, a Full Bench disposed of questions of law as to the admissibility in evidence in this suit of the judgment and record in a prior suit, in which it had been found, as a fact, that there had been at one time, in existence an heir born of the parentage which the defence in this suit alleged to be that of the minor defendant.

It was disputed in the present suit, whether the minor defendant was the same individual whom his alleged mother, the defendant in the former suit (there being the same plaintiff in both suits), stated to be her son ; also, whether, if that identity were proded, the suit would be barred as *res-judicata.*

This latter question was decided in the negative by the Full Bench, which held the judgment in the former suit not to be conclusive upon the present one ; but also, held the record to be admissible. There was no appeal from that decision ; and on an appeal from the decree of the Divisional Court, the Judicial Committee affirmed, on the facts, the decree made. PALAKDHARI SINGH v. COLLECTOR OF GORAKHPUR, 15 A. 261 (P.C.) = 6 Sar. P.C.J. 378 = 17 Ind. Jur. 167 ... 884

Frivolous Accusation.

See FRIVOLOUS COMPLAINT.

Frivolous Complaint.

Criminal Procedure Code, s. 560—Compensation for frivolus or vexatious complaint—Such compensation inapplicable to a complaint under s. 110 of the Code.—The ward of compensation under s. 560 of the Code of Criminal Procedure must be in respect of a frivolous and vexatious accusation of an offence of which the accused person has been discharged or acquitted. That section is not applicable to an application made to a Magistrato solely with a view to his taking proceedings under s. 110 of the Code. QUEEN-EMPRESS v. LAKHPAT, 15 A. 365 = 13 A.W.N. (1893), 114 952

General Clauses Act, 1868.

(1) S. 2, cls. 5 & 6—See MORTGAGE (PRIORITY), 13 A. 432.

(2) S. 3, cl. 13—See APPELLATE COURT, 13 A. 320.

(3) See STANDING CROPS, 14 A. 30.

Gift.

See PRE-EMPTION, 14 A. 533.

Government Revenue.

See MORTGAGE (SALE OF MORTGAGED PROPERTY), 13 A. 195.

Guardian ad litem.

See GUARDIAN AND WARD, 14 A. 35.

Guardian and Ward.

Guardian and Ward—Guardian ad litem—*How long appointment of guardian* ad litem *remains in force—Charge of guardian on application of ward—*

Guardian and Ward—(*Concluded*). PAGE

Act VIII *of* 1890 (*Guardian and Wards Act*). s. 10.—Where a guardian *ad-litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant, the Court will appoint the guardian so named in the absence of any special and valid objection to such person. JWALA DEI v. PIRBHU, 14 A. 35=11 A.W.N. (1891), 192 ... 394

Guardians and Wards Act, 1890.

S. 10.—See GUARDIAN AND WARD, 14 A. 35.

High Court, Jurisdiction of.

(1) *Jurisdiction—Civil and Revenue Courts—Appeal—Erroneous exercise of Jurisdiction by subordinate Court capable of being made a ground of appeal to the High Court.*—Where the High Court is the Court of appeal from any particular subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal before it, the High Court has power as an appellate Court to set right the proceedings of such subordinate Court. JWALA PRASAD v. SALIG RAM, 13 A. 575=11 A.W.N. (1891), 158 ... 363

(2) See COMPROMISE DECREE, 14 A. 350.

(3) See REVISION, 13 A. 277.

(4) See REVISION, 14 A. 413.

(5) See REVISION, 15 A. 405.

High Court, Powers of.

See APPEAL, 15 A. 413.

High Court Sessions.

See SESSIONS TRIAL, 14 A. 521.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—CUSTOM.
4.—DEBTS.
5.—GIFT.
6.—INHERITANCE.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE.
10.—MINORITY AND GUARDIANSHI .
11.—PARTITION.
12.—RELIGIOUS ENDOWMENT.
13.—REVERSIONERS.
14.—SUCCESSION.
15.—WIDOW.

——1.—Adoption.

(1) *Adoption by widow to deceased husband—Deed of adoption, construction of—Powers of adoptive mother.*—The widow of a separated Hindu made an adoption to her deceased husband under a power to adopt conferred upon her by her husbands's will. The deed by which the adoption, the validity of which was not disputed, was evidenced, contained, amongst others, the following conditions;—" that during my, (*i.e.*, the adoptive mother's) life-time I shall be the owner and manager of the estate and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukarji born of me."

Held that these words conferred upon the widow an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made, so far as her position as

Hindu Law—1.—Adoption—(*Concluded*). PAGE

manager was concerned. KALI DAS v. BIJAI SHANKAR, 13 A. 391 = 11 A.W.N. (1891) 141 ... 250

(2) *Benares School—Adoption—Adoption of only son—Maxim,* quod fieri non debet factum valet.—According to the Benares School of Hindu Law, the giving in adoption of an only son is sinful, and to that extent contrary to the Hindu Law; but the adoption of such a son, having taken place in fact, is not null and void; and the maxim *quod fieri non debet factum valet* is applicable and should be applied to such an adoption.

So *held* by the Full Bench. BENI PRASAD v. HARDAI BIBI, 14 A. 67 (F.B.) = 12 A.W.N. (1892) 161 ... 415

(3) *Custom—Adoption of sisters's son—Bohra Brahmans.*—Amongst the Bohra Brahmans of the northern districts of the North-Western Provinces, there exists a valid and legal custom in virtue of which a person of that caste can adopt his sister's son. CHAIN SUKH RAM v. PARBATI, 14 A. 53 = 11 A.W.N. (1891) 222 ... 406

(4) See RES JUDICATA, 15 A. 327.

——2.—Alienation.

(1) *Joint Hindu family—Hypothecation by father of joint ancestral estate—Property described as* "haq haquq zamindari apna"*—Decree enforcing hypothecation—Attachment of estate—Suit by sons for declaration that only father's interest affected by hypothecation—Burden of proof.*—Where a Hindu son comes into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt which he desires to be exempted from paying was of such a nature that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate approved.

In a suit by the sons of a Hindu for a declaration that certain joint ancestral property was not liable to sale in execution of a decree upon a hypothecation-bond of such property executed by their father in which the property was described as "*haq haquq zamindari apua,*" and that the bond and decree were limited to the father's own interest,—*held* by the Full Bench that, if the plaintiffs could not show that the interest which was hypothecated was a limited interest, the Court must take it, as against the plaintiffs, that the family property was hypothecated. PEM SINGH v. PARTAB SINGH, 14 A. 179 (F.B.) = 12 A.W.N. (1892) 49 ... 484

(2) *Hindu Law—Mitakshara—Joint Hindu family—Mortgage—Attempt by one co-sharer to mortgage his undivided share on his own account—Effective sale of part of such a share in execution of a decree against the co-sharer—Interest allowed on the mortgage debt according to the contract.*—Under the Mitakshara, as administered by the High Courts of the North-West Provinces and Bengal, an undivided share in ancestral estate, held by a member of a joint family in coparcenary, cannot be mortgaged by him on his own private account, without the consent of those who share the joint estate. An attempted mortgage by one of them does not create a charge which can have priority over purchases at execution sales made *bona fide* and without notice of it; such purchasers having acquired the right of compelling the partition which the debtor might have compelled, had he been so minded, before the alienation by the sale of his share.

As to the invalidity of the attempted mortgage, *Sadabart Prasad Sahu* v. *Fooltash Koer* referred to, and approved. As to the right of the purchaser of the share at a judicial sale, *Deen Dyal* v. *Jugdeep Narain Singh,* followed, and reference made to the distinction, mentioned in the latter case, between a voluntary alienation without such consent, and an involuntary one as the result of the execution of a decree against the co-parcener, and a judicial sale thereunder.

Hindu Law—2.—Alienation—(*Concluded*). PAGE

A father and son composed a joint family, holding a share of ancestral lands. The son mortgaged to a banker, to secure a loan, his interest in the undivided share. His father, without having notice of the mortgage, purchased in good faith, portions of the estate forming part of the son's joint share, at sales in execution of decrees against the latter, obtained by his creditors.

Held, that the son's interest in the portions so sold, passed to the father, whose rights therein as purchaser at the judicial sales were not affected by the mortgage. The mortgagee could, in execution of a money decree, which he might obtain against the mortgagor, personally attach and bring to a judicial sale such parts of the mortgaged property as had not already been sold, but not in virtue of the mortgage.

Interest on the money lent was contracted to be payable,—" even if a suit should be instituted " at the rate fixed for the period for which the money was lent. *Held*, that interest must be decreed at this rate, according to the contract, down to the institution of the suit. BALGOBIND DAS v. NARAIN LAL, 15 A. 339 (P.C.) = 20 I.A. 116 = 6 Sar. P.C.J. 313 = 17 Ind. Jur. 425 ... 934

(3) See HINDU LAW (WIDOW), 14 A. 420.

——3.—Custom.

See HINDU LAW (ADOPTION), 14 A. 53.

——4.—Debts.

(1) *Hindu Law—Joint Hindu family—Liability of sons during their father's life-time for his antecedent debts.*—*Held* by the Full Bench that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the sons were born which purported to mortgage the joint family property, the consideration having been, with a trifling exception, money advances antecedently made by the mortgagee to him not as manager of the family or with the authority of the sons or for family purposes, but not for purposes of immorality or for purposes which if the father was dead would exonerate the sons from the pious obligation of paying such debts of the father.

Held also that the decree in such a suit should be a decree for sale of the mortgaged property under s. 88 of Act No. IV of 1882. BADRI PRASAD v. MADAN LAL, 15 A. 75 (F.B.) = 13 A.W.N. (1893), 52 ... 765

(2) See HINDU LAW (JOINT FAMILY), 13 A. 216.

——5.—Gift.

Hindu Law—Hindu widow—Gift.—The widow of a separated Hindu being in possession, as such widow, of property left by her husband, executed a deed of gift of such property in favour of her daughter's son, her daughter being also a party to the deed. Subsequently to the execution of this deed of gift the executant's daughter gave birth to another son :—*Held*, that the deed in question could not affect more than the life interests of the executant and her daughter, and could not operate to prevent the succession (as to a moiety of the property) opening up in favour of the subsequently-born son on the death of the survivor of the two ladies. DULI SINGH v SUNDAR SINGH, 14 A. 377 = 12 A.W.N. (1892) 33 ... 610

——6.—Inheritance.

See SUCCESSION, 13 A. 573.

——7.—Joint family.

(1) *Joint Hindu family—Mortgage executed by father on the whole joint family property in respect of his own debt—Liability of sons—Burden of proof.*—The father of a joint and undivided Hindu family executed a mortgage over the whole immoveable property of the joint family. The mortgagees having obtained a decree on their mortgage and having put an attachment on the joint family property, the minor sons of the mortgagor sued for a declaration that their interest in the attached property was not liable under the mortgagees' decree, inasmuch as the debts in respect of which the mortgage had been executed had been contracted for immoral purposes and were not such as they, by the Hindu law, were under a pious obligation to discharge. *Held*, that the burden of proving that the debts in question were contracted for the purposes alleged lay on the plaintiffs. BHAWANI BAKHSH v. RAM DAI, 13 A. 216 = 11 A.W.N. (1891) 57 ... 136

Hindu Law—7.—Joint family—(*Concluded*). PAGE

(2) *Joint Hindu family—Simply money decree against father how far binding upon son's interest in the joint family property—Execution of decree—Civil Procedure Code*, s. 237.—With reference to the question whether the whole joint family property or only the interest of the father therein is liable under a decree obtained against a Hindu father, *held* that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or of simple money decree, it may be presumed that the family property and not the mere undivided share of the father was sold.

The specification required by S. 237 of the Civil Procedure Code, of the judgment-debtor's share or interest in immoveable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share, which was sought to be attached, and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, the Court would hold unless something to the contrary appeared, that the sale was of that share and interest only. MUHAMMAD HUSAIN v. DIP CHAND, 14 A. 190=12 A.W.N. (1892), 53 ... 492

(3) See EXECUTION OF DECREE, 15 A. 380.

(4) See HINDU LAW (ALIENATION), 14 A. 179; 15 A. 339.

(5) See HINDU LAW (DEBTS), 15 A. 75.

(6) See HINDU LAW (PARTITION), 13. A. 165; 14 A. 498.

——8.—Maintenance.

(1) *Hindu widow—Maintenance—Attachment of property assigned in lieu of maintenance—Civil Procedure Code*, s. 266, *cl.* (1).—*Held* that an interest in the income of immoveable property assigned by way of maintenance to a Hindu widow by the members of a her family is not capable of being attached and sold in execution of decree against the widow. GULAB KUAR v. BANSIDHAR, 15 A. 371=13 A.W.N. (1893) 149 ... 956

(2) See HINDU LAW (WIDOW), 15 A. 382.

——9.—Marriage.

See HUSBAND AND WIFE, 13 A. 126.

——10.—Minority and Guardianship.

See HINDU LAW (PARTITION), 14 A. 498.

——11.—Partition.

(1) *Evidence of partition of joint family—Presumption.*—In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of a share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged, as a ground of appeal, that the Courts below, in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family. RAM CHARAN v. DEBI DIN, 13 A. 165 (P.C.)=5 Sar. P.C J. 616 ... 103

(2) *Joint Hindu family—Partition to detriment of minor—Suit by minor on attaining majority to recover his full share—Limitation—Act* XV *of* 1877, *sch.* ii, *arts.* 95 and 96.—Certain members of a joint Hindu family partitioned the family property among them in such a way as to give one member of the family, who at the time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle, though the uncle was not the natural guardian of the minor, nor in any other way entitled to deal with the minor's property. The minor on attaining majority brought a suit for recovery of the full share to which he was entitled. *Held* that this was not a suit for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor. The suit was therefore not subject to the limita-

Hindu Law—11—Partition—(*Concluded*). PAGE

tion of three years prescribed by arts. 95 and 96 of the second schedule of Act No. XV of 1877. LAL BAHADUR SINGH v SISPAL SINGH, 14 A. 498=12 A.W.N. (1892) 61 ... 687

—— 12.—Religious Endowment.

See MAHANT, 13 A. 256.

—— 13.—Reversioner.

(1) *Hindu Widow—Reversioner—Right to sue—Next presumptive reversioner—Intervening woman's estate.*—The plaintiff, grandson (daughter's son) of a deceased Hindu, sued during the lifetime of his mother to set aside a will made by his mother's father in favour of an idol under the management of his stepmother, the testator's second wife.

Held, that, there being no evidence of collusion or connivance, the plaintiff, not being the next reversioner, was not competent to maintain the suit. The fact that his mother's estate, should it ever come into her possession, would be only a limited estate, would not affect the plaintiff's subsisting position in respect of his right to sue. ISHWAR NARAIN v. JANKI, 15 A. 132=13 A.W.N. (1893) 49 ... 802

(2) See LIMITATION ACT, Art. 141, 14 A. 156.

—— 14.—Succession.

See MAHANT, 13 A. 256.

—— 15.—Widow.

(1) *Hindu widow—Burden of proving necessity where a Hindu widow attempts to alienate property held by her for her widow's estate.*—In order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led, on reasonable ground, to believe that there was.

In a suit upon a mortgage of such property executed under the authority of a widow borrowing money, the point whether the loan was necessary was expressed in the issues in the form of a question how far the defendants' objections, grounded on the absence of necessity, were tenable. This was obviously an incorrect mode of trying the suit, because it assumed that it was for the defendants to show absence of necessity, and did not accord with the obligation upon a mortgagee, claiming under a widow, to prove a valid mortgage. It was sufficient to defeat the suit that, upon the whole case, there had been no proof of the lendor's having fulfilled the legal obligation to inquire and satisfy himself that the widow, from whom he was taking a charge upon her husband's inheritance, had a proper justification for so charging it. AMARNATH SAH v. ACHAN KUAR, 14 A. 420 (P.C.)=19 I.A. 196=6 Sar. P.C.J. 197 ... 637

(2) *Maintenance—Suit on a consent decree to recover arrears of maintenance—Unchastity of widow—Starving maintenance.*—A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by the husband's relatives, either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's suit to enforce her right. Upon proof of such subsequent unchastity the widow is entitled to no maintenance whatever. DAULTA KUARI v. MEGHU TIWARI, 15 A. 382=13 A.W.N. (1893) 149 ... 963

(3) See HINDU LAW (ADOPTION), 13 A. 391.

(4) See HINDU LAW (GIFT), 14 A. 377.

(5) See HINDU LAW (REVERSIONER), 15 A. 132.

Hundi.

See STAMP DUTY, 13 A. 66.

Husband and Wife.

Hindu Law—Suit for restitution of conjugal rights—Desertion—Cruelty—Limitation—Act XV of 1877 (Limitation Act), s. 23, sch. ii, Nos. 34, 35 and 120.—The texts of the Hindu law relating to conjugal co-habitation and imposing restrictions upon the liberty of the wife, and placing her under the

Husband and Wife—(*Concluded*). PAGE

control of her husband, are not merely moral precepts, but rules of law. The rights and duties which they create may be enforced by either party against the other and not exclusively by the husband against the wife. The Civil Courts of British India, as occupying the possession in respect of judicial functions, formerly occupied in the system of Hindu Law by the King, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband.

It is not necessary, as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant. The provisions of arts. 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits of this description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Muhammadans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with s. 23 of the Limitation Act.

Desertion by a wife of her husband is permitted by the Hindu Law under certain circumstances, but the insanity of the husband will not justify his desertion by the wife. In any case desertion does not terminate the relation of husband and wife. A suit for restituion of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant. BINDA v. KAUNSILIA, 13 A. 126 = 11 A.W.N. (1891) 18 ... 79

Hypothecation.

(1) See EQUITABLE CHARGE, 15 A. 301.

(2) See MORTGAGE (SIMPLE MORTGAGE), 13 A. 28.

Illegal Agreement.

See CHAMPERTY, 15 A. 352.

Immoveable property.

(1) See MAGISTRATE, JURISDICTION OF, 15 A. 394.

(2) See STANDING CROPS, 14 A. 30.

Injunction.

(1) See APPEAL, 15 A. 8.

(2) See EXECUTION OF DECREE, 13 A. 76.

(3) See MORTGAGE (GENERAL), 14 A. 162.

Insolvency.

(1) *Insolvency—Procedure in case of dishonest applicant—Powers of the Court—Civil Procedure Code, ss.* 350, 359*—Construction of statutes—Reference to statement of Objects and Reasons and to Report of Select Committee.*—A Court is competent to take action under s. 359 of the Civil Procedure Code at the instance of a creditor, after the hearing under s. 350 has determined.

(*Per* STRAIGHT, J.—It is desirable that an application under s. 359 should be made immediately or as soon as possible after the hearing under s. 350, but a delay of some months will not make the application unentertainable.)

When once any of the frauds referred to in clauses (*a*), (*b*) or (*c*) of s. 359 have been proved at a hearing under s. 350, the Court must under s. 359 either itself pass sentence on the applicant who has committed such frauds, or must send him to a Magistrate to be dealt with according to Law The Court has no option to decline to adopt either of these courses.

In acting under s. 359, the Court does not re-try the questions of fact decided by it at the hearing under s. 350, but has to proceed upon the

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findings come to at that hearing. An applicant for a declaration of insolvency who does not avail himself of his right of appeal from the order rejecting his application, is concluded by the findings of fact at the hearing under s. 350, and cannot afterwards question them.

In construing a statute the Court cannot refer to the statement of Objects and Reasons attached to a Bill, or to the report of a Select Committee, or to the debates of the Legislature, but can only look to the statute itself. KADIR BAKHSH v. BHAWANI PRASAD, 14 A. 145=12 A.W.N. (1892) 6... 463

(2) See EXECUTION OF DECREE, 14 A. 358.

(3) See PRINCIPAL AND SURETY, 13 A. 10; 15 A. 183.

Interest.

(1) *Mortgage-bond—Interest post diem—Damages—Act* IV *of* 1882 (*Transfer of Property Act*), ss. 67 *and* 86.—Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of contract.

Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages no distinction is to be drawn between simple bonds and mortgage bonds. SRI NIWAS RAM PANDE v. UDIT NARAIN MISR, 13 A. 330=11 A.W.N. (1891) 66 ... 209

(2) See CONTRACT ACT, s. 74, 15 A. 232.

(3) See DECREE, AMENDMENT OF, 15 A. 12.

(4) See HINDU LAW (ALIENATION), 15 A. 339.

Irregularity.

See APPELLATE COURT, 14 A. 366.

Issues.

See APPELLATE COURT, 14 A. 366; 15 A. 315.

Joinder of Causes of action.

See SPECIFIC RELIEF ACT, 15 A. 384.

Joint decree

See CROSS DECREES, 14 A. 339.

Joint Possession.

See POSSESSORY SUIT, 15 A. 412.

Joint trial of accused.

Criminal Procedure Code, ss. 233, 234, 537, 338, 339—*Separate offences, effect of trial of in the same proceeding—Evidence, admissibility of—Pardon, withdrawal of—Trial of person whose pardon has been withdrawn.*—In a Criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of which the trial is being held.

An accused person to whom a tender of pardon has been made, and who has given evidence under that pardon against persons who were co-accused with him, should not, if such pardon is withdrawn, be put back into the dock and tried as if he had never received a tender of pardon, but his trial should be separate from and subsequent to that of the persons co-accused with him.

Where four accused were at one and the same trial tried for offences of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours previously and at a place close to the scene of the robbery and murder:—*Held* that the trial of these separate offences together, though an error or irregularity within the meaning of s. 537 of the Code of Criminal Procedure, would not necessarily render the whole trial void. QUEEN-EMPRESS v. MULUA, 14 A. 502=12 A.W.N. (1892) 95 ... 690

Judgment. PAGE

See CIV. PRO. CODE, ss. 203, 562, 622, 617, 13 A. 533.

Jurisdiction.

(1) *Civil Procedure Code, s. 411—Sale of property for purpose of realizing Court-fees erroneously supposed to be due to Government—Such order* ultra vires *and no necessity to bring a suit to set it aside—Jurisdiction.*—An order for sale and a sale under such order are *ultra vires* and nullities when in fact there was no jurisdiction in the Court to make the order. BALWANT RAO v. MUHAMMAD HUSAIN, 15 A. 324=13 A.W.N. (1893) 140 ... 924

(2) See APPELLATE COURT, 13 A. 320.

(3) See CIV. PRO. CODE, s. 11, 14 A. 141.

(4) See REVISION, 14 A. 413.

(5) See VALUATION OF SUIT, 15 A. 63; 15 A. 378.

Jurisdiction of Civil Courts.

(1) *Civil and Revenue Courts—Suit for declaration that tenants are shikmis and not occupancy tenants, on that their holdings are plaintiffs' sir land—Act* XII *of* 1881 *(N.W.P. Rent Act), ss.* 10, 95 *(a)—Act* XIX *of* 1873 *(N W P. Land Revenue Act), s.* 241—*Act* I *of* 1877 *(Specific Relief Act)*, s. 42.—The effect of s. 95 (*a*) and s. 10 of the North-Western Provinces Rent Act (XII of 1881) is to deprive the Civil Courts of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zemindar and tenants, the status of the tenants.

A Civil Court has no jurisdiction to entertain a suit in which, the defendants being admittedly the tenants of the plaintiffs, the plaintiffs, pray for a declaration that certain entries of the defendants in the revenue records as occupancy tenants, and certain orders of the Revenue Courts maintaining those entries, be set aside, and that the defendants are shikmis and not occupancy tenants, and that the land in question is the plaintiff's sir land. Such a suit cannot be brought within the Civil Court's jurisdiction by dropping all the reliefs claimed except the last-mentioned declaration, that being merely of importance as incidental to the previous ones, and as a roundabout mode of obtaining a declaration that the defendants are not the plaintiff's occupancy tenants.

Per Edge, C.J., and Mahmood, J.—Whether the last-mentioned prayer is one which could be brought under s. 42 of the Specific Relief Act *quære*.

Per Straight, J.—The suit might also be considered as one to set aside orders passed by the Settlement Officer in the discharge of his duty for the purpose of correcting the jamabandi as a part of the record of rights, and thus the jurisdiction of the Civil Court was barred by s. 241 of the North-Western Provinces Land Revenue Act (XIX of 1873). MAHESH RAI v. CHANDAR RAI, 13 A. 17 (F.B.)=10 A.W.N. (1890) 235 ... 11

(2) *Civil and Revenue Courts, jurisdiction of—Act* XII *of* 1881, *s.* 95—*Suit involving the determination of status of tenant.*—A Civil Court has no jurisdiction to entertain a suit, the decision of which necessarily involves the determination of the class of tenancy of one or other of the parties to it. SAKINA BIBI v. SWARATH RAI, 15 A. 115=13 A.W.N. (1893) 11 ... 791

(3) See CO-SHARERS, 14 A. 273; 15 A. 137.

(4) See HUSBAND AND WIFE, 13 A. 126.

(5) See JURISDICTION OF REVENUE (COURTS), 14 A. 381.

(6) See LANDLORD AND TENANT, 13 A. 364; 15 A. 387 (F.B).

(7) See MAGISTRATE, JURISDICTION OF, 15 A. 394.

(8) See RES JUDICATA, 13 A. 309.

Jurisdiction of Courts.

(1) See APPEAL, 13 A. 78.

(2) See MAINTENANCE, 13 A. 343.

(3) See STAY OF EXECUTION, 15 A. 196.

(4) See SUBORDINATE JUDGES, JURISDICTION OF, 14 A. 348.

Jurisdiction of Revenue Courts.

(1) *Act* XII *of* 1881 *(N. W. P. Rent Act), ss.* 9, 93, *cl.* (*a*), 112 *A*, 161—*Landholder and tenant—Occupancy tenant—Suit by landholder against successor*

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of occupancy tenant for arrears of rent which accrued during the lifetime of his predecessor—Jurisdiction—Civil and Revenue Courts.—An occupancy tenant in possession, who has accepted the occupancy holding, is liable to be sued for arrears of rent not barred by limitation which accrued in the lifetime of the person from whom the right of occupancy has devolved upon him.

The suit above referred to is exclusively cognizable by a Court of Revenue. So *held* by the Full Bench, Mahmood, J, *dissentiente*. LEKHRAJ SINGH v. RAI SINGH, 14 A. 381 (F.B.)=12 A.W.N. (1892) 143 ... 612

(2) See CO-SHARERS, 14 A. 273, 15 A. 137.

(3) See JURISDICTION OF CIVIL COURTS, 13 A. 17; 15 A. 115.

(4) See LANDLORD AND TENANT, 13 A. 364; 15 A. 387 (F.B.)

(5) See MAGISTRATE, JURISDICTION OF, 15 A. 394.

(6) See RES JUDICATA, 13 A. 309.

(7) See SET OFF, 15 A. 404.

Jury.

See MISDIRECTION OF JURY, 14 A. 25.

Lambardar.

(1) See CO-SHARERS, 14 A. 273; 15 A. 137.

(2) See SET OFF, 15 A. 404.

Lambardar and Co sharer.

See CO-SHARERS.

See LAMBARDARS.

Landlord and Tenant.

(1) *Landholder and tenant—Suit for possession of fallen wood of self-sown trees growing on an occupancy holding—Burden of proof.*—A zemindar claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy-holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied; and (*sed quære*) there is no general rule in India to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees. NATHAN v. KAMLA KUAR, 13 A. 571=11 A.W.N. (1891) 167 ... 361

(2) *Landholder and tenant—Suit for rent where the right to receive it is disputed—Jurisdiction of Civil and Revenue Courts—Act* XII *of* 1881 (*North-Western Provinces Rent Act*), s. 148.—M sued I and another for rent in the Court of the Collector. The defendants pleaded payment to V, who was accordingly brought on to the record as a co-defendant under s. 148 of the North-Western Provinces Rent Act (XII of 1881). The Collector decided in favour of V. The plaintiff appealed to the District Judge making all three persons respondents. The District Judge reversed the decision of the Collector and ordered the whole costs to paid by V, who thereupon appealed to the High Court.

Held that the District Judge had no jurisdiction to entertain the appeal so far as the party brought in under s. 148 was concerned, and, that being so, had no power to award costs against him. MIRZA ANAND RAM v. MAUSUMA BEGUM, 13 A. 364=11 A.W.N. (1891) 107 ... 231

(3) *Act* XII *of* 1881 (*North-Western Provinces Rent Act*), s. 189—*Act* XIV *of* 1886 (*Amending Act* XII *of* 1881), s. 5—"*Rent payable by the tenant*"—*Appeal.*—The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent. RADHA PRASAD SINGH v. PERGASH RAI, 13 A. 193=11 A.W.N. (1891) 83 ... 120

(4) *Act* XII *of* 1881 (*North-Western Provinces Rent Act*), s. 189—*Act* XIV *of* 1886 (*Amending Act* XII *of* 1881), s. 5—"*Rent payable by the tenant*"—*Appeal.*—The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean

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the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent.

Where a zemindar sued a tenant for rent of certain alluvial land, the amount claimed not being above Rs. 100, and the tenant objected that there was a custom in the village by which rent was paid in case of alluvial land only on the culturable portion, and that during some of the years in suit a less portion of the land than that for which rent was claimed had been culturable:—*Held* that in such a suit the rate of rent was in dispute and an appeal would therefore lie. RADHA PRASAD SINGH v. MATHURA CHAUBE, 14 A. 50=11 A.W.N. (1891) 219 ... 404

Act XII *of* 1881 (*N.W.P. Rent Act*), s. 56—*Landholder and tenant—Landholder's lien for rent—"Rent payable"—"Arrears of rent due."*—The first paragraph of s. 56 of Act No. XII of 1881, applies not only where there is rent in arrear due from the cultivator to his landlord, but also where rent is accruing due in respect of the period during which the produce was being grown.

Hence where any one except the landlord wishes to bring to sale the produce of a cultivator, he must, in order to avoid the prohibition contained in s. 56 of Act No. XII of 1881, tender, to the immediate landlord of the cultivator the amount, if any, for which the landlord might on the next ensuing sale day distrain the produce for arrears of rent. JAGAN NATH PRASAD v. BHIKA RAM 15 A. 375=13 A.W.N. (1893) 122 ... 958

(6) *Landholder and tenant—Suit for ejectment against occupancy tenant and his mortgagee—Limitation—Act* XV *of* 1877—*Act* XII *of* 1881, *s.* 94.—The plaintiff, a zemindar, sued one Ishri, an occupancy tenant, for ejectment under s. 93 (*b*) of the N.-W.P. Rent Act (XII of 1881), and to that suit one C. D, a mortgagee of the occupancy holding who had obtained a foreclosure decree against the occupancy tenant, got himself made a party defendant under s. 112-A of the Act. The pleadings, however, were not amended and the suit proceeded to appeal before the District Judge.

Held that under the above circumstances the suit as against C.D., the intervening defendant (who, so far as the plaintiff was concerned, was a trespasser) was of a civil nature and therefore subject to the ordinary rules of limitation as laid down in the Indian Limitation Act and not to the special limitation prescribed by s. 94 of Act XII of 1881. SRI KISHEN v. ISHRI, 14 A. 223=12 A.W.N. (1892) 73 ... 513

(7) *Act* XII *of* 1881, *s* 36—*Suit in ejectment as against trespassers—Previous admission by plaintiff of defendant's tenancy—Estoppel.*—The service of a notice of ejectment under s. 36 of Act No. XII of 1881 is, as between the person who causes such notice to be served and the person on whom it is served, a conclusive admission by the former of the existence between them of the relationship of landlord and tenant; and the landlord cannot afterwards sue in the Civil Court to eject the same tenant from the same land on the ground that he is not a tenant but a mere trespasser. BALDEO SINGH v. IMDAD ALI, 15 A. 189=13 A.W.N. (1893) 93 ... 839

(8) *Cause of action—Suit by zemindar to recover possession of occupancy holding against occupancy tenant and his alleged transferee in possession—Death of occupancy tenant after filing of suit but before notice—Act* XII *of* 1881, *s.* 9.—A plaintiff is not entitled to a decree in his suit unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to a decree.

One K.C., a zemindar, sued in a Court of Revenue to recover an occupancy holding from one B S., his occupancy tenant, and that tenant's transferee G.S., to whom, by a transfer which was inoperative under s. 9 of Act No. XII of 1881. B.S had purported to make over his occupancy holding. The occupancy tenant died after the suit was filed, but before he had received notice of it, and the transferee being in sole possession of the occupancy holding defended the suit. *Held* under the above circumstances that the zemindar's suit must fail, inasmuch as at the time when it was filed he was not entitled to immediate possession of the occupancy holding. GULZAR SINGH v. KALYAN CHAND, 15 A. 399=13 A.W.N. (1893) 170 ... 975

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(9) *Occupancy holding, transfer of—First and second mortgages of occupancy holding—Suit by second mortgagee to eject first mortgagee in possession.*—Where an occupancy holding was mortgaged under two successive mortgage deeds to different parties, and the mortgagees under the first mortgage having been put in possession, the mortgagees under the second mortgage sued to eject them.

Held, that, both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants, who were in possession, had a right, as against the plaintiffs, to retain possession. USUF KHAN v. SARVAN, 13 A. 403=11 A.W.N. (1891) 141 ... 258

(10) *Zamindar and tenant—Lessor and lessee—Lessee taking lease direct from zamindar—Suit by occupancy tenant to eject zamindar's lessee—Equitable estoppel.*—Where a person took a permanent lease of a cultivatory holding direct from the zamindar without making any inquiries as to who were the cultivators and on what tenure they held; and where, the permanent lessee having commenced to build, one of the cultivators, being an occupancy tenant, subsequently brought a suit in ejectment against him:—*held*, that the lessee should, by the knowledge that the land was a cultivatory holding, have been put on his guard and have made inquires as to the exact condition of the title, and that as he had not done so the doctrine of equitable acquiescence could not be applied in his favour. BISHESHAR v. MUIRHEAD, 14 A. 362=12 A.W.N. (1892) 36 ... 600

(11) *Act* XII *of* 1881, ss. 7, 8, 9—*Landlord and tenant—Occupancy tenant, power of, to sub-let—Perpetual lease by occupancy tenant.*—The effect of a perpetual lease made by an occupancy tenant of his occupancy holding to a person not a co-sharer in the right of occupancy considered. MAHESH SINGH v. GANESH DUBE, 15 A. 231 (F.B.)=13 A.W.N. (1893) 130 ... 866

(12) *Act* XII *of* 1881, ss. 7, 8, 9 —*Ex-proprietary tenant, power of, to sub-let, Right of occupancy.*—An ex-proprietary tenant can sub let the whole or any part of his occupancy holding, and such a sub-letting is not forbidden by s. 9 of Act No. XII of 1881. KHIALI RAM v. NATHU LAL, 15 A. 219 (F.B.)=13 A.W.N. (1893) 125 ... 859

(13) *Act* XII *of* 1881, *ss.* 93, 95, *cls,* (*m*) *and* (*n*)—*Jurisdiction—Civil and Revenue Courts*—No suit will lie against a landlord in a Civil Court for the wrongful dispossession of a tenant from a holding to which Act No. XII of 1881 applies.

Where a plaint in a Civil Court alleges facts which, if true, would show that the dispute or matter involved in the suit was one to which s. 93 or s. 95 of Act XII of 1881 would apply, the plaint should be rejected under cl. (c) of s. 54 of the Code of Civil Procedure, or possibly in some cases returned under s. 57 of the same Code.

The plaintiffs, alleging themselves to be occupancy-tenants and to have been wrongfully dispossessed by their landlords, who had made a lease of the land in suit, sued the landlords and the lessees of such landlords for recovery of possession and for damages. *Held* that such suit was exclusively cognizable by a Court of Revenue. TARAPAT OJHA v. RAM RATAN KUAR, 15 A. 387 (F.B.)=13 A.W.N. (1893) 164 ... 967

(14) See APPEAL, 15 A. 186.

(15) See EASEMENT, 14 A. 185.

(16) See JURISDICTION OF CIVIL COURTS, 13 A. 17, 15 A. 115.

(17) See JURISDICTION OF REVENUE COURT, 14 A. 381.

(18) See PRE-EMPTION, 13 A. 224.

(19) See RELINQUISHMENT, 13 A. 396.

(20) See SET OFF, 15 A. 404.

(21) See USE AND OCCUPATION, 14 A. 176.

(22) See VALUATION OF SUIT, 15 A. 63.

Lathi.

Act XLV of 1860, *s.* 148—"*Deadly weapon*"—*Lathi.*—The question whether or not a *lathi* is a "deadly weapon" within the meaning of s. 148 of the Indian Penal Code is a question of fact to be determined on the special circumstances of each case as it arises. QUEEN-EMPRESS v. NATHU, 15 A. 19=12 A.W.N. (1892) 158 ... 727

Lease. PAGE

(1) See LANDLORD AND TENANT, 14 A. 362.

(2) See USE AND OCCUPATION, 14 A. 176.

Legal Necessity.

See HINDU LAW (WIDOW), 14 A. 420.

Legal Practitioners Act, 1879.

Act XVIII *of* 1879, *Legal Practitioners Act*, *s.* 13.—A pleader's professional misconduct having amounted to "reasonable cause," within the meaning of s. 13 of the Legal Practitioners Act, XVIII of 1879, for suspending him from practice, their Lordships declined to interfere with the decision of the High Court as to the punishment, it not being clearly shown that the *quantum* awarded was unreasonable and excessive. *In the matter of* F.W. QUARRY, 13 A. 93 (P.C.)=5 Sar. P.C.J. 638=17 I.A. 199 ... 58

Legal Representative.

(1) See APPEAL, 13 A. 290.

(2) See RES JUDICATA, 13 A. 53.

Letters Patent.

(1) *S.* 10—*Civil Procedure Code, ss.* 556, 558, *and* 588 *cl.* (27).—*Dismissal of appeal for default—Appeal under s.* 10 *of the Letters Patent from order of dismissal.*—No appeal under s. 10 of the Letters Patent will lie from an order under s. 556 of the Code of Civil Procedure dismissing an appeal for default, the appellant not having had recourse to the procedure provided by s. 558 of the said Code. POHKAR SINGH v. GOPAL SINGH, 14 A. 361=12 A.W.N. (1892) 30 ... 599

(2) S. 10—See APPEAL, 14 A. 226; 15 A. 359; 15 A. 373.

Letters Patent Appeal.

See APPEAL.

Lien.

(1) See CO-SHARERS, 14 A. 273.

(2) See LANDLORD AND TENANT, 15 A. 375.

Limitation.

(1) *Civil Procedure Code, s.* 54—*Act No.* VII *of* 1870, *s.* 28—*Act No.* XV *of* 1877, *s.* 4—*Plaint insufficiently stamped—Power of Court to grant time for making good the deficiency—Limitation.*—When a Court fixes a time under cl. (*a*) or cl. (*b*) of s. 54 of the Code of Civil Procedure it must be a time within limitation. Section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. JAINTI PRASAD v. BACHU SINGH, 15 A. 65=13 A.W.N. (1893) 29 ... 758

(2) *Act* XV *of* 1877, *s.* 4—*Civil Procedure Code, ss.* 541, 542, 584, 585, 587—*Limitation—Second Appeal—Plea of limitation as to first appellate Court taken orally by appellant in Second Appeal—Court not bound to consider such plea.*—An appellant in a Second Appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondents' appeal to the lower Court (where they had been appellants) had been barred by limitation, when it was presented.

Held that, even though the plea proposed to be raised was one involving a question of limitation, the appellant was not entitled as of right to be heard in support of it without the leave of the Court granted under s. 542 of the Code of Civil Procedure; that the Court was not itself bound to consider that plea, and under the circumstances did not think it necessary to enter into. AHMAD ALI v. WARIS HUSAIN, 15 A. 123=13 A.W.N. (1893) 47 ... 796

(3) See APPEAL, 13 A. 189.

(4) See CIV. PRO. CODE, s. 230, 15 A. 198.

(5) See CIV. PRO. CODE, s. 559, 14 A. 154.

(6) See FORFEITURE ACT, s. 20, 13 A. 108.

(7) See PAUPER APPEAL, 13 A. 305.

(8) See POSSESSORY SUIT, 14 A. 193.

(9) See PRE-EMPTION, 14 A. 529.

Limitation Act (XV of 1877.)

(1) See APPEAL, 13 A. 78.

(2) See LANDLORD AND TENANT, 14 A. 223.

(3) Ss. 2 & 5, Arts. 177, 178—See APPEAL TO PRIVY COUNCIL, 15 A. 14.

(4) S. 15—See EXECUTION OF DECREE, 13 A. 76.

(5) S. 15, Arts. 66, 116—See MORTGAGE (GENERAL), 14 A. 162.

(6) 19—See EVIDENCE, 15 A. 56.

(7) S. 22—See PARTIES TO SUITS, 14 A. 524.

(8) S. 23, Arts. 34, 35, 120—See HUSBAND AND WIFE, 13 A. 126.

(9) Art 64—See ACCOUNT STATED, 15 A. 1.

(10) Arts. 95 & 96—See HINDU LAW (PARTITION), 14 A. 498.

(11) *Arts. 113, 116—Limitation—Suit by mortgagor to recover money due on a registered mortgage deed.*—A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877), sch. ii, No. 113 (for specific performance of a contract) is applicable. The perriod of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution, of the mortgage-deed. NAUBAT SINGH v. INDAR SINGH, 13 A. 200=11 A.W.N. (1891) 5 ... 125

(12) *Art. 120—Suit by purchser of decree to recover money of deceased judgment-debtor in the hands of his agent—Limitation.*—One A P, having certain moneys lying at his credit in Calcutta, empowered A L to receive the same and hold them on his behalf. A P died at Moradabad, and subsequently to his death, the said moneys, which remained in the hands of A L, were attached by one of the creditors of A P in execution of a decree. The decree-holder sold his rights under the decree in respect of the moneys in the hands of A L to the plaintiffs, who sued to obtain the same from A L.

Held that the period of limitation applicable to such a suit was that prescribed by art. 120 of the second schedule of the Indian Limitation Act (Act XV of 1877). CHAND MAL v. ANGAN LAL, 13 A. 368=11 A.W.N. (1891) 130 ... 234

(13) Art. 120—See PRE-EMPTION, 14 A. 405.

(14) *Art. 127—Suit by Muhammadan for possession by right of inheritance of shares in the property of their deceased ancestor.*—The words "joint family property" in No. 127 of sch. ii of the Limitation Act (XV of 1877) mean "the property of a joint family."

Hence, the period of limitation prescribed by No. 127 of sch. ii of the Limitation Act, will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immoveable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they allege they had been dispossessed by the defendants. AMME RAHAM v. ZIA AHMAD, 13 A. 282 (F.B.)=11 A.W.N. (1891) 88 ... 177

(15) *Art. 141—Limitation—Suit by daughter entitled to possession of immoveable psoperty on death of Hindu widow.*—The daughter of a separated Hindu, who was entitled to succeed to her father's immoveble property upon his widow's death, instituted, after the widow's death, a suit for possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow.

Held, by the Full Bench that art. 141 of sch. ii of the Limitation Act (XV of 1877) was applicable, and that limitation ran from the date of the widow's death. RAM KALI v. KEDAR NATH, 14 A. 156 (F.B.)=12 A.W.N. (1892) 22 ... 470

(16) Art. 148—See MORTGAGE (REDEMPTION), 14 A. 1.

(17) Art. 179—See COMPROMISE DECREE, 14 A. 350.

(18) Art. 179 (2)—See EXECUTION OF DECREE, 13 A. 1.

(19) Art. 179 (4)—See STEP-IN-AID OF EXECUTION, 13 A. 89 ; 13 A. 124.

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(20) Art. 179, cl, (4)—See STEP-IN-AID OF EXECUTION, 13 A. 211.

(21) *Art.* 179 (5)—*Civil Procedure Code, Chapters* VII *and* XIII, *and s.* 647—*Act* VI *of* 1892, *s.* 4—*Execution of decree—Procedure applicable to execution proceedings.*—The issuing of a notice under s. 248 of the Code of Civil Procedure gives a fresh starting point for limitation under art. 179, cl. 5 of sch. ii, of the Indian Limitation Act, 1877, whether such notice is issued on a valid or an invalid application for execution.

Chapters VII and XIII of the Code of Civil Procedure cannot, in view of s. 5 of Act No. VI of 1892, be applied to proceedings in execution of decrees.

But a Court has power inherent, if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application.

Similarly, a Court has inherent power, if such power is not conferred upon it by statute, to proceed forthwith to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application and that act has not been done.

When an order is made striking an execution case off the file of pending cases or dismissing it on grounds other than a distinct finding that the decree is incapable of execution, that the decree-holder's right to get the decree executed is barred by limitation, or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word "dismissed" for the words "struck of the file," or any other similar words have been used in the order, the decree-holder is not barred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree. DHONKAL SINGH v. PHAKKAR SINGH, 15 A. 84 (F.B.)=13 A.W.N. (1893) 6 ... 770

Lis pendens.

See CONTRIBUTION, 13 A. 371

Loan.

See EVIDENCE, 14 A. 169.

Lunacy Act (XXXV of 1858).

Ss. 2, 7, 9, 10, 23—See MAHOMEDAN LAW (MINORITY AND GUARDIANSHIP). 15 A. 29.

Lunatic.

See MAHOMEDAN LAW (MINORITY AND GUARDIANSHIP), 15 A. 29.

Magistrate, Jurisdiction of.

(1) *Criminal Procedure Code, ss.* 145, 146—"*Tangible immoveable property—Standing crops—Attachment—Civil and Revenue Courts—Jurisdiction.* Standing crops are "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure.

S. 146 of the Code of Criminal Procedure does not give jurisdiction to pass an order of attachment in a dispute between parties whose rights regarding such dispute would have to be determined by a Revenue Court GANGA PRASAD v. NARAIN. 15 A. 394=13 A.W.N. (1893) 145 ... 971

(2) See SECURITY TO KEEP THE PEACE, 14 A. 43.

Mahals, Partition of.

See WAJIB-UL-ARZ, 15 A. 410.

Mahant.

Hindu Law—Succession to the "gaddi" of temple—Nature of evidence required to prove title to succeed—Explanation of terms "nihang" and "grihast"—Per EDGE, C. J., and MAHMOOD J.—The question who is entitled to succeed to the office of a deceased *Mahant* must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased *Mahant* belonged. It is necessary for the person claiming a right to succeed as *Mahant* to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponent's title,

Mahant—(*concluded*). PAGE

Per MAHMOOD, J.—It was necessary for the plaintiff in this case to prove that he was "*Nihang*," as distinguished from "*Grihast*" which he failed to do. Meaning of the terms "*Nihang*" and "*Grihasl*" explained. BASDEO v. GHARIB DAS, 13 A. 256=11 A.W.N (1891) 59 ... 160

Mahomedan Law.

1.—ACKNOWLEDGMENT AND SONSHIP.
2.—ENDOWMENT.
3.—GIFT.
4.—INHERITANCE.
5.—LEGITIMACY.
6.—MINORITY AND GUARDIANSHIP.
7.—MOSQUE.
8.—PRE-EMPTION.
9.—WAKF.

——1.—Acknowledgment and sonship.

Muhammadan Law—Legitimacy—Acknowledgment.—Held that a Muhammadan could not by acknowledging him as his son render legitimate a child whose mother at the time of his birth he could not have married by reason of her being the wife of another man. LIAQAT ALI v. KARIM-UN-NISSA, 15 A. 396=13 A.W.N. (1893) 167 ... 973

——2.—Endowment.

See REVISION, 14 A. 413.

——3.—Gift.

See CONSTRUCTION OF DOCUMENT, 13 A. 409.

——4.—Inheritance.

See LIMITATION ACT, art, 127, 13 A. 282.

——5.—Legitimacy

See MAHOMEDAN LAW (ACKNOWLEDGMENT AND SONSHIP), 15 A. 396.

——6.—Minority and Guardianship.

Muhammadan law—Shia sect—*Act* XXXV *of* 1858, *ss.* 2, 7, 9, 10, 23—*Guardian of lunatic—"The legal heir"—Wife of lunatic.*—One M. S. a *Shia* Muhammadan, was formally adjudged a lunatic under the provisions of Act No. XXXV of 1858. At the time of this adjudication M.S. had a wife, Z, who had had one child by him, but that child had died previously to M. S. being adjudged a lunatic; it did not however appear that there was any reason precluding the possibility of further issue of the marriage.

Held by Mahmood, J., that under the law applicable to the *Shia* sect of Muhammadans Z. was one of the "legal heirs" of M. S. within the meaning of s. 10 of Act No. XXXV of 1858, and as such was excluded by the terms of the proviso to that section from being appointed guardian the person of her lunatic husband.

In cases under the Lunacy Act (Act No. XXXV of 1858) the High Court as a Court of appeal will not take upon itself the duty of deciding who may be the fittest person to appoint as guardian of the person or property of a person adjudged a lunatic thereunder. That duty should rest with the Courts to which it is entrusted by the Act.

Held by Knox, J., that upon the general circumstances of the case the wife was not a fit person to be appointed as guardian of the lunatic: *sed quære* whether she was within the meaning of s. 10 of Act No. XXXV of 1858 "the legal heir" of the lunatic and therefore statutorily disqualified. FAZL RAB v. KHATUN BIBI, 15 A. 29=12 A.W.N. (1892) 225 ...

——7.—Mosque.

Muhammadan Law—Public mosque—Right of all Muhammadans without distinction of sect to use such mosque for the purposes of worship—Right to say "amin" loudly during worship.—Where a mosque is a public mosque upon to the use of all Muhammadans without distinction of sect, a Muhammadan who, in the *bona fide* exercise of his religious duties in such mosque, pronounces the word "*amin*" in a loud tone of voice, according

Mahomedan Law—7.—Mosque—(*Concluded*). PAGE

to the tenets of his sect, does nothing which is contrary to the Muhammadan ecclesiastical law or which is either an offence or civil wrong, though he may by such conduct cause annoyance to his fellow-worshippers in the mosque. But any person, Muhammadan or otherwise, who goes into a mosque not *bona fide* for religious purposes, but *mala fide* to create a disturbance there and interferes with the devotion of the ordinary frequentors of the mosque, will render himself criminally liable. JANGU v. AHMAD ULLAH, 13 A. 419 (F.B.) ... 268

——8.—Pre-emption.

(1) See BAI-BIL WAFA, 14 A. 195.

(2) See PRE-EMPTION, 13 A. 373 ; 15 A. 104.

(3) See WAJIB-UL-ARZ, 13 A. 407.

——9.—Wakf.

(1) *Muhammadan law—Wakf—Construction of document.*—Where a Muhammadan of the *Shia sect* executed a document purporting to come into operation after his death, which document provided in a most complete manner of the devolution of his property, with the intention apparently of preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowances for the other members, and of maintaining the dignity of the *raisat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties.

Held, that such a document could not be construed as creating a *wakf*. Though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settlor, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses, but the object of the executant was evidently merely the maintenance of the family estates and of the dignity of the *raisat*. MURTAZAI BIBI v. JUMNA BIBI, 13 A. 261=11 A.W.N. (1891) 13 ... 163

(2) *Muhammadan Law*—Waqf—*Waqf-namah containing provision for descendants of grantor.*—The fact that the grantor of a *waqf* has in the deed constituting the same made some provision for the maintenance of his kindred and descendants will not render the *waqf* invalid. DEOKI PRASAD v. INAIT-ULLAH, 14 A. 375=12 A.W.N. (1892) 48 ... 608

(3) *Muhammadan Law*—Shia sect—Waqf.—According to the law applicable to the *Shia sect* of Muhammadans a *waqf-bil-wasiyat*, or testamentary *waqf*, is not valid unless actual delivery of possession of the appropriated property is made by the *waqif* (or appropriator) himself to the *muttawalli* (or superintendent appointed by the *waqif*).

According to the same law the death of the *waqif* before actual delivery of possession of the appropriated property by him to the *muttawalli* or the beneficiaries of the trust renders the *waqf* null and void *ab initio*.

Consequently, where the *waqif* dies, as mentioned above, before actual delivery of possession of the appropriated property, the consent of his heirs to the testamentary *waqf* cannot validate such *waqf*.

Distinction between *waqf-bil-wasiyat* and *wasiyat-bil-waqf* explained. AGHA ALI KHAN v. ALTAF HASAN KHAN, 14 A. 429 (F.B.)=12 A.W.N. (1892) 187 ... 643

(4) Sunnis—*Relinquishment of possession on the part of the waqif essential.* —According to the law of *Sunni* Muhammadans it is essential to the validity of a *waqf* that the *waqif* should actually divest himself of possession of the *waqf* property.

Hence where a *Sunni* Muhammadan executed and registered what purported to be a deed of *waqf*, but never acted upon it and retained possession until his death of the property dealt with by the deed, which property subsequently passed to his two sons by inheritance.

Held that no valid *waqf* of the property mentioned in the said deed was constituted. MUHAMMAD AZIZ-UD-DIN AHMAD KHAN v. THE LEGAL REMEMBRANCER TO GOVERNMENT, N.W.P. AND OUDH, 15 A. 321=13 A.W.N. (1893) 109 ... 922

Maintenance. PAGE

(1) *Criminal Procedure Code, ch. XV, s. 488—Order for maintenance of wife—Wife living apart from her husband for good cause—Jurisdiction.*—Where a wife, after a temporary absence from her husband on a visit, found on her return that he was living with another woman and thereupon left him and went to live in a different district and in that district applied for an order for maintenance against her husband,—

Held that, the wife being justified in refusing to live with her husband and in choosing her own place of residence, the neglect of her husband to maintain her was an offence within the jurisdiction of the appropriate Court at the place where the wife resided. *In the matter of the petition of* MALCOLM DECASTRO, 13 A. 348=11 A.W.N. (1891) 115 ... 221

(2) *Criminal Procedure Code, ss. 488, 490—Order for maintenance of wife—Application by wife to enforce order—Plea that applicant had been divorced—Duty of Court to which application for enforcement is made.*—Where a person in whose favour an order under s. 488 of the Code of Criminal Procedure has been made takes that order before a Magistrate, and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance. It is no part of the duty of a Magistrate on such an application as above mentioned, *viz.*, an application under s. 490 of the Code of Criminal Procedure, to entertain a plea by the party against whom the order is sought to be enforced to the effect that he has divorced the applicant and is therefore no longer liable to pay maintenance. MAHBURAN v. FAKIR BAKHSH, 15 A. 143=13 A.W.N. (1893) 63 ... 810

Malikana dues.

See SET-OFF, 15 A. 404.

Mandatory Injunction.

See TRESPASS, 13 A. 98.

Material Irregularity.

Criminal Procedure Code, ss. 268, 428, 537—Material irregularity—Assessors, statement of deceased person not proved in their presence.—Where in a trial for murder held with assessors the Court relied on a statement made by the deceased, and the evidence necessary to prove such statement was not recorded until after the olcse of the trial and the discharge of the assessors. *Held* that this amounted to a material irregularity which was not covered by s. 537 of the Code of Criminal Procedure. QUEEN-EMPRESS v. RAM LAL, 15 A. 136=13 A.W.N. (1893) 50 ...

Mesne Profits.

(1) See RES JUDICATA, 13 A. 53.

(2) See TRANSFER OF SUIT, 14 A. 531.

Minor and Guardian.

(1) See APPEAL, 13 A. 78.

(2) See GUARDIAN AND WARD.

(3) See HINDU LAW (PARTITION), 14 A. 498.

(4) See MAHOMEDAN LAW (MINORITY AND GUARDIANSHIP).

Misdirection of Jury.

(1) *Jury, misdirection of—What amounts to misdirection—Act XLV of 1860, ss. 361, 366.*—In a trial with a jury under s.366 of the Indian Penal Code, the Judge on the question of intent charged the jury in the following words :—"It remains only to consider the questions of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the facts : "

Held, that this amounted to a misdirection of the jury. The question of intent was a pure question of fact, but the way in which it had been put

Misdirection of Jury—(*Concluded*). PAGE

to the jury left them no option but to adopt the view taken by the Judge. QUEEN-EMPRESS v. HUGHES, 14 A. 25=11 A.W.N. (1891) 170 ... 388

(2) See APPEAL TO PRIVY COUNCIL, 15 A. 310.

Misjoinder of causes of action.

See EXECUTION OF DECREE, 15 A. 380.

Money decree.

(1) See MORTGAGE (SIMPLE MORTGAGE), 13 A. 28.

(2) See RES JUDICATA, 13 A. 53.

Money had and received.

See EQUITABLE CHARGE, 15 A. 304.

Money, Suit for.

See MORTGAGE (SALE OF MORTGAGED PROPERTY), 13 A. 195.

Mortgage.

1.—GENERAL.
2.—CONDITIONAL SALE.
3.—CONSTRUCTION OF MORTGAGES.
4.—EQUITABLE MORTGAGE.
5.—PRIORITY.
6.—REDEMPTION.
7.—SALE OF MORTGAGED PROPERTY.
8.—SIMPLE MORTGAGE.

——1.—General.

(1) *Mortgage—Bond stipulating for recovery of loan "from my moveable and immoveable property"—Such instrument not a mortgage—Limitation—Act* XV *of* 1877 (*Limitation Act*), *sch.* ii, *arts*, 66, 116—*Attachment of debt before judgment—Civil Procedure Code*, ss. 485, 486, 268 (*a*)—*Act* XV *of* 1877, s. 15—*Injunction or order staying a suit.*—A bond containing a stipulation "that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money together with the interest fixed by instituting a suit from my moveable and immoveable property my own "milk" does not create a mortgage upon any property of the obligor.

To such a bond art. 66 of sch. ii of the Limitation Act (XV of 1877) is applicable; but where the instrument is registered, art. 116 may be applied to a suit for failure to pay the bond debt.

An attachment before judgment under s. 485 read with s. 486 and s. 268 (*a*) of the Civil Procedure Code, of a debt secured by a bond; or an injunction obtained by a third party and restraining the attaching creditor from subsequently bringing the bond to sale in execution of his decree; is not an injunction or order staying the institution of a suit upon the bond by the obligee within the meaning of s. 15 of the Limitation Act. COLLR. OF ETAWAH v. BETI MAHARANI, 14 A. 162=12 A.W.N. (1892) 27 ... 474

(2) See LIMITATION ACT, arts. 113, 116, 13 A. 200.

——2.—Conditional Sale.

(1) *Act* IV *of* 1882 (*Transfer of Property Act*), s. 135—*Actionable claim—Transfer of claim for an amount less than its value—Suit by transferee to enforce claim—Defendant not entitled to plead that terms of transfer were unconscionable.*—A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806, his heirs, who were out of possession, executed a deed of assignment to a third person, transferring to him the rights acquired by the mortgagee under that order. At the time of the execution of the deed no steps had been taken by the mortgagee or his heirs to bring a suit for declaration of their title and for possession of the property. A suit for that purpose was brought by the assignee, the defendants being the conditional vendors and also the assignors under the deed above mentioned. The latter made no defence, but admitted the

Mortgage—2.—Conditional Sale—(*Concluded*). PAGE

justice of the claim, and a decree was passed in favour of the plaintiff against them as well as against the other defendants.

Held, that the answering defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has an actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor.

Held, also that the answering defendants were entitled to the benefit contained in the first paragraph of s. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off the plaintiff's hands by paying to him the price and incidental expenses of the sale with interest on that price from the day that the plaintiff paid it to the date of its repayment to him. HAKIM-UN-NISSA v. DEO NARAIN, 13 A. 102 ... 64

(2) See BAI-BIL-WAFA, 14 A. 195.

(3) See PRE-EMPTION, 14 A. 405.

——3.—Construction of Mortgages.

See MORTGAGE (SALE OF MORTGAGED PROPERTY), 14 A. 513.

——4.—Equitable Mortgage.

See TRANSFER OF PROPERTY ACT, S. 59, 14 A. 238.

——5.—Priority.

(1) *Mortgage—Rights of prior and subsequent incumbrances inter se—Rights of mortgagee purchasing equity of redemption—Right of sale of mortgaged property—Suit to bring mortgaged property to sale, who necessary parties to—"Property," meaning of the term in Act* IV *of* 1882—*Act* IV *of* 1882 (*Transfer of Property Act*), *ss.* 3 *and* 6, *chap.* IV passim—*Act* I *of* 1868 (*General Clauses Act*), ss. 2, *cls.* (5) *and* (6).—A and B jointly mortgaged certain immoveable property to X by a simple mortgage-deed on the 10th September, 1882. They again mortgaged the same property to X on the 23rd February, 1884. On the 6th August, 1885, A mortgaged a portion of the said property to Y. On the 12th August 1885, B mortgaged a portion of the same property to X. On the 21st August, 1885, A mortgaged a portion of the same property to Z. On the 20th September, 1886, A and B sold to X the property mortgaged to him and with the proceeds of that sale X's three mortgages were paid off. On the 8th January, 1887, Y used A.B. and X for cancelment of the deed of sale of the 20th September, 1886, and for sale of the property mortgaged to him under his deed of the 6th August, 1885. Y did not make Z a party to this suit. He did not ask for redempcion of X's mortgages nor for foreclosure of Z's mortgage.

Upon the facts it was held by EDGE, C.J., STRAIGHT, TYRRELL and KNOX, JJ.—(MAHMOOD, J. *dissentiente*):—

(1) That X not having exhibitd any intention of foregoing altogether his rights in respect of the mortgages of the 10th September, 1882, and the 23rd February, 1884, was entitled to keep those securities alive and to use them as a shield against the claim of Y, the subsequent mortgagee, to the extent of the amount which was due under them on the 20th September, 1886.

(2) That Y as subsequent mortgagee could not bring to sale under his mortgage-deed the property mortgaged to him without first redeeming X's two prior mortgages.

(3) That Z's mortgage of the 21st August, 1885 having been registered, Y must be taken to have had notice of it, and, having had notice thereof, was bound to make Z a party to the suit for sale under his (Y's) mortgage.

(4) That the term "property as used in Chapter IV of Act of 1882" means an actual physical object and does not include mere rights relating physical object.

Mortgage—5.—Priority—(*Concluded*). PAGE

Held, by the Full Bench.

That the Transfer of Property Act (IV of 1882), so far as the question of reliefs and procedure is concerned, applies to mortgages executed before the coming into force of the Act.

MAHMOOD, J., *contra* :—

Inasmuch as a mortgagee cannot bring the mortgaged property to sale without the intervention of a Court, a private purchase by the mortgagee of the rights remaining to the mortgagor in such property, though it may be valid as against the mortgagor, can have no effect in defeating the rights of puisne and mesne incumbrancers. Moreover, where a second mortgage to a third party intervenes between the mortgage to and the purchase by the prior mortgagee of the rights of the mortgagor, such intermediate mortgage prevents the merger of the rights of the prior mortgagee as such with those which he might acquire by his purchase.

The right of sale is an essential incident of a simple mortgage, and inheres as well in puisne and mesne as in prior mortgagees subject to the rights of the prior mortgagees. The puisne or mesne mortgagee is not bound by the terms of the prior mortgage, or mortgages, but is entitled to bring the property mortgaged to sale subject to such prior mortgage or mortgages.

The provisions of s. 85 of Act IV of 1882 are not absolutely imperative, and though thereunder a subsequent incumbrancer ought to be made a party to a suit by a prior mortgagee on his mortgage, the non-joinder of such subsequent incumbrancer is not a fatal defect in the suit. Registration of a subsequent mortgage is not necessarily any notice to a prior mortgagee of the existence of such subsequent mortgage ; it being no part of a mortgagee's duty to be on the watch for incumbrances subsequent to his own.

The terms "property" throughout Act IV of 1882 is used in its most generic sense and will include the right known as an "equity of redemption." MATA DIN KASODHAN v. KAZIM HUSAIN, 13 A. 432 (F.B.) ... 276

(2) See HINDU LAW (ALIENATION), 15 A. 339.

(3) See MORTGAGE (SALE OF MORTGAGED PROPERTY), 13 A. 581.

(4) See PARTIES TO SUITS, 13 A. 315.

(5) See REGISTRATION ACT, S. 50, 13 A. 288.

——6.—Redemption.

(1) *Court-fee—Mortgagee—Redemption—Decree for redemption conditional on payment of a certain sum—Appeal by mortgagor—Court fee payable on memorandum of appeal—Act* VII *of* 1870 (*Court Fees Act*), *s.* 7, *ch. ix.*—Where a mortgagor sues for redemption on the allegations that the mortgage debt has been satisfied, and a decree for redemption is passed on payment of a certain amount and the mortgagor appeals against the amount he is ordered to pay, the court-fee payable on the memorandum of appeal must, under s. 7, cl. ix of Act VII of 1870, (Court Fees Act), be computed according to the principal money expressed to be secured by the instrument of mortgage, and not according to the balance which the mortgagor alleges to be due.

Semble.—If the decree had allowed redemption on payment of a certain sum, and the defendant mortgagee was appealing on the ground that the amount due was greater than that sum, the court-fee should be calculated on the difference between the sum mentioned in the decree and the amount alleged by the appellant to be due. PIRBHU NARAIN SINGH v. SITA RAM, 13 A. 94=10 A.W.N. (1890) 231 ... 59

(2) *Mortgage—Joint Mortgage—Redemption of the whole by one co-mortgagor—Rights of redeeming co-mortgagor as against the others—Limitation—Act* XV *of* 1877 (*Limitation Act*), *sch. II, art.* 148.—Where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by art. 148 of sch. II of the Limitation Act (XV of 1877). Such period begins to run from the date when the original

Mortgage—6.—Redemption—(*Concluded*). PAGE

mortgage was redeemable and not from the date of its redemption by the aforesaid co mortgagor. ASHFAQ AHMAD v. WAZIR ALI, 14 A. 1 (F.B.) =11 A.W.N. (1891) 211=11 A. 423 ... 373

(3) See PARTIES TO SUITS, 13 A. 315.

——7.—Sale of Mortgaged Property.

(1) *Payment of Government revenue by mortgagees in possession to save the property—Payment of mortgage-money into Court by mortgagors and relinquishment of possession by mortgagees—Subsequent suit by mortgagees to recover the Government revenue paid by them by sale of the mortgaged property—Act* IV *of* 1882 (*Transfer of Property Act*), s. 83.—The plaintiffs were mortgagees in possession of certain shares in a village under a mortgage which, as to the principal amount advanced, was a simple mortgage, as to the interest a usufructuary mortgage. The mortgagees, to save the property from sale, paid up certain arrears of Government revenue. Subsequently, the defendant, who was the representative of the mortgagors, under s. 83 of the Transfer of Property Act (IV of 1882), paid the original sum due under the mortgage into Court. The mortgagees withdrew the money so paid in and deposited the mortgage-deed in Court. The mortgagees then, after relinquishing possession of the mortgaged property, sued to recover the money which they had paid as Government revenue by sale of the mortgaged property.

Held that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit, which was for realization of the Government revenue paid by them, by sale of the mortgaged property, must fail.

Semble, a mortgagee, who had given up his lien under circumstances similar to those above described, might bring a simple money suit to recover money paid by him to save the property from sale in execution for arrears of Government revenue. ANANDI RAM v. DUR NAJAF ALI BEGUM, 13 A. 195=10 A W.N. (1890) 228 ... 122

(2) *Prior and subsequent mortgages—Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree to be given.*—Where in a suit to bring certain immoveable property to sale under a mortgage it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immoveable property in order to save a portion thereof from sale under two prior mortgages: *held* that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged. TULSA v. KHUB CHAND, 13 A. 581=11 A.W.N. (1891) 193 ... 368

(3) *Suit for sale by mortgagee against auction-purchaser, mortgagee having accepted part of the proceeds of the former sale—Act* VIII *of* 1859, *s.* 271—*Estoppel.*—On the 10th of February, 1872, one S. R. mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March, 1877, J. P. and G. P. brought to sale in execution of money decrees against S. R. two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale, Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction-purchaser for sale of one biswa in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's pos-

Mortgage—7.—Sale of Mortgaged Property—(*Concluded*). PAGE

session, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage. JHINKA v. BALDEO SAHAI, 14 A. 509=12 A.W.N. (1892) 98 ... 694

(4) *Suit for sale on a mortgage—Rights of mortgagee in respect of non-hypothecated property of the mortgagor*—Res-judicata—*Act* IV *of* 1882, *ss.* 68, 88, 89 *and* 90—*Civil Procedure Code, sch. IV, forms Nos.* 109 *and* 128.—Where there is nothing to show a contrary intention of the parties, every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief over against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under the provisions of s. 90 of the Transfer of Property Act, and if such relief is refused the refusal will not bar a subsequent application under s. 90.

Observations on the meaning and application of ss. 88, 89 and 90 of the Transfer of Property Act. Explanation of the term "legally recoverable" in s. 90. MUSAHEB ZAMAN KHAN v. INAYAT-UL LAH, 14 A. 513=12 A.W.N. (1882) 80 ... 698

(5) See EXECUTION PROCEEDINGS, 13 A. 278.

(6) See MORTGAGE (PRIORITY), 13 A. 432 (F.B.).

(7) See MORTGAGE (SIMPLE MORTGAGE), 13 A. 28.

——8.—Simple Mortgage.

Mortgage—Hypothecation—Charge—Lien—Transfer of interest in immoveable property—Construction of document — Words—"Arh"—"Mustaghraq" Power of sale in default—Bona fide *purchaser for value without notice —Rights of purchaser at sale in execution of money decree—Act* IV *of* 1882 (*Transfer of Property Act*), *ss* 40, 58 (*b*), 69, 100.—In January 1883 a decree was obtained upon a bond executed in October, 1875, whereby certain immoveable property was made security for a loan, the transaction being described not by the word "*rehan*" or mortgage, but by the words "*arh*" and "*mustaghraq.*" The instrument contained no express covenant for sale of the property in default of payment, but it contained a covenant prohibiting alienation until payment, and a stipulation that, in the event of the property specified being destroyed or proving insufficient to satisfy the debt, the obligee might realize the amount from the obligor's person and other property. The decree directed the sale of the property as in the terms of an ordinary decree for the sale of mortgaged property. In 1885, before any steps had been taken in execution of the decree, the same property was sold in execution of a simple money decree against the obligor, and the purchaser obtained possession. It was found as a fact that at the time of the sale the bond of October, 1875, and the decree thereon of January, 1883, were not notified, but through no fault of the obligee decree-holder, and that the purchaser was a *bona fide* transferee for value without notice of the bond and decree.

Held that the words "*arh*" and "*mustaghraq*" used in the bond implied a power of sale in default and denoted a mortgage without possession; that the transaction, though entered into prior to the passing of the Transfer of Property Act (IV of 1882), must be regarded as amounting to a simple mortgage as defined in s. 58 (*b*) of that Act, and not as merely creating a charge as defined in s. 100; and that consequently the rights of the obligee must prevail over those of the subsequent *bona fide* purchaser for value without notice of the bond and decree thereon.

Held also by Mahmood, J., that the title of the judgment-debtor at the time of the sale in 1885 in execution of the simple money decree was subject to the mortgage decree of January, 1883, and the purchaser at that sale could acquire no higher title than the judgment-debtor possessed, and was equally bound by the terms of the decree of January 1883, in respect of the property which he had purchased, and could not prevent the property being sold under that decree except by paying up the decretal money.

Per Mahmood, J.—The power of sale mentioned in s. 58 (*b*) of the Transfer of Property Act is not a power in the mortgagee to bring the mortgaged property to sale independently of a Court.

The nature of simple mortgage, hypothecation, charge and lien discussed KISHEN LAL v. GANGA RAM, 13 A. 28=10 A.W.N. (1890) 216 ... 18

Mortgage Bond. PAGE

See INTEREST, 13 A. 330.

Mortgage Lien.

See MORTGAGE (SALE OF MORTGAGED PROPERTY), 13 A. 195.

Muafi Tenure.

See EXECUTION OF DECREE, 13 A. 119.

Non-joinder of Parties.

(1) See PARTIES TO SUITS, 14 A. 524.

(2) See RES JUDICATA, 13 A. 53.

Notice.

See LANDLORD AND TENANT, 15 A. 189.

Oaths Act, 1873.

(1) *Ss. 10 and 11—Referee's depositions inadequate for decision of question referred—Appeal after death of referee—Practice.*—Where a cause had been decided under the provisions of ss. 10 and 11 of the Oaths Act (X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties.

Held, that the case should be remanded to the lower Court for disposal according to the usual procedure. MAHABIR PRASAD MISR v. MAHADEO DAT MISR, 13 A. 386=11 A.W.N. (1891), 143 ... 246

(2) S. 11—See CIV. PRO. CODE, S. 11, 14 A. 141.

Objections.

(1) See APPEAL, 15 A. 186.

(2) See LIMITATION, 15 A. 123.

(3) See REMAND, 15 A. 119.

(4) See SECOND APPEAL, 13 A. 580.

Occupancy Tenure.

(1) See JURISDICTION OF CIVIL COURT, 13 A. 17.

(2) See JURISDICTION OF REVENUE COURTS, 14 A. 381.

(See LANDLORD AND TENANT, 13 A. 403; 13 A. 571; 14 A. 223; 14 A. 362; 15 A. 219; 15 A. 399.

Opium Act.

S. 9—See BIAS, 15 A. 192.

Order.

See APPEAL, 15 A. 359.

Outcaste.

See SUCCESSION, 13 A. 573.

Ownership.

See LANDLORD AND TENANT, 13 A. 571.

Pardanashin Woman.

Conditions necessary to the valid execution of a document by.—Where a deed executed by a *pardahnashin* woman is ought to be set aside, it is for the party wishing to uphold the deed to show affirmatively that the transaction intended to be carried out by the deed was a reasonable one, that the executant was fully cognizant of the meaning and legal and practical effect thereof and that she executed the same with her full and free consent, that is to say, that she had independent advice on the subject and was not otherwise, as, *e.g.*, by reason of bodily or mental infirmity, or by reason of fraud or coercion practised upon her, incapable of giving a rational consent to the transaction.

One Mariam Bibi a *pardanashin* lady of some 70 years of age, and more or less illiterate, executed on the 11th September 1888, a deed which purported to divest her immediately of all her property in favour of her son

Pardanashin Woman—(*Concluded*). PAGE

Murtaza Husen, who was dumb and imbecile, her daughter Sakina, who was named in the deed as guardian of murtaza Husen, and that daughter's son, Muhammad Yakub. Muhammad Yakub was betrothed to a daughter of one Fakir Husen and one of Sakina's daughters was married to one Shakurul Husen. Those two persons, *viz.*, Fakir Husen and Shakurul Husen were mainly instrumental in procuring the execution of the deed in question. The deed was drafted in very artificial language, and it was not shown that the executant ever understood its contents or effect. The executant was moreover at the time of execution in ill health and great mental distress; owing to the death of her son, Muhammad Husen, which had happened some months previously. The deed was also executed in the absence of the person who was at that time the executant's chief adviser and the manager of her property. Lastly, it appeared that as soon as the executant came to know what the true nature of the deed was and that proceedings had been initiated in the Revenue Department for mutation of names, she took immediate measures to show her dissent from the provisions of the deed and her disapproval of what had been done thereunder.

Held that under the circumstances above set forth the deed in question could not be considered as having been executed under the conditions necessary in such cases and must be set aside. MARIAM BIBI v. SAKINA, 14 A. 8=11 A.W.N. (1891), 213 ... 377

Pardon.

(1) See CRIM. PRO. CODE, S. 337, 14 A. 336.

(2) See JOINT TRIAL OF ACCUSED, 14 A. 502.

Parties to suits.

(1) *Mortgage—Prior and puisne incumbrancers—Puisne incumbrancer not made a party to suit upon prior incumbrance—His right to redeem not thereby affected.*—If a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage into suit, join the puisne incumbrancer as a party, that puisne incumbrancer's right to redeem will not thereby be affected. NAMDAR CHAUDHRI v. KARAM RAJI, 13 A. 315=11 A.W.N. (1891), 90 ... 199

(2) *Suit—Non-joinder of parties—Limitation—Act XV of 1877, s. 22—Civil Procedure Code, s. 32—Partnership—Right of surviving partner to sue for debts due to firm.*—Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm.

A Court may, under s. 32 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added. IMAM-UD-DIN v. LILADHAR, 14 A. 524=12 A.W.N. (1892), 101 ... 705

(3) *Civil Procedure Code, s. 311—Execution of decree—Application to set aside sale in execution—Decree-holder a necessary party to such application.*—The decree-holder is a necessary party to an application under s. 311 of the Code of Civil Procedure.

Hence where a judgment-debtor applied under the above-mentioned section to have a sale in execution of a decree against him set aside and made no attempt to implead the decree-holder until long after limitation had expired. *Held*, that the application must be dismissed. ALI GAUHAR KHAN v. BANSIDHAR, 15 A. 407=13 A.W.N. (1893), 173 ... 981

(4) See APPEAL, 13 A. 78; 13 A. 290.

(5) See CIV. PRO. CODE, S. 559, 14 A. 454.

(6) See MORTGAGE (PRIORITY), 13 A. 432.

(7) See RES JUDICATA, 13 A. 53.

Partition Proceedings.

See RES JUDICATA, 13 A. 309.

Partnership.

See PARTIES TO SUITS, 14 A. 524.

Pauper Appeal.

Limitation—Application for leave to appeal in forma pauperiss—*Subsequent appeal in regular form—Payment of Court fee on appeal no retrospective*

Pauper Appeal—(*Concluded*).

effect.—Where an application for leave to appeal *in forma pauperis* having been presented and rejected, a regular appeal was subsequently filed, but after the period of limitation had expired.

Held that the payment of the court-fee on the regular appeal could not be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper, so as to convert that memorandum of appeal into a good appeal within time. Until the regular appeal was filed there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal. BISHNATH PRASAD v. JAGARNATH PRASAD, 13 A. 305=11 A.W.N. (1891) 99 ... 193

Pauper Suit.

Suit in forma pauperis—*Appeal—Right of Government to appeal in respect of Court fee on portion of plaintiff's claim dismissed—Civ. Pro. Code,* ss. 411, 412.—In a suit *in forma pauperis* the District Judge decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion which was dismissed. The Secretary of State, not having been a party to the litigation in the Court below, then preferred an appeal in respect of the court-fees on that portion of the plaintiff's claim which had been dismissed.

Held that such an appeal would lie; though the more suitable procedure would have been for the Government to have applied, through the Collector, to the Court of first instance to review its judgment and to repair the omission in its decree. SECRETARY OF STATE v. BHAGWANTI BIBI, 13 A. 326=11 A.W.N. (1891) 97 ...

Penal Code (Act XLV of 1860).

(1) Ss. 24, 147, 391—See RIOT, 15 A. 22.

(2) S. 148—See LATHI, 15 A. 19.

(3) *S.* 182—*Definition of offence provided for in s.* 182, *explained.*—In order to constitute the offence defined in s. 182 of the Indian Penal Code it is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information. QUEEN-EMPRESS v. BUDH SEN, 13 A. 351=11 A.W.N. (1891) 109 ... 223

(4) S. 182—See FALSE COMPLAINT, 15 A. 336.

(5) S. 188—See CRIM. PRO. CODE, Ss. 133, 136, 140, 13 A. 577.

(6) Ss. 191, 193—See CRIM. PRO. CODE, 15 A. 11.

(7) S. 355—See CRIM. PRO. CODE, S. 192, 14 A. 346.

(8) Ss. 361, 366—See MISDIRECTION OF JURY, 14 A. 25.

(9) S. 395—See DACOITY, 15 A. 299.

(10) S. 411—See STOLEN PROPERTY, 15 A. 317.

(11) Ss. 415, 511—See ATTEMPT, 15 A. 173.

(12) Ss. 463, 471—See USING FORGED DOCUMENT, 15 A. 110.

(13) *Ss.* 511, 307, 300, 299—*Attempt to commit murder—Facts necessary to constitute such attempt.*—Section 511 of the Indian Penal Code does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307 of the said Act.

A person is criminally responsible for an a atttempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only prevented by some cause independent of his volition. QUEEN-EMPRESS v. NIDDAH, 14 A. 38=11 A.W.N. (1891) 176 ... 397

Penalty

See CONTRACT ACT, 15 A. 232.

Pending Appeals.

See RESTORATION OF APPEAL, 15 A. 55.

Perpetual Lease. PAGE

See LANDLORD AND TENANT, 15 A. 231.

Personal interest.

See BIAS, 15 A. 192.

Place of Worship.

See MAHOMEDAN LEW (MOSQUE), 13 A. 419.

Plaint.

See VERIFICATION OF PLAINT, 15 A. 59.

Pleader and Client.

(1) *Counsel and client—Authority of counsel to compromise a case on behalf of his client—Nature of power conferred by counsel's retainer.*—A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client ; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client. JANG BAHADUR SINGH v. SHANKAR RAI, 13 A. 272 (F.B.) = 11 A.W.N. (1891) 61 ... 170

(2) See COSTS, 15 A. 169.

Possession.

(1) See ARMS ACT, Ss. 19 (*f*), 25, 15 A. 129.

(2) See LANDLORD ANT TENANT, 13 A. 403.

Possessory Suit.

(1) *Possession—Ejectment—Suit in ejectment on a possessory title—Act I (Specific Relief Act*, s. 9.—*Per* EDGE, C.J., STRAIGHT and TYRRELL, JJ. (MAHMOOD, J., *dissentiente*).

Section 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being, whatever his tile, in possession of immoveable property, is ousted therefrom,

That section does not debar a person who has been ousted by a trespasser from the possession of immoveable property to which he has merely a possessory title, from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession.

Per MAHMOOD, J.

A person who is suing upon a merely possessory title to recover possession of immoveable property against a person who has ousted him must bring his suit, if at all, under s. 9 of Act I of 1877, and therefore within six months from the date of his dispossession. WALI AHMAD KHAN v. AJUDHIA KANDU, 13 A. 537 = 11 A.W.N. (1891) 196 ... 340

(2) *Suit for recovery of possession of immoveable property—Limitation—Adverse possession—Burden of proof—Act* XV *of* 1877 (*Limitation Act*), s. 28.—Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within twelve years of the suit. JAFAR HUSAIN v. MASHQ ALI, 14 A. 193 = 12 A.W.N. (1892) 55 ... 494

(3) *Practice—Suit for exclusive possession—Decree for joint possession, circumstances under which such decree may be granted.*—Although under certain circumstances in a suit for exclusive possession of immoveable property a decree for joint possession may be given, nevertheless such a decree should not be given unless the plaintiff asks for it and the evidence shows that he is entitled to it. ANTU SINGH v. MANDIL SINGH, 15 A. 412 = 13 A. W.N. (1893). 177 ... 984

(4) See FORFEITURE ACT, S. 20, 13 A. 108.

(5) See RES JUDICATA. 14 A. 512.

Practice and Procedure.

(1) See APPEAL, 14 A. 221.

(2) See APPELLATE COURT, 15 A. 315.

(3) See LIMITATION, 15 A. 123.

Practice and Procedure —(*Concluded*). PAGE

(4) See POSSESSORY SUIT, 15 A. 412.

(5) See SECOND APPEAL, 13 A. 580, 15 A. 367.

(6) See SESSIONS TRIAL, 14 A 212.

(7) See SET-OFF, 13 A. 296.

Pre-emption.

(1) *Act* XIX *of* 1873 (*North-Western Provinces Land Revenue Act*), ss. 166, 168 *and* 188—*Act* XII *of* 1881 (*North-Western Provinces Rent Act*), s. 177—*Interpretation of statutes--Meaning of the terms "Patti" and "Patti of a mahal —Pre-emption.*—The expression " patti of a Mahal " as used in s. 188 of the North-Western Provinces Land Revenue Act (XIX of 1873) means a division of a mahal distinct from the share of an individual co sharer.

The right of pre-emption, therefore, which is given by the above-named section is not exerciseable on the sale merely of the share of an individual co-sharer not amounting to such a division of a mahal.

Moreover the provisions of s. 188 of Act XIX of 1873 do not apply to a sale under s. 168 of the same act of land other than that in respect of which the arrears which it is sold to satisfy accrued.

Hence where the share of a co-sharer in an imperfect pattidari village, not being the land in respect of which the arrears of rent, for the satisfaction of which the said share is sold, are due, is sold under the provisions of s. 177 of the North-Western Provinces Rent Act (XII of 1881), no right of pre-emption can be claimed in respect of such sale.

So held by EDGE, C.J. and YOUNG, J.

MAHMOOD, J., *contra.*—There being no statutory definition of the word "patti" that word must be taken in its ordinary acceptation, and in that acceptation it means the share of a pattidar, whether such share amounts to a definite division of a Mahal or not. The exigencies of the law of pre-emption require that in s. 188 of Act XIX of 1873 the word " patti " should be construed in its broader signification as equivalent to any share of a pattidar.

The words of s. 168 which provide that land sold under that section is to be proceeded against " as if it were the land on account of which the revenue is due under the provisions of this Act " render the incidents of sales under s. 166, including pre-emption, applicable to sales under s. 168, with the exception thar in such case only the defaulter's interest in the land sold passes by the sale.

Hence a right of pre-emption would accrue under s. 188 in respect of the compulsory sale of any share of a co-sharer though such share did not amount to a " patti " in the sense of a definite division of a mahal. BAIJ NATH v. SITAL SINGH, 13 A. 224 = 11 A.W.N. (1891) 68 ... 141

(2) *Civil Procedure Code*, s. 214—*Decree for pre-emption conditioned on payment within fixed time—Omission to state consequence of non-payment Limitation.*—Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period:—*Held* that the plaintiff unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption. JAI KISHN v. BHOLA NATH, 14 A. 529 = 12 A.W.N. (1892) 106 ... 708

(3) *Wajib-ul-arz—Gift*—Shankalap.—No right of pre-emption arises where land is assigned without consideration as *shankalp*. HAR NARAIN PANDE v. RAM PRASAD MISR, 14 A. 333 = 12 A.W.N, (1892) 39 ... 580

(4) Wajib ul-arz, *construction of—Muhammadan Law*,—In a suit for pre-emption based on a *wajib-ul-arz* the material words of the *wajib-ul-arz* under the heading of " custom for pre-emption " were as follows :—At the time a proprietary share is transferred a right of purchase will vest, first, in a co-sharer of the same family, and then in the other co-sharers of the village in preference to a stranger, provided that the same price is paid by the co-sharer as is offered by the stranger."

Held that these words were intended to define a special custom of pre-emption, and did not merely mean that the custom of pre-emption

Pre-emption—(*Concluded*). PAGE

according to the Muhammadan law was to be followed. JASODA NAND v. KANDHAIYA LAL, 13 A. 373=11 A.W.N. (1891) 136 ... 238

(5) *Conditional sale*— Wajib-ul-arz—*Pre-emption.*—The pre-emptional rights of the parties to a deed of conditional sale cannot be affected by a *wajib-ul-arz* prepared subsequently to the execution of the deed of conditional sale, but prior to the sale becoming absolute, they not being parties to the *wajib-ul-arz*, and the *wajib-ul-arz* not apparently indicating any pre-existing custom of pre-emption in the village. BECHAN RAI v. NAND KISHORE RAI, 14 A. 341=12 A.W.N. (1892) 18 ... 585

(6) *Decree conditional on payment of price stated within a fixed period, otherwise suit to stand dismissed—Non-payment of pre-emptive price—Appeal after expiration of period fixed by decree.*—The plaintiff in a pre-emption suit obtained a decree in his favour for pre-emption of the share in suit on payment of a fixed sum within a period specified in the decree otherwise his suit was to stand dismissed.

Held, that such plaintiff could appeal from such decree after the period prescrided therein had elapsed without his paying in the pre-emptive price fixed thereby, both as to the correctness of the pre-emptive price and as to the reasonableness of the time allowed for payment. KODAI SINGH v. JAISRI SINGH, 13 A. 376 (**F.B.**) ... 239

(7) *Regulation* XVII *of* 1806, *ss.* 7 *and* 8—*Mortgage by conditional sale—Foreclosure—Pre-emption, suit for—Limitation—Act* XV *of* 1877 (*Indian Limitation Act*), *sch.* ii, *art.* 120.—Where a mortgage by conditional sale had been duly foreclosed in accordance with the procedure laid down in ss. 7 and 8 of Regulation XVII of 1806 and at the expiration of the year of grace a portion of the mortgage money remained unpaid;—*held* in a suit for pre-emption of the mortgaged property that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the plaintiff's right of pre-emption accrued and limitation began to run against him from the expiration of such year of grace. ALI ABBAS v. KALKA PRASAD, 14 A. 405 (**F.B.**)=12 A.W.N. (1892) 108 ... 627

(8) *Muhammadan Law—Vicinage—Separate* mahals.–Where an estate, originally one, has been divided into two separate *mahals*, no right of pre-emption under the Muhammadan law will subsist on behalf of one of such *mahals* in respect of the other merely by reason of vicinage: nor will any right of pre-emption arise from the fact that certain appurtenances to the original *mahal* are still enjoyed in common by the owners of the separated *mahals*. ABDUL RAHIM KHAN v. KHARAG SINGH, 15 A. 104=12 A.W.N. (1892) 240 ... 783

(9) See MAHOMEDAN LAW—PRE-EMPTION, 13 A. 407.

Preliminary Enquiry.

See SANCTION TO PROSECUTE, 15 A.

Prescription.

See EASEMENT, 14 A. 185.

Presentation to proper Court.

See APPELLATE COURT, 13 A. 320.

Presumption.

(1) See ARMS ACT, S. 19 (c); 15 A. 27.

(2) See EASEMENT, 15 A. 270.

Principal and Agent.

See LIMITATION ACT, Art. 120, 13 A. 368.

Principal and Surety.

(1) *Surety, liability of—Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss.* 336, 344.—A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment debtor files his petition under s. 344 to be declared insolvent. RAMZAN v. GERARD, 13 A. 100=11 A.W.N. (1891) 5 ... 63

Principal and Surety—(*Concluded*). PAGE

(2) *Civil Procedure Code, ss.* 244, 336, 622—*Insolvency—Surety for filing petition—Revision.*—One B. M. became surety under s. 336 of the Code of Civil Procedure on behalf of one G.R., a judgment-debtor, to the effect that G. R. would appear before the Court when called on, and would within one month file an application to be declared an insolvent. G. R. did so apply, but on the surety's asking the Court to declare him discharged of his liability the Court is refused to do so. *Held*, (1) that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent and (2) that the order refusing to discharge him was not appealable was therefore open to revision under s. 622 of the Code. BANNA MAD v. JIMMA DAS, 15 A. 183=13 A.W.N. (1893), 68 ... 835

Privy Council Appeal.

See APPEAL TO PRIVY COUNCIL.

Privy Council Appeal (Criminal Case).

See APPEAL TO PRIVY COUNCIL, 15 A. 310.

Promissory Note.

See STAMP DUTY, 13 A. 66.

Provincial Small Cause Courts Act, 1887.

(1) S. 25—See APPEAL, 15 A. 373.

(2) S. 25—See CIV. PRO. CODE, Ss. 203, 562, 622, 647, 13 A. 533.

(3) S. 25—See REVISION, 15 A. 139.

(4) S. 25—See REVISION, 13 A. 277.

(5) Sch. II, cl, 18—See REVISION, 14 A. 413.

(6) S. 35—See SMALL CAUSE SUIT, 13 A. 324.

(7) Sch. II, cl. 6—See STANDING CROPS, 14 A. 30.

Question of Fact.

See ATTEMPT, 15 A. 173.

Question of Law.

See APPEAL, 15 A. 413.

Re-examination of prosecution witnesses.

See CRIM. PRO. CODE, 14 A. 346.

Reformatory Shools Act, 1876.

S. 22—*Government Notification,* (*India*) *No.* 173 *of the* 14*th March*, 1889—*Sentence—Reformatory School.*—Where a boy over fourteen, but otherwise of uncertain age, was ordered upon conviction by a Magistrate, to be detained in a reformatory School for two years. *Held* that such sentence, having regard to the rule made by the Governor-General-in-Council on the 14th of March 1889, under s. 22 of Act No. V of 1876, was illegal. The proper course for the Magistrate to have adopted with reference to the abovementioned rules was to have ascertained as near as might be the exact age of the offender and sentenced him to a specified period of detention which should be that elapsing between his conviction and the attainment by him of the age of eighteen years. QUEEN-EMPRESS v. NARAIN, 15 A. 208=13 A.W.N. (1893) 107 ... 851

Regenerate Classes.

See RES JUDICATA, 15 A. 327.

Registrar.

See COURT, 15 A. 141.

Registration Act (III of 1877).

(1) Ss. 3, 17, 47, 49—See STEP-IN-AID OF EXECUTION, 13 A. 89.

(2) *S.* 50—*Registered and unregistered document—Priority—Mortgage under registered deed competing with auction-purchaser at a sale under a decree on a prior unregistered mortgage deed.*—Under s. 50 of the Registration Act the decree or order which is not to be affected by a registered document must be a decree or order made prior to the execution and registration of the registered document. Therefore where the plaintiffs, who were mortgagees

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under a registered instrument, sued to set aside a sale to the defendants under a decree on an unregistered mortgage, the plaintiffs' registered mortgage being subsequent to the unregistered mortgage on which the defendants relied, but prior to the decree thereon—*held* that the defendants, auction-purchasers, must take subject to the rights of the plaintiffs as mortgagees. JAGRUP RAI v. RADHEY SINGH, 13 A. 288 (F.B.)=11 A.W.N. (1891) 63 ... 181

(3) S. 73—See COURT, 15 A. 141.

Reg XVII of 1806 [Bengal Land (Redemption and Foreclosure).]

Ss. 7 and 8—See PRE-EMPTION, 14 A. 405.

Relinquishment.

Ex-proprietary tenant—Relinquishment of exproprietary rights—Act XII *of* 1881 (*North-Western Provinces Rent Act*), *ss.* 9, 31.—Though an ex-proprietary tenant cannot transfer his rights as such for a consideration, there is nothing to prevent his voluntarily relinquishing those rights. GAYA SINGH v. UDIT SINGH, 13 A. 396=11 A.W.N. (1891) 140 ... 253

Remand.

(1) *Civil Procedure Code, s.* 566—*Remand—Court to which remand is made not competent to delegate its functions in respect of such remand.*—When a case is remanded under s. 566 of the Code of Civil Procedure to the lower Appellate Court for findings on certain issues, it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto. SABRI v. GANESHI, 14 A. 23=11 A.W.N. (1891) 205 ... 387

(2) *Civil Procedure Code, ss.* 562, 591—*Appeal—Objection to previous order in the case—Such objection to be taken in memorandum of appeal.*—Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree to question the validity of an order of remand previously made in the case under s. 562 of the Code of Civil Procedure. TILAK RAJ SINGH v. CHAKARDHARI SINGH, 15 A. 119=13 A.W.N. (1893), 14 ... 793

(3) See APPEAL, 15 A. 413.

(4) See CIV. PRO. CODE, Ss. 203, 572, 622, 647, 13 A. 533.

(5) See OATHS ACT, Ss. 10 & 11, 13 A. 386.

Remedy.

See TRESPASS, 13 A. 98.

Rent Suit.

(1) See SET-OFF, 15 A. 404.

(2) See USE AND OCCUPATION, 14 A. 176.

Reply, Right of.

See SESSIONS TRIAL, 14 A. 212.

Res Judicata.

(1) *Act* XIX *of* 1873 (*N.W.P. Land Revenue Act*), *s.* 113—*Civil Procedure Code, s.* 13—*Question of title arising on an application for partition before a Revenue Court, how to be determined—Suit for declaration of right to partition.*—Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforcible, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. Such a suit will not be barred by reason of the former decree for partition, though that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been, raised in the suit in which it was passed.

If a Revenue Court in disposing of an applicatian for partition determines a question of title, it must, in so doing, act in conformity with the provisions of s. 113 of Act XIX of 1873. If it disposes of the application otherwise than in the manner contemplated by s. 113, its proceedings are *ultra vires* and will not debar the parties from suing in a Civil Court for a declaration of their right to partition. NASRAT-ULLAH v. MUJIB-ULLAH, 13 A. 309=11 A.W.N. (1891) 117 ... 195

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(2) *Civil Procedure Code, s. 13—Finding in judgment in conflict with terms of decree.*—The decree in a suit gave the plaintiff an unrestricted right to the property claimed by him, but in the judgment on which that decree was based it was stated, the finding apparently not being a finding on any material issue in the suit, that the defendants were entitled to certain rights in respect of the property decreed to the plaintiff. No application was made to bring the decree into conformity with the judgment, and the decree as it stood was affirmed on appeal. *Held* that the defendants, as plaintiffs in a subsequent suit between the same parties relating to the same property, could not plead the finding in their favour in the judgment as constituting *res judicata* in the face of the clear wording of the decree. INDARJIT PRASAD v. RICHA RAI, 15 A. 3=13 A.W.N. (1892) 113 ... 716

(3) *Civil Procedure Code, s. 13, Expl. II—Execution of decree—Principle of* res judicata *as applied to execution proceedings.*—Where a person on his own application was added as a party respondent to an appeal, and on the case in appeal being remanded under s. 562 of the Code of Civil Procedure for re-trial on the merits, practically took no steps whatever to defend the suit.—*Held* that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence in the suit, had he chosen to defend it. KISHAN SAHA v. ALADAD KHAN, 14 A. 64=11 A.W.N. (1891) 221 ... 413

(4) *Civil Procedure Code, ss. 13, 43—Ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees, and effect, in execution of his representatives not being parties to the operative one—Mesne profits—Parties—Non-joinder.*—The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure, to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order of sale against which the dismissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs of the original judgment-debtors.

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it. RADHA PRASAD SINGH v. LAL SAHIB RAI, 13 A. 53 (P.C.)=17 I.A. 150 =5 Sar. P.C.J. 600 ... 33

(5) *Civil Procedure Code, ss. 13, 278, 331—Execution of decree*—Res judicata.—The plaintiff, having obtained a decree for possession of certain land, applied for execution by delivery of possession. Whereupon a third party filed an objection, in the Court of the Munsiff, that he held a prior decree for possession of the same land, and therefore the plaintiff's decree was incapable of execution. This objection was allowed, and the plaintiff then sued for establishment of his right to possession of the land jointly with the objector, making the former judgment-debtor and the objector defendants to the suit. The Subordinate Judge in first appeal held that the Munsif had

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acted under s. 331 of the Code of Civil Procedure, and, applying s. 13 of the same Code, dismissed the plaintiff's suit. The plaintiff then appealed.—*Held* that circumstances did not exist to give the Munsif jurisdiction to act under s. 331, and that his order must be taken to have been made, as it purported to have been made, under s. 278.

The scope and application of s. 331 of the Code of Civil Procedure commented upon. MAHABIR PRASAD v. PARMA, 14 A. 417=12 A.W.N. (1892) 51 ... 635

(6) *Civil Procedure Code, s. 43—Splitting remedies—Suit for declaration of title and for possession—Subsequent suit for possession.*—Where a previous suit for a declaration of title to immoveable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure. MOHAN LAL v. BILASO, 14 A. 512=12 A.W.N. (1892), 80 ... 696

(7) *Civil Procedure Code*, s. 13—Res judicata.—One Musammat Nazir Begam brought a suit against a lambardar for her share in the profits of a certain *mahal*, her claim being based upon an assignment executed in her favour on the 29th of July 1889 by one Musammat Basti Begam as heir to one Musammat Moti Begam, deceased. Prior to that assignment, namely on the 3rd of June, 1887, a suit had been commenced by the lambardar against Basti Begam and one Khwajah Bakhsh for possession of other property alleged to have been of Moti Begam in her life-time, and in this suit it was ultimately found, but subsequently to the above-mentioned assignment in favour of Nazir Begam, that Khwajah Bakhsh, and not Basti Begam, was the heir to Moti Begam. *Held* that the suit commenced on the 3rd of June 1887 did not operate as *res judicata* in respect of the present plaintiff's (Nazir Begam's) claims under her assignment from Basti Begam. NIAZ-ULLAH KHAN v. NAZIR BEGAM, 15 A. 108=12 A.W.N. (1892) 246 ... 786

(8) *Civil Procedure Code*, s. 13—*Soundness in law of previous decision immaterial —Hindu Law—Adoption—Baqqals.*—Where a judicial decision pleaded as constituting *res judicata*, in all other respects fulfils the requirements of s. 13 of the Code of Civil Procedure, and no appeal has been preferred against it within limitation, it is immaterial whether such decision is or is not sound law.

Semble that *Baqqals* do not belong to the regenerate classes, and therefore, the rule of law which forbids a Hindu to adopt a boy whose mother he could not have married, does not apply to them. PHUNDO v. JANGI NATH, 15 A. 327=13 A.W.N. (1893) 110 ... 926

(9) *Execution of decree—Principle of* res judicata *as applied to execution proceedings—Rule in Sarju Prasad* v. *Sita Ram—Civil Procedure Code, s. 373.* —Where a judgment-debtor, being entitled and having an opportunity to plead s. 373 of the Code of Civil Procedure as a bar to execution of the decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the Court and orders passed thereon, the principle of *res judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought in fact to have been held to be barred by the operation of s. 373 abovementioned. SHER SINGH v. DAYA RAM, 13 A. 564=11 A.W.N. (1891) 164 ... 356

(10) See EXECUTION OF DECREE, 15 A. 49.

(11) See FORMER JUDGMENT, 15 A. 261

(12) See MORTGAGE (SALE OF MORTGAGED PROPERTY), 14 A. 513.

Restitution of conjugal rights.

See HUSBAND AND WIFE, 13 A. 126.

Restoration of Appeal.

Application for restoration of an appeal dismissed for default—Vakalatnama.—Where a vakil had been duly empowered by a *vakalatnama* drawn in the customary form to file and conduct an appeal in the High Court, and that appeal had been dismissed for default :—*Held* that such vakil was

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competent without filing a fresh *vakalatnama* to present an application for the restoration of the said appeal to the list of pending appeals. RAGHUNATH SINGH v. RAGHUBIR SAHAI, 15 A. 55=12 A.W.N. (1892), 222 ... 751

Revenue Court.

See APPEAL, 14 A. 500.

Revenue Partition.

(1) See BUTWARA PROCEEDINGS.

(2) See WAJIB-UL-ARZ, 15 A. 410.

Revision.

(1) *Act* IX *of* 1887 (*Provincial Small Cause Courts' Act*), *s.* 25—*Small Cause Court—Revision—Circumstances under which High Court will exercise its revisional power under s.* 25 *of Act* IX *of* 1888.—Section 25 of the Provincial Small Cause Courts' Act (IX of 1887) was not intended to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. The revisional powers given by that section are only exerciseable where it appears that sum substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. MUHAMMAD BAKAR v. BAHAL SINGH, 13 A. 277 (F.B.)=11 A.W.N. (1891) 80 ... 173

(2) *Powers of High Court—Jurisdiction—Act* IX *of* 1887 (*Small Cause Courts Act*) *sch. ii. cl* (18).—Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision.

A suit by a Mahammadan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by clause (18) of schedule ii of the Provincial Small Cause Courts Act IX of 1887, and therefore not cognizable by a Court of Small Causes. MIHR ALI SHAH v. MUHAMMAD HUSEN, 14 A. 413=12 A.W.N. (1892) 79 ... 632

(3) *Act* IV *of* 1882, *s.* 87—*Civil Procedure Code, ss.* 2, 244 *and* 622—*Revision.*—An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgage money by a mortgagor is a decree within the meaning of ss. 2 and 244 of the Code of Civil Procedure, 1882, and therefore no application will lie under s. 622 of that Code for revision of such order. RAHIMA v. NEPAL RAI, 14 A. 520=12 A.W.N. (1892), 99 ... 702

(4) *Act* IX *of* 1887, *s.* 25—*Civil Procedure Code, s.* 622—*Revision—Limitation Wrong decision of a point of limitation no ground for revision.*—An application under s. 25 of Act IX of 1887 to set aside a decree ought not to be entertained except in cases to which a similar application under s. 622 of the Code of Civil Procedure would be allowed.

Such an application will not lie where the sole ground is whether the first Court was or was not right in its decision on a question of limitation. R.N. SAHAI v. OFFL. LIQUDR OF. H. BANK, 15 A. 139=13 A.W.N. (1893) 59 ... 807

(5) *High Court's power of revision—Practice—Civil Procedure Code, ss.* 281, 283, 484, 622.—The High Court will not exercise its revisional jurisdiction so long as there is any other remedy open to the applicant.

Where a Subordinate Judge disallowed an application for the release of certain property which had been attached before judgment. *Held* that there being a remedy by suit under s. 283 of the Code of Civil Procedure, the High Court should not interfere with such order in revision. J.J. GUISE v. JAISRAJ, 15 A. 405=13 A.W.N. (1893), 172 ... 979

(6) See APPEAL, 15 A. 373.

(7) See CIV. PRO. CODE, Ss. 203, 562, 622, 647, 13 A. 533.

(8) See COSTS, 15 A. 169.

(9) See DECREE AMENDMENT OF, 15 A. 121.

(10) See PRINCIPAL AND SURETY, 15 A. 183.

(11) See SANCTION TO PROSECUTE, 15 A. 61.

Right of way.

See EASEMENT, 14 A. 185; 15 A. 270.

Right of Suit. PAGE

(1) See HINDU LAW (REVERSIONER), 15 A. 132.

(2) See PARTIES TO SUIT, 14 A. 524.

Riot.

(1) *Act* XLV *of* 1860, *ss.* 24, 147 *and* 391—*Dacoity—Riot—Dishonest intention a necessary ingredient of dacoity.*—Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Muhammadan, not for the purpose of causing "wrongful gain" to themselves or "wrongful loss" to the owner of the cattle, but for the purpose of preventing the killing of the cows:—

Held, that they could not properly be convicted of dacoity but only of riot. QUEEN-EMPRESS v. RAGHUNATH RAI, 15 A. 22=12 A.W.N. (1892) 220 ... 729

(2) See DACOITY, 15 A. 299.

Sale.

See BAI-BIL-WAFA, 14 A. 195.

Sale Certificate.

See EXECUTION SALE, 15 A. 107.

Sale of Goods.

See SET-OFF, 15 A. 9.

Sanction to prosecute.

(1) *Crim. Pro. Code*, *ss.* 195, 404, 439—*Sanction to prosecute—Appeal—Revision.*—The proceeding under s. 195 of the Code of Criminal Procedure by which an order granting or refusing to grant sanction to prosecute may be set aside is a proceeding in revision and not by way of appeal. MEHDI HASAN v. TOTA RAM, 15 A. 61=12 A.W.N. (892), 242 ...

(2) *Crim. Pro. Code*, *s.* 476—*Order by Magistrate for prosecution under* s. 195 *of the Indian Penal Code—Preliminary inquiry.*—When a Magistrate takes action under s. 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry. QUEEN-EMPRESS v. MATABADAL, 15 A. 392=13 A.W.N. (1893) 146 ... 970

Search Warrant.

See ARMS ACT, Ss. 19 (*f*), 25, 15 A. 129.

Second Appeal.

(1) *Plea raised at the hearing which was not taken in the memorandum of appeal—Practice.*—A plea that the memorandum of appeal in the lower appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation is not a plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal. RAM KISHEN UPADHIA v. DIPA UPADHIA, 13 A. 580 =11 A.W.N. (1891) 166 ... 367

(2) *Plea sought to be raised which was not taken in the memorandum of appeal—Civ. Pro. Code, s.* 542.—Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exerciseable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice. BANSIDHAR v. SITA RAM, 13 A. 381=11 A.W.N. (1891) 147 ... 243

(3) *Civ. Pro. Code*, *ss.* 54, 55, 543, 551, 582, 584, 585—*Second appeal, summary rejection of memorandum—Reasons for rejection to be recorded—Per* EDGE, C. J.—A Judge to whom a memorandum of appeal from an appellate decree is presented for admission is entitled to consider whether any of the grounds mentioned in s. 584 of the Code of Civil Procedure in fact exist and apply to the case before him and if they do not to reject the memorandum of appeal summarily.

Section 551 of the Code of Civil Procedure applies to appeals which have been admitted.

Per AIKMAN, J.—When a memorandum of appeal is summarily rejected, whether under s. 543, or under s. 54 read with s. 582 of the Code of Civil

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Procedure, the reason for such rejection should be recorded; *sed quœre* whether, unless it appears from the memorandum of appeal taken by itself that a second appeal does not lie, a second appeal can be summarily rejected and should not rather be dealt with under s. 551 of the Code.

Semble that a ground of appeal to the effect that the lower appellate Court has misconstrued a document is not one of the grounds of second appeal contemplated by s. 584 of the Code of Civil Procedure. RUDR PRASAD v. BAIJNATH, 15 A. 367=13 A.W.N. (1893), 115 ... 953

(4) See COSTS, 15 A. 333.

(5) See LIMITATION, 15 A. 123.

Security to keep the peace.

Power of the Magistrate of a district to call upon a person residing in another district to furnish security—Criminal Procedure Code, s. 107.—Section 107 of the Criminal Procedure Code does not empower a Magistrate to issue process under it to a person not residing within his jurisdiction. *In re Petition of* ABDUL AZIZ, 14 A. 49=11 A.W.N. (1891) 182 ... 403

Sentence.

See CRIM. PRO. CODE, Ss. 342, 367, and 540, 14 A. 242.

Separate Offences.

See JOINT TRIAL OF ACCUSED, 14 A. 502.

Separate Suit.

Execution of decree—Sale in execution—Sale set aside—Suit by purchaser for return of purchase money—Civil Procedure Code, ss. 295, 315.—Where an auction-purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person in whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under s. 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code. KISHUN LAL v. MUHAMMAD SAFDAR ALI KHAN, 13 A. 383 =11 A.W.N. (1891) 138 ... 244

Separate Trials.

See TRANSFER OF SUIT, 14 A. 531.

Sessions Court.

(1) *Criminal Procedure Code, ss.* 423, 439—*Sessions Judge, powers of, as a Court of appeal—Commitment.*—It is competent to a Sessions Judge acting as a Court of appeal under s. 423 of the Code of Criminal Procedure, 1882, having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session. QUEEN-EMPRESS v. MAULA BAKESH, 15 A. 205=13 A.W.N. (1893) 105 ... 849

Practice—Session trial—Witness—Rejection by Court of Sessions of witnesses sent up by the committing Magistrate.—It is the duty of a Sessions Court to examine all the witnesses sent up by the committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up unless it has good reason to belive that such witness came into the Court house with a predetermined intention of giving false evidence. QUEEN-EMPRESS v. BANKHANDI, 15 A. 6=12 A.W.N. (1882) 114 ... 403

Sessions Judge Jurisdction.

Criminal Procedure Code, ss. 195, 476, 487—*Act* XLV *of* 1860, s. 193—*False evidence Jurisdiction—Sessions Judge.*—A Sessions Judge who has directed the trial of a person for the offence of giving false evidence committed in the course of a judicial proceeding of a criminal nature before him cannot try the case himself. QUEEN-EMPRESS v. MAKHDUM, 14 A. 354=12 A.W.N. (1892) 32 ... 595

Sessions Trial.

(1) *Sessions Court—Assessors—Assessors prevented by death or illness from attending a trial—Crim. Pro. Code, ss.* 268 *and* 285.—During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on, another assessor became too ill to take any further part in the trial, and the third, assessor was obliged o

Sessions Trial—(*Concluded*). PAGE

retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished.

Held, that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provisions of s. 268 of the Code of Criminal Procedure) been held before a Court not having jurisdiction. QUEEN-EMPRESS v. MUHAMMAD MAHMUD KHAN, 13 A. 337=11 A.W.N. (1891) 93 ... 214

(2) *Practice—Sessions trial—Adducing evidence for the defence—Documents produced for cross-examination of Crown witness—Right of reply—Criminal Procedure Code, ss. 289, 292—Witness for Crown tendered at Sessions trial who had not been examined by the committing Magistrate.*—In a trial before a High Court or a Court or Session evidence for the defence cannot be adduced until the close of the case for the prosecution ; but council for the defence may, while a witness for the Crown is under cross-examination, put documents to him, and if in so doing counsel reads or causes to be read to the Court such documents, he thereby impliedly undertakes to put those documents in as evidence at the proper time. When such documents as aforesaid are filed in Court as evidence, or any other documentary evidence is put in by the defence, the defence has "adduced evidence" within the meaning of ss. 289 *et seq.* of the Code of Criminal Procedure, so as to give the prosecution a right of reply, though no witnesses may be called for the defence.

In a trial at the Criminal Sessions of the High Court, during the cross-examination of one of the witnesses for the Crown, counsel for the defence put certain documents to the witness, and these were read to the Court and jury and marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and after the cross-examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply, in the event of the accused not calling witnesses.

Held that although, as a matter of order, such a question would be better raised either when the first document intended to be used in this way was put to a witness, or when the accused was asked if he meant to adduce evidence, yet there was nothing in the Code of Criminal Procedure to prevent the Court from deciding the question at any other stage, and that, under the special circumstances of the case, it might be considered then.

Held also that the use of the documents in the manner above stated gave the prosecution a right of reply.

At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice. QUEEN-EMPRESS v. G. W. HAYFIELD, 14 A. 212=12 A.W.N. (1892) 63 ... 506

(3) *Practice—Sessions trial—Witness for the Crown not called at Sessions trial though examined before the Committing Magistrate—Duty of the prosecution with regard to the production of such witness.*—At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness's testimony. All that the prosecution is bound to do is to have the winesses who were examined before the committing Magistrate present at the trial so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. QUEEN-EMPRESS v. STANTON AND FLYNN, 14 A. 521=12 A.W.N. (1892) 110 ... 703

(4) See CRIM. PRO. CODE, Ss. 342, 366, 367 and 540, 14 A. 242.

Set-off. PAGE

(1) *Practice—Suit for balance of account—Civil Procedure Code, s. 111.*—The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions, one to the effect that the Government, if it saw fit at the expiration of the lease to farm the bridge to any other contractor, should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible he will be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease, and the Magistrate of the District, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock, which was ultimately fixed at Rs. 10,900. The Magistrate added a percentage, bringing the total amount up to Rs. 12,100; and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract.

Held that the sum of Rs. 12,100 assessed in the manner above described, could not strictly be regarded as a set-off. The suit was one for balance of account and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favour. SECRETARY OF STATE v. MADARI LAL, 13 A. 296 (F.B.) = 11 A.W.N. (1891) 85 ... 186

(2) *Civil Procedure Code, ss. 111 and 216—Set-off—Cross-claims of the nature of set-off.*—The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not of the quality contracted for. *Held* that in such a suit, the defendant might claim by way of set-off compensation for the loss which he had incurred in the re-sale of that portion of the timber, the subject of the contract, of which the plaintiffs had failed to take delivery.

S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off. NIAZ GUL KHAN v. DURGA PRASAD, 15 A. 9 = 12 A.W.N. (1892) 115 ... 720

(3) *Jurisdiction—Civil and Revenue Courts—Set-off.*—A Court of Revenue cannot entertain a claim to a set-off unless such claim, if made the subject of a suit, would fall within its jurisdiction.

Held that in a suit in a Court of Revenue by a lambardar to recover rent the defendant was not competent to plead as a set-off that certain arrears of *malikana* were due to him by the plaintiff. BENI MADHO v. GAYA PRASAD, 15 A. 401 = 13 A.W.N. (1893) 168 ... 978

(4) See CROSS DECREES, 14 A. 339.

Shankalp.

See PRE-EMPTION, 14 A. 333.

Shiahs.

See MAHOMEDAN LAW (WAKF), 14 A. 429.

Sir Land.

See JURISDICTION OF CIVIL COURTS, 13 A. 17.

Small Cause Suit.

Suit pending in Court of Subordinate Judge with Small Cause Court powers—Transfer to Munsif's Court—Civil Procedure Code, s. 25—Act IX of 1887 (Provincial Small Cause Courts' Act), s. 35.—The plaintiff filed his suit as Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers. During the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers. In consequence of this the District Judge made an order under s. 25 of the Code of Civil Procedure, transferring all cases above the value of Rs. 50 then pending before the Subordinate Judge in his capacity

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as a Small Cause Court, to the Munsif to be tried as Munsif's Court cases. The Munsif had Small Cause Court powers up to Rs. 50. The plaintiff's suit was for Rs. 69. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed.

Held that, granting that the suit was a Small Cause Court suit (which was not decided), whether s. 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887) was applicable, it would remain throughout a Small Cause Court suit and be subject to the incidents of such a suit. MANGAL SEN v. RUP CHAND, 13 A. 324=11 A.W.N. (1891) 96 ... 205

Specific Relief Act (I of 1877).

(1) S. 9—*Suit for possession of land by person wrongfully ejected—Joinder of other claims.*—A Court should in all cases in which it applies give effect to the provisions of the first paragraph of s. 9 of the Specific Relief Act, 1877, whether that section is expressly pleaded or not.

There is nothing to prevent a claim for damages and a claim for establishment of title being joined with a claim for the relief provided for by the above-mentioned section. RAM HARAKH RAI v. SHEODIHAL JOTI, 15 A. 384=13 A.W.N. (1893) 163 ... 965

(2) S. 9—See POSSESSORY SUIT, 13 A. 537.

(3) S. 42—See JURISDICTION OF CIVIL COURTS, 13 A. 17.

Stamp Act (1879).

(1) See STAMP DUTY, 13 A. 66.

(2) Sch. I, Art. 1—See EVIDENCE, 15 A. 56.

Stamp Duty.

(1) *Stamp—Promissory note not chargeable with duty of 6, 10 or 12 annas—Such promissory note written on impressed sheet of proper value bearing the word "hundi"—Note duly stamped—Act I of* 1879 (Stamp Act,) ss. 3. (10) 9,33,34, 57—*Rules by Governor General in Council—Notification No.* 1288 *of 3rd March* 1882, *Rules* 3, 4, 6—*Notification No.* 2955 *of 1st December* 1882, *Rule* 6 *A.*—The effect of Notification No. 2955 of the 1st December 1882, amending the Rules made by the Governor-General in Council under s. 9 of the Stamp Act (I of 1879) and published in Notification No. 1288 of the 3rd March 1882, is not to prohibit all promissory notes except those chargeable with a duty of 6, 10 or 12 annas being written on impressed sheets bearing the word "*hundi.*" A Rule which says that certain promissory notes shall be written on impressed sheets bearing the word "*hundi*," cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word "*hundi.*"

A promissory note for an amount not exceeding Rs. 200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, is duly stamped if written on an impressed sheet of the value of two annas, though that impressed sheet bears the word "*hundi.*" RADHA BAI v. NATHU RAM, 13 A. 66=10 A.W.N. (1890) 238... 41

(2) *Act* VII *of* 1870 *s.* 5—*Act* VI *of* 1892, *s.* 3—*Court-fee—Finality of decision of taxing officer.*—Where an appellant whose memorandum of appeal had been declared by the taxing officer of the Court to be insufficiently stamped applied for relief under s. 3 of Act No. VI of 1892, and it was found that the report of the taxing officer was erroneous and that the correct stamp had as a matter of fact been put on the memorandum of appeal, *held*, that the appellant was entitled to the relief sought notwithstanding the provisions of s. 5 of Act No. VII of 1870. BADRI PRASAD v. KUNDAN LAL, 15 A. 117=13 A.W.N. (1893) 45 ... 792

(3) See EXECUTION SALE, 15 A. 107.

(4) See LIMITATION, 15 A. 65.

(5) See SECOND APPEAL 13 A. 580.

Standing Crops.

(1) *Attachment—Small Cause Court—Standing crops—Immoveable Property Act* I *of* 1866 (*General Clauses Act*)—*Civil Procedure Code—Act* IX *of* 1887

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(*Small Cause Courts Act*) *sch.* i, *ii cl.* (6).—Standing crops are immoveable property in the sense of the General Clauses Act (I of 1868) and of cl. (6) of the second schedule of the Small Cause Courts Act (Act IX of 1887), and of the Civil Procedure Code. CHEDA LAL v. MULCHAND, 14 A. 30=11 A.W.N. (1891) 174 ... 391

(2) See MAGISTRATE, JURISDICTION OF, 15 A. 394.

Statement made to the Police.

(1) *Crim. Pro. Code, ss.* 161 *and* 162—*Statement made by a witness to police officer making an investigation—Use of such statement to contradict witness—Use of statement against accused.*—A statement made by a witness under s. 161 of the Code of Criminal Procedure to a police officer investigating a case may be proved at the trial of such case to contradict such witness, the witness having been first cross-examined on the point in respect of which it is sought to contradict him. But where it appeared that, but for the principal witness for the defence having been discredited by means of proof of a previous inconsistent statement made by the said witness before the investigating officer, the accused would have been acquitted, it was *held* that this amounted to a using of such statement as evidence against the accused within the meaning of s. 162 of the Code of Criminal Procedure. QUEEN-EMPRESS v. MADHO, 15 A. 25=12 A.W.N. (1892) 220 ... 731

(2) See CRIM. PRO. CODE, s. 161, 15 A. 11.

Statutes, Construction of.

(1) See INSOLVENCY, 14 A. 145,

(2) See PRE-EMPTION, 13 A. 221.

Stay of Execution.

Civ. Pro. Code. s. 546—*Execution of decree—Application for stay of sale of immoveable property in execution of a money-decree under appeal.*—An application under the third paragraph of s. 546 of the Code of Civil Procedure to stay the sale of immoveable property in execution of a decree for money against which an appeal has been filed must be made to the Court which passed the decree and not to the appellate Court. IN THE MATTER OF THE PETITION OF MURAD-UN-NISSA, 15 A. 196=13 A.W.N. (1893) 99 ... 844

Stay of Suit.

(1) See INJUNCTION.

(2) See MORTGAGE (GENERAL), 14 A. 162.

Step in-aid of Execution.

(1) *Execution of decree—Act* XV *of (Limitation Act), sch.* ii. *art.* 179 (4)—"*Step-in-aid of execution*"—*Application by transferee of decree for sale of hypothecated property—Non-registration of deed of assignment—Civ. Pro. Code, s.* 232—*Act III of* 1877 (*Registration Act*), *ss.* 3, 17, 47, 49—*Effect of subsequent registration.*—On the 13th November 1886, the assignee of a decree for sale hypothecated property applied, under s. 232 of the Civil Procedure Code, for execution of the decree, but, objection being raised, that the deed of assigment had not been registered, subsequently applied for the return of the deed that it might be registered, and it was returned accordingly. The deed was afterwards duly registered, the next application for execution of the decree was made on the 25th.

Held (i) that the deed of assignment was not a document which comprised immoveable property within the meaning of s. 49 of Registration Act III of (1877), a decree for sale not being immoveable property as defined in s. 3

(ii) that consequently, although the assignee might not, under the latter portion of s. 49, use the deed for the purpose of proving his title, there was no provision in the Act saying that he should not take title, under the deed ;

(iii) that the position of the assignee when he made his application on the 13th November 1886 was that he was unable to prove that there was a title by assignment in himself ;

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(iv) that the subsequent registration cured the absence of registration on the 13th November 1886, and, under s. 47 of the Registration Act, the document thereupon had full effect, and related back to its execution ;

(v) that the application of the 13th November 1886 was a step-in-aid of execution of the decree within the meaning of art. 179 (4) of sch. ii of the Limitation Act (XV of 1877), and that the application of the 25th April 1888, was within time. ABDUL MAJID v. MUHAMMAD FAIZULLAH, 13 A. 89=10 A.W.N. (1890) 186 ... 55

(2) *Civ. Pro. Code, s.* 206—*Application to bring decree into conformity with the judgment—Execution of decree—Limitation—Act* XV *of* 1877, *sch* ii, *art*, 179 (4)—"*Step-in aid of execution*."—The granting of an application under s. 206 of the Civ. Pro. Code to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holder; nor is such an application a "step-in-aid of execution" within the meaning of art. 179, sch. ii of the Limitation Act (XV of 1877). KALLU RAI v. FAHIMAN, 13 A. 124=11 A.W.N. (1891) 32 ... 78

(3) *Execution of decree—Step-in-aid of execution—Application by decree-holder for leave to bid at sale—Act* XV *of* 1877 (*Limitation Act*), *sch.* ii, *No.* 179, *cl.* (4).—The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is "a step-in-aid of execution" within the meaning of cl. (4), No. 179, sch. ii of the Limitation Act (Act XV of 1877). BANSI v. SIKREE MAL, 13 A. 211=10 A.W.N. (1890) 230. 132

Stolen Property.

Act XLV, *of* 1860 *s.* 411—*Dishonest retention of stolen property—Property belonging to different owners—Separate convictions.*—Where a person was found in possession of stolen property identified as belonging to different owners, but it did not appear that he had received such property at different times. *Held* that he could not properly be tried and convicted under s. 411 of the Indian Penal Code separately in respect of the property identified by the owner. QUEEN-EMPRESS v. MAKHAN, 15 A. 317=13 A.W.N. (1893) 101 ... 919

Striking of Execution Proceedings.

(1) See EXECUTION OF DECREE, 15 A. 49.

(2) See LIMITATION Act, Art. 179 (5), 15 A. 84.

Subordinate Judges Jurisdiction of.

Jurisdiction—Dismissal of suit by Munsif preliminary point—Remand by Subordinate Judge on appeal—Fresh appeal before second Subordinate Judge, who disagrees with the finding of the former Subordinate Judge.—Where there are two Subordinate Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate presiding officers. KHARAG PRASAD BHAGAT v. DURDHARI RAI, 14 A. 348=12 A.W.N. (1892) 25 ... 591

Succession.

(1) *Justice and equity and good conscience—Succession to outcasted Brahmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow.*—Khuman, a Brahmin, lived with a Bania widow, for which offence he was outcasted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons in possession of the property which he had acquired. This being so, the brothers of the deceased Khuman sold the property which had been thus acquired by him to one R.K. R.K. thereupon sued his vendors and the surviving sons of Khuman by the widow, together with their mother and the widow of a deceased son for recovery of the property:—

Held that the sons of Khuman by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by Khuman as against the brothers of deceased who had remained in caste. RADHA KISHEN v. RAJ KUAR, 13 A. 573=11 A.W.N. (1891) 157 ... 362

(2) See WAJIB-UL-ARZ, 15 A. 147.

Succession Certficate Act, 1889. PAGE

Ss. 9 and 19—Order granting certificate conditioned on the filing of security—Appeal.—Where on an application for a certificate of succession under the Succession Certificate Act (Act VII of 1889) an order was made granting the certificate conditionally on the applicant's furnishing security.

Held that this was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that therefore no appeal would lie therefrom. BHAGWANI v. MANNI LAL, 13 A. 214=11 A.W.N. (1891) 45 ... 134

Suits Valuation Act, 1887.

Ss. 4 and 10. See VALUATION OF SUIT, 15 A. 378.

Sulahnamah.

See COMPROMISE DECREE, 14 A. 350.

Summary rejection of appeal.

See SECOND APPEAL, 15 A. 367.

Sunnis.

See MAHOMEDAN LAW (WAKF), 15 A. 321.

Tender of Pardon.

See PARDON.

Tender of payment.

See LANDLORD AND TENANT, 15 A. 375.

T tle.

(1) See APPEAL, 14 A. 500.

(2) See POSSESSORY SUIT, 14 A. 193.

(3) See RES JUDICATA, 13 A. 309.

Transfer of Appeal.

See APPELLATE COURT, 15 A. 315.

Transfer of Case.

See COGNISANCE OF OFFENCE, 13 A. 345.

Transfer of Property Act (IV of 1882).

(1) S. 2 d).—See USE AND OCCUPATION, 14 A. 176.

(2) Ss. 3, 6 and 85.—See MORTGAGE (PRIORITY), 13 A. 432.

(3) Ss. 40, 58 (b), 69, 100.—See MORTGAGE (SIMPLE MORGAGE), 13 A. 28.

(4) Ss. 52, 82.—See CONTRIBUTION, 13 A. 371.

(5) S. 58.—See BYE-BIL-WAFA, 14 A. 195.

(6) S. 59—*Mortgage, equitable—Deposit of title-deeds in Calcutta—Immoveable property in mofussil*—It is not necessary to the validity of a mortgage by deposit of title deeds under s. 59 of the Transfer of Property Act (IV of 1882) that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed. MADHO DAS v. RAM KISHEN, 14 A. 238=12 A.W.N. (1892) 97 ... 522

(7) Ss. 67, 86—See INTEREST, 13 A. 330.

(8) Ss. 68, 88, 89, 90.—See MORTGAGE (SALE OF MORTGAGED PROPETY), 14 A. 513.

(9) S. 83.—See MORTGAGE (SALE OF MORTGAGED PROPERTY), 13 A. 195.

(10) S. 87—See REVISION, 14 A. 520.

(11) S. 88.—See HINDU LAW (DEBTS), 15 A. 75.

(12) Ss. 88 and 89.—See EXECUTION PROCEEDINGS, 13 A. 278.

(13) Ss. 88, 90.—See EXECUTION OF DECREE, 15 A. 324.

(14) S. 90—*Meaning of the term "Legally recoverable."*—A decree-holder having obtained separate decrees against his judgment-debtor on two unregistered bonds each for a sum of less than Rs. 100 hypothecating one and the same property, took out execution on one bond and brought to sale the hypothecated property, which was purchased by a third party. The sum for which that property was sold was only sufficient to satisfy one decree; and the decree-holder accordingly, within three years from the date when

Transfer of Property Act (IV of 1882)—(*Concluded*). PAGE

the latter of the two bonds fell due, applied for a decree under s. 90 of the Transfer of Property Act.

Held that under the above circumstances there was a balance legally recoverable otherwise than out of the property sold and that the decree-holder was therefore entitled to a decree under s. 90. BAGESHRI DIAL v. MUHAMMAD NAQI, 15 A. 331=13 A.W.N. (1893), 120 ... 928

(15) S. 90.—See EXECUTION OF DECREE, 13 A. 356; 13 A. 360.

(16) S. 100.—See CO-SHARERS, 14 A. 273.

(17) S. 135.—See MORTGAGE (CONDITIONAL SALE), 13 A. 102.

Transfer of suit.

Act X *of* 1877, *ss.* 45 *and* 212, 244, *clause* (*a*)—*Suit for recovery of immoveable property and for mesne profits—Separate trials of the two claims—Transfer of suit by order of High Court—Duty of Court to which the transfer is made.* When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge.

In a suit on title in which the recovery of immoveable property and *mesne* profits are claimed the Court may, under s. 45 of the Code of Civil Procedure, order separate trials in respect of the claim for the recovery of the immoveable property and in respect of the claim for *mesne* profits.

Where under s. 212 of the Code of Civil Procedure a Court in such suit passes a decree for the property and directs an inquiry into the amount of *mesne* profits that direction as to the inquiry into the amount of *mesne* profits need not necessarily be contained in the decree. FATIMA BIBI v. ABDUL MAJID, 14 A. 531=12 A.W.N. (1892) 154 ... 710

Trespass.

Trespass—Building on plaintiff's land—Damages—Mandatory injunction—Suit for further damages—Alleged disobedience of mandatory injunction—Cause of action—Suit not maintainable.—The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass, and an injunction, and a decree was passed for damages and for a mandatory injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition. Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobedience of the mandatory injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate, was likely to fall. There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit.

Held, that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution. JAWITRI v. H. A. EMILE, 13 A. 98=10 A.W.N. (1890) 232 ... 61

Unchastity.

See HINDU LAW (WIDOW), 15 A. 382.

Unconscionable Agreement.

See CHAMPERTY, 15 A. 352.

Use and Occupation.

Lease—Assignment by the official Liquidator of lease held by a company in liquidation—Assignment not in writing registered—Suit for rent—Use and occupation.—In the course of the winding up of a Company, the Official Liquidator, with the sanction of the Court, sold the remainder of a lease for a long term of years reserving a rent, which was held by the Company. No written assignment was ever executed, but the Official Liquidator handed over the lease to the purchaser, who entered into possession. In a suit by the lessors against the purchaser for rent.

Use and Occupation—(*Concluded*). PAGE

Held that whether the assignment was invalid because not in writing and registered, or whether it fell within s. 2 (*d*) of the Transfer of Property Act (IV of 1882), the defendant, even if not liable as assignee in law of the lease, was liable, for rent as for the use and occupation, and under such circumstances the rent fixed by the lease would be a fair basis for the amount to be decreed. GAYA PRASAD v. BAIJ NATH, 14 A. 176=12 A.W.N. (1892) 25 ... 483

Using Forged Document.

Act XLV *of* 1860, *ss.* 363, 464, 470, 471, 23, 24, 25, 29—*Using forged document*—*False certificate of attendance at law lectures*—"*Claim*"—"Property."—The term "claim" in s. 463 of the Indian Penal Code is not limited in its application to a claim to property.

The term "property" in the same section will cover a written certificate.

It is not necessary to constitute a forgery under s. 463 of the Indian Penal Code that the property with which it is intended that the false document shall cause a person to part should be in existence at the time when the false document was made.

One S. B. presented to the Principal of Queen's College, Benares, a false certificate purporting to have been granted by the Principal of Canning College, Lucknow, to the effect that he had attended a certain proportion of a certain first year course of law lectures, delivered at Canning College, S. B. in fact never having attended such lectures. Had that certificate been a true one it would have entitled S. B. to attend a further course of law lectures at any one of several associated institutions, amongst which was Queen's College, Benares, without attending or paying the fees for the first course of lectures.

On presentation of the above certificate S. B. obtained permission to attend, and attended, a course of second year lectures at Queen's College, Benares, without attending or paying the fees required for the first year course. After S.B. had attended the above mentioned second year course of lectures at Queen's College, Benares, he again presented to said false certificate to the Principal of Queen's College with a view to his obtaining a consolidated certificate, which was necessary, as he alleged, to enable him to become a candidate in the Judge's Court Pleadership Examination in Calcutta.

Held that on both occasions, when he presented the false certificate to obtain admission to the second year law class at Queen's College, Benares, and again when he endeavoured by its use to obtain the consolidated certificate in order to gain admission to the Pleadership Examination in Calcutta S.B. was guilty of the offence provided for by s. 471 of Indian Penal Code. QUEEN-EMPRESS v. SOSHI BHUSHAN, 15 A. 210=13 A.W.N. (1893) 96 ... 853

Vakalatnamah.

See RESTORATION OF APPEAL, 15 A. 55.

Valuation of appeal.

See APPEAL, 15 A. 363.

Valuation of Suit.

(1) *Act* VII *of* 1870 (*Court Fees Act*, s. 7—*Act* VII *of* 1887 (*Suits Valuation Act*), *ss.* 4, 10—*Adoption*—*Suit to set aside an adoption*—*Valuation of suit.*—The value for the purposes of jurisdiction of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff. SHEO DENI RAM v. TULSHI RAM, 15 A. 378=13 A.W.N. (1893) 147 ... 960

(2) *Act* VII *of* 1870, s. 7, *para.* 5—*Act* VII *of* 1887, s. 8—*Court-fee*—*Jurisdiction*—*Suit to eject a tenant at fixed rates*—*Valuation of suit.*—A suit to eject a tenant at fixed rates is a suit for the possession of land within the meaning of paragraph 5, s. 7 of the Courts-Fees Act, 1870, and the valuation of such suit for the purposes of Court-fees and of jurisdiction is the value of the subject-matter of the suit, that is to say of the tenant-right, not of the land itself nor of merely one year's rent. RAM RAJ TEWARI v. GIRNANDAN BHAGAT, 15 A. 63=12 A.W.N. (1892) 240 ... 757

(3) See APPEAL, 15 A. 363.

(4) See APPELLATE COURT, 13 A. 320.

Vendor and Puchaser. PAGE

See EQUITABLE CHARGE, 15 A. 304.

Verification of Plaint.

Civil Procedure Code, s. 52—Plaint, form of verification of.—In order to constitute a proper verfication of a plaint within the meaning of s. 52 of the Code of Civil Procedure, it is necessary for the person verifying, if all the facts or within his knowledge, to state distinctly that they are to his knowledge true ; and if he has knowledge as to some and only information and belief as to others, to state to which he speaks from his knlowledge and to which from his information and belief. A verification in the form :—" To the limit (or extent) of my knowledge the purport of this is true," is not such a verification as satisfies the requirements of s. 52 of the Code. GIRDHARI v. KANAHIYA LAL, 15 A. 59=12 A.W.N. (1892) 235 754

Vexatious Complaint.

See FRIVOLOUS COMPLAINT.

Vicinage.

See PRE-EMPTION, 15 A. 104.

Wajib-ul-arz.

(1) Wajib-ul-arz, *effect of as evidence of village custom*—Wajib-ul-arz *not signed by lambadar or co-sharers—Construction of* wajib-ul-arz —Where a *wajib-ul-arz* was not signed by the lambadar or by any of the co-sharers of the village for which it was framed, but was found to have been in existence without having been questioned by any of the parties who might have been affected thereby for a period of some thirteen years : *Held* that the *wajib-ul-arz* might be taken as *prima facie* evidence of the custom of the village for which it was framed.

The said *wajib-ul-arz* contained a clause relative to pre-emptive rights to the following effect :—"When any *muafidar* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it, and if he does not take it, then another man who desire to take it takes it." *Held* that this clause was declaratory of the village custom and that it was not intended thereby to adopt the Muhammadan law of pre-emption. RUSTAM ALI KAHN v. ABBASI BEGAM, 13 A. 407=11 A.W.N. (1891) 146 ... 260

(2) Wajib-ul-arz—*Improper use of* wajib-ul-arz *to record wishes of sole proprietor of village—Succession—Hindu Law—Primogeniture.*—The object of the *wajib-ul-arz* is to supply a reliable record of existing local custom. It was never intended that the *wajib ul-arz* should be used as an indirect means of giving effect to the wishes of a sole proprietor with regard to the nature of his tenure or the mode of devolution of the property which should obtain after his death. SUPERUNDDHWAJA PRASAD v. G. PRASAD, 15 A. 147=13 A.W.N. (1893) 85 ... 813

(3) *Act* XIX *of* 1873, *ss.* 3, *sub-s.* (1), 107—*Partition*—Wajib-ul-arz—*Power of Collector in constituting a new mahal by partition to frame a new* wajib-ul-arz *for such mahal.*—It is within the implied, though not within the specified, powers of a Collector while constituting new *mahals* by partition of a previously existing single *mahal* to frame a new *wajib ul-arz* for each of the new *mahals* so constituted. KEDAR NATH v. RAM DIAL, 15 A. 410 =13 A.W.N. (1893) 173 ... 982

(4) See PRE-EMPTION, 13 A. 373 ; 14 A. 341.

Way.

See RIGHT OF WAY.

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(1) See CRIM. PRO. CODE, Ss. 342, 366, 367, 540, 14 A. 242

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